UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-mc-24497-BLOOM

In Re Application of:
BIO ENERGIAS COMERCIALIZADORA
DE ENERGIA LTDA pursuant to 28 U.S.C. § 1782
_____/

**MR. BARBOSA FILHO'S REPLY MEMORANDUM IN SUPPORT OF THE MOTION TO VACATE THE *EX PARTE* ORDER GRANTING A 28 U.S.C. § 1782 APPLICATION AND TO OTHERWISE PROVIDE RELIEF**

**BERNHARD LAW FIRM PLLC**
333 SE 2nd Avenue, Suite 2000
Miami, Florida 33131
Telephone: 786.871.3349
E-mail: abernhard@bernhardlawfirm.com
By: */s/ Andrew J. Bernhard, Esq.*
Florida Bar No. 84031

*Counsel for Mr. Barbosa Filho*

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## REPLY

The Court must determine whether the private Getulio Vargas Foundation in Brazil is sufficiently state-related and official that it merits this Court's participation in its proceedings, in the name of state-to-state governmental comity. Because the Getulio Vargas Foundation is neither state-governed nor automatically subject to judicial review by an official Brazil court, it does not merit this Court's involvement. The Foundation does not qualify as a sufficient "tribunal" under 28 U.S.C. § 1782 and the Court should vacate its grant of aid. The case law supports this.

Even if there were a sufficient "tribunal," which there is not, the Court must also determine whether there are other good reasons to stay out of a private dispute in Brazil, with guidance from the *Intel* factors and progeny. After considering those factors and BEC's response, it still seems most prudent to stay out of this private Brazilian dispute, given that:

1. First, the Brazilian forum can handle this discovery directly because the subpoena respondents are allegedly the owners and officers of Vega, subject to discovery through Vega in Brazil, and all discovery must derive from Vega to be relevant (the participant *Intel* factor);
2. Second, injecting duplicative discovery under § 1782 into a private Brazilian arbitration, on the very limited information given by BEC, unfairly disrupts the parties' parity in a country that is plainly not receptive to U.S. intrusion (the comity *Intel* factor);
3. Third, all signs point to a circumvention by BEC, upon review of the IBA Rules governing the Brazil arbitration and consideration of BEC's obfuscation and lack of transparency (the circumvention *Intel* factor); and
4. Fourth, BEC's request are not narrowly tailored to Vega's alleged contract breaches and impermissibly seek privileged, private, financial, corporate, and personal information that colors rights against self-incrimination (the intrusion and burden *Intel* factor).

Three independent legal experts gave their opinions, and they are all against this discovery. The filings and exhibits speak for themselves, and show that Mr. Barbosa Filho has consistently sought transparency on proceedings in Brazil. This all supports granting Mr. Barbosa Filho's motion and denying BEC's circumvention and disruption of parity in Brazil through § 1782.

## I. The Getulio Vargas Foundation is not a sufficiently official "tribunal" subject to Brazil's laws and judicial review.

The Getulio Vargas Foundation is a Brazilian think tank, not an official state court. Exhibit B at ¶ 7 (Decl. K. Rosenn). Is this private foundation a sufficiently official "tribunal" to merit this Court's official involvement? No. It is not state-sponsored and is not subject to state court judicial review, as required to merit this Court's participation in its proceedings, in the name of state-to-state governmental comity under § 1782.

There is an overwhelming quantity of courts around the country that have found a private foreign arbitration forum like this does not suffice the official "tribunal" requirement under § 1782. *See In re Application of Operadora DB*, 2009 WL 2423138, *8–10 (M.D. Fla. Aug. 4, 2009) (district court declined to adopt position that § 1782 applied to private arbitration); *In re Petrobras Securities Litigation*, 393 F. Supp. 3d 376, 386 (S.D.N.Y. 2019) (same); *In re Application of Hanwei Guo for an Order to Take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782*, No. 18 MC 561, 2019 WL 917076 (S.D.N.Y. Feb. 25, 2019) (same); *In re Application of Caratube Int'l Oil Co., LLP*, 730 F. Supp. 2d 101, 106 (D.D.C. 2010) (same); *In re Application of Finserve Group Ltd.*, No. 4:11-mc-2004-RBH (D.S.C. Oct. 20, 2011) at *5 (same); *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 Fed App'x 31, 34 (5th Cir. Aug. 6, 2009) (same); *In re an Arbitration in London, England*, 626 F. Supp. 2d 882 (N.D. Ill. 2009) (same); *La Comision Ejecutiva Hidroelectrica del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481 (S.D. Tex. 2008) (same); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880,

881–83 (5th Cir. 1999) (same); *Republic of Kazakhstan v. Biederman Int'l*, 168 F.3d 880 (5th Cir. 1999); *NBC v. Bear Stearns*, 165 F. 3d 184, 185 (2d Cir. 1999) (same).[1]

Along with the above authority that the Getulio Vargas Foundation is not a sufficient "tribunal" under § 1782, the fact is that the Foundation is not automatically subject to judicial review by Brazil, which is decisive. *Operadora* at *20 (judicial review is key in 1782); *Mesa Power Group, LLC*, 878 F. Supp. 2d 1296, 1303 (S.D. Fla. 2012) (citing *In re Consorcio Ecuatoriano*, 685 F.3d 987, 995 (11th Cir. 2012)); Ex. G (Getulio rules); Ex. H (IBA Rules).

Likewise, there is no indication in the Getulio rules or organizational documents that it is a state-sponsored court—it is not an official tribunal. Exhibit G (Getulio rules).[2] The panel derives its power from a private agreement, the parties are free to adopt any rules they desire counter to Brazil law, rules, and procedure, and Getulio runs independently of state-sponsored tribunals; it does not qualify under § 1782. *Operadora* at 10. Accordingly, the Getulio Vargas Foundation is not a sufficient "tribunal" under prevailing case law and a functional analysis, and the Court should vacate its order granting § 1782 interference in private Brazil matters.

[1] BEC alleges that Mr. Barbosa Filho's position "has been rejected by the majority of courts that have addressed this issue," but BEC fails to cite all the cases on each side or show such a majority. Response at *5. For his part, Mr. Barbosa Filho was very candid to this Court that the courts are split on this issue. *See* Motion at n.1. Two courts provide a great breakdown of the split between courts on this issue and how they have analyzed the matter: *In re Dubey*, 949 F. Supp. 2d 990, 993–96 (C.D. Cal. 2013) (summarizing law and denying 1782 relief) and *In re Grupo Unidos Por El Canal S.A.*, 14-mc-80277-JST (DMR) (N.D. Cal. Apr. 21, 2015) at *11–20 (same).

[2] In its response, BEC cited several cases. However, they are all distinguishable from the events and issues here. Most involved an actual state court or a specifically state-sponsored tribunal, while one was overturned. None expressly reached and decided the question of the sufficiency of a private arbitration. *Application of Consorcio Ecuatoriano de Telecomunicaciones, S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1270 n.4 (11th Cir. 2014) ("We decline to answer . . ."); *In re Grupo Unidos* (confirming that the Eleventh Circuit explicitly declined to answer this question); *In re Petrobras* at 385–86 (a private Brazilian arbitration does not suffice "tribunal").

## II. The *Intel* factors still weigh against § 1782 interference.

### A. First, the Brazilian forum can handle this discovery directly because the subpoena respondents are allegedly the owners and officers of Vega, subject to discovery through Vega in Brazil, and all discovery must derive from Vega to be relevant.

Under the first *Intel* factor, the Court must consider if the subpoena respondent in the U.S. is also a participant to the Brazil proceeding. If so, everything should just be done in Brazil. Otherwise the discovery is duplicative and rulings on objections may conflict. Is Mr. Barbosa Filho considered a "participant" to the Brazil proceedings? Who is considered a "participant"?

Under applicable case law, if you are suing a company, that company's owners, officers, attorneys, agents, employees, and sometimes even parent companies and affiliates are all considered "participants" who should not be subjected to duplicative § 1782 discovery here—that would include Mr. Barbosa Filho as alleged officer-owner of Brazil party Vega. *See In re Lloreda*, 323 F. Supp. 3d 552, 559–60 (S.D.N.Y. 2018) (employee of party-company was considered a participant); *Kiobel v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 245 (2d Cir. 2018) (attorney); *Lazaridis v. Int'l Centre for Missing and Exploited Children, Inc.*, 760 F. Supp. 2d 109, 114 (D.D.C. 2011) (company to president/officer); *In re Judicial Assistance Pursuant to 28 U.S.C. § 1782 by Macquarie Bank Ltd.*, 2:14-cv-797, 2015 WL 3439103, at *6 (D. Nev. May 28, 2015) (related but distinct entity); *In re Kreke Immobilien KG*, 2013 WL 5966916, at *5 (S.D.N.Y. Nov. 8, 2013) (subsidiary, because "the notion that [the parent company] could somehow be a nonparticipant in the foreign action [against subsidiary] is untenable"); *In re IPC Do Nordeste, LTDA*, 2012 WL 4448886, *9–10 (E.D. Mich. Sept. 25, 2012) (affiliate); *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 85 (2d Cir. 2004) (non-party).[3]

[3] This also aligns with decisions outside of § 1782 matters. *Wilson v United States*, 221 U.S. 361, 380 (1911) (in determining whether documents are corporate or private, inquiry should focus on "nature of the documents and capacity in which they are held," not physical custody); *United States*

This is because the key issue is whether the discovery sought is obtainable through the foreign proceeding, not whether the technically named "party" is the same as the specific § 1782 subpoena respondent. *Id.*; *see also Andover Healthcare, Inc. v. 3M Co.*, 817 F.3d 621, 623 (8th Cir. 2016) (*aff'ing* denial of § 1782); *In Matter of Application of Leret*, 51 F. Supp. 3d 66, 70–71 (D.D.C. 2014) (denying § 1782 aid on non-party); *In re Application of OOO Promnesfstroy*, Misc. No. M 19099 (RJS), 2009 WL 3335608, at *5 (S.D.N.Y. Oct. 15, 2009) ("not the nominal target" of subpoena); *In re Godfrey*, 526 F. Supp. 2d 417, 419 (S.D.N.Y. 2007) (denying § 1782 aid); *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194 and n.5 (S.D.N.Y. 2006) (quashing on non-parties).

In addition to the above American case law showing Mr. Barbosa Filho should be considered a "participant," the IBA Rules allegedly governing the Brazil arbitration here also contemplate that a Party's officers, employees, legal advisors, and other representatives are considered participants to the proceedings, and thus this discovery should be handled there through them. *See, e.g.*, Ex. H at IBA Rules Article 4.3 ("It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them"); Ex. H at IBA Evidence Rules Article 4.2 (Party or its officer, employee, or other representative); Resp. at *9.

BEC says it can't get this discovery in Brazil because it only named Vega as defendant, not its alleged owner-officer Mr. Barbosa Filho. But that's not tenable under the above case law or common sense.[4] BEC provides no explanation as to why these documents are not accessible

*v. MacKey*, 647 F.2d 898, 899 (9th Cir. 1981) (per curiam) (subpoena to vice president of company for personal diaries, calendars, and appointment books were for documents that were "corporate rather than personal in nature," despite that documents were not owned or kept by the corporation).

[4] BEC improperly relied on *Consorcio Ecuatoriano*, 747 F.3d at 1272, which only addressed the fourth *Intel* factor and is entirely inapplicable here. BEC failed to distinguish the crucial differences between a company's affiliate and its owners/officers. Response at *10.

directly through Vega.[5] BEC says that unless you're the actual defendant named in the foreign proceeding, it doesn't count. That is not accurate. It counts if you are any kind of "participant," including if you are the defendant itself, the defendant's owner, officer, employee, or agent. *Supra*. Thus, U.S. court involvement is duplicative, may lead to contradictory rulings on objections, and is otherwise not necessary. This first *Intel* factor weighs against § 1782 aid.

**B. Injecting duplicative discovery under § 1782 into a private Brazilian arbitration, on the very limited information given by BEC, unfairly disrupts the parties' parity in a country that is plainly not receptive to U.S. intrusion.**

The second *Intel* factor is an analysis of government-to-government comity, with the aim to improve it. We help judicial process in other countries' governments, in the hope that other countries' governments will help our judicial process here. To see if that effect will occur here, the Court must "look to the nature, attitude, and procedures of that [foreign] jurisdiction" as to whether § 1782 discovery would improve comity with the foreign country. *Schmitz*, 376 F.3d at 84 (denying § 1782 under second *Intel* factor).

Here, three experts have opined that the nature, attitude, and procedures of Brazil indicate that U.S. court intrusion will not further government-to-government comity. Exhibits B, C, and D. It bears remembering that the Foundation is a private law school think tank, not a state court. Given that BEC chose the Getulio Vargas Foundation and IBA Rules over an action in the Brazilian courts, this Court should be "reluctant [] to interfere with the parties' bargained-for expectations concerning the process." *Caratube* at 106 ("resort to § 1782 in the teeth of such [arbitration]

[5] *In re Ex Parte LG Electronics Deutschland GmbH*, 2012 WL 1836283, *3 (S.D. Cal. May 21, 2012) ("LEG has not explained why that information cannot be obtained from Mitsubishi in [the foreign lawsuit]. . . . Accordingly, the Court finds that this factor actually weighs against granting this [§ 1782] application.). Any conclusory and unverified statements to the contrary have no value. *See, e.g., Shipping and Transit, LLC v. 1A Auto, Inc.*, 283 F. Supp. 3d 1290, 1299 (S.D. Fla. 2017) (conclusory and unsupported statements have no evidentiary value).

agreements suggests a party's attempt to manipulate United States court processes for tactical advantage."). There is no evidence the Brazil parties discussed or requested non-party discovery from the Foundation, weighing against § 1782 involvement. *Caratube* at 106–07.

The Court should also look for any authoritative proof [6] that a foreign forum would reject § 1782 discovery, which is "embodied in a forum country's judicial, executive, or legislative declarations that specifically address the use of evidence gathered under foreign procedures." *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995). Here, the Brazil and U.S. governments, and three independent and uncontested experts, specifically notified that Brazil is not receptive to U.S. intrusion in Brazilian evidentiary matters, and interprets it as jeopardizing Brazilian sovereignty. *Schmitz* at 84; Ex. B, C, D; *Digitechnic* at *6. Disregarding this would "generally discourage future assistance to our courts" and contradict the aims of § 1782. *Id*.

Further, the Court's involvement "should not be applied in a way that will create obvious confusion or skew the results in the foreign litigation," because that does not help comity, and the Court "should consider the effect of its decision on the "procedural parity' of the parties to the foreign litigation," and "exercise its discretion . . . in a manner which does not prejudice either party." *In re Edelman*, 295 F.3d 171, 181 (2d Cir. 2002) (for "*equitable* procedures")); *Leret*, 51 F. Supp. 3d at 70 (*aff'ing* denial of § 1782). Thus, even where a forum may be receptive, the forum's nature or the character and stage of the proceedings may still counsel against § 1782 aid. *Caratube*, 730 F. Supp. 2d at 106 (denying § 1782 on nature/character despite receptivity). Here, the independent experts have opined that allowing § 1782 involvement in these proceedings will

[6] The § 1782 applicant should provide actual evidence of receptivity to fulfill this second *Intel* factor, and certainly more than conclusory assertions. *In re Digitechnic*, 2007 WL 1367697, at *5–6 (W.D. Wash. 2007) (weighing second *Intel* factor against applicant where it failed to provide any actual evidence of its assertion of receptivity).

unfairly skew the results in the foreign litigation and eliminate "'procedural parity' of the parties to the foreign litigation." Exhibit B at ¶ 26 (K. Rosenn); *Edelman* at 181; *Leret* at 70.

Lastly, "whether a petitioner has sought the intended discovery from the foreign tribunal [at all] does have some bearing on the foreign court's receptivity to American judicial assistance," even if there is no foreign exhaustion requirement. *Green Dev. Corp. S.A. De C.V. v. Zamora*, 2016 WL 2745844, at *8, 19–20 (S.D. Fla. May 10, 2016) (quashing § 1782 subpoena). In other words, if the § 1782 applicant has not sought the discovery at all in the foreign proceeding, it is likely because the forum is not receptive to the discovery sought and/or would not appreciate its authority and discretion being preempted. *Id*.; *Andover*, 817 F.3d at 624 (8th Cir. 2016). Here, BEC still refuses to disclose whether it sought discovery in Brazil and that forum's position on it. *Green* at *7.[7] If BEC has not sought the discovery at all in the Brazil proceeding, it is likely because the forum is not receptive to the discovery sought. *Id*. This factor weighs against BEC.

### C. All signs point to a circumvention, upon review of the IBA Rules governing the Brazil arbitration and consideration of BEC's obfuscation and lack of transparency.

On the third *Intel* factor, "whether the § 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country of the United States," this factor weighs against BEC. *See In re Kurbatova*, 18-mc-81554-BLOOM/Valle (S.D. Fla. May 17, 2019) at *6. "This factor suggests that a district court should be vigilant against a petitioner's attempt to 'replace a [foreign] decision with one by [a U.S.] court.'" *In re Kreke* at *6 (no § 1782).

[7] In its response, BEC failed to distinguish receptivity from discoverability and admissibility. BEC relies on an unorthodox Illinois decision that in no way addressed discoverability or admissibility, although it did rely on the expert opinion of Keith Rosenn, the same expert against § 1782 here. 466 F. Supp. 2d at 1031–32. BEC failed to address Brazil's declaration under Article 23 of the Hague Convention, prohibiting enforcement of U.S. discovery orders and declaring it will not entertain requests for obtaining discovery in the U.S. Exhibit D at ¶ 7 and n.1 (Decl. R. Amado). As BEC argues receptivity may be inferred from assent to treaties, so too must its lack be inferred from declarations against cooperation. In sum this factor weighs against § 1782 interference here.

Although the Court need not determine if an applicant has first exhausted discovery abroad, "a perception that an applicant has 'side-stepped' less-than-favorable discovery rules by resorting immediately to § 1782 can be a factor in a court's analysis." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2013 WL 183944, at *3 (N.D. Cal. Jan. 17, 2013) (quashing § 1782 subpoena); *Caratube*, 730 F. Supp. 2d at 101 (same); *Salcido-Romo v. S. Copper Corp.*, 2016 WL 3213212, at *3 (D. Ariz. June 10, 2016) (same); *In re IPC*, 2012 WL 4448886 at *12 (same).

Here, Professor Rosenn's expert opinion is that BEC's activity here "seriously disturbs the fairness of the arbitration proceeding," reflecting circumvention. Ex. B at ¶ 26. The other experts agree. Ex. C and D. Moreover, BEC's activity doesn't make sense unless it is a circumvention. *In re IPC* at *12. As the *IPC* court stated on nearly identical circumstances:

> Because rational actors do not needlessly increase their own litigation costs, there must be a reason that [BEC] is seeking the information here rather than in Brazil. One reasonable explanation is that [BEC] is attempting to circumvent proof-gathering restrictions of the Brazilian court. [citations omitted]. If so, the third *Intel* factor weighs against [BEC]. If not, this [third *Intel*] factor nevertheless weighs against [BEC] because its conduct contravenes an express policy of the United States: 'providing efficient assistance to participants in international litigation.' *Intel Corp.,* 542 U.S. at 252."

*Id*. at 12–13. It further appears that BEC is seeking to circumvent the actual IBA Rules governing their arbitration, because BEC refuses to cite them here and discuss how they allow this § 1782 discovery. That's because the IBA Rules do not expressly allow this § 1782 discovery.[8]

BEC says a circumvention argument rests on lack of information. *But this is the trap laid by BEC all along*. The undersigned repeatedly requested any information or documentation before

[8] Upon review, Articles 2–4 and 9 of the IBA Rules shows that these discovery requests should have gone through the Getulio Vargas Foundation, subject to IBA objections, privileges, confidentiality, and discovery resolution procedures, to be ruled on directly by the Foundation. *See* Exhibit H (IBA Rules). In particular, Article 9.2–9.3 provide a long list of applicable objections, subject to a specific IBA objection resolution procedure, that BEC seeks to side-step here.

filing its motion, and BEC refused. *See* Ex. A (emails).[9] It is wrong to now use this against Mr. Barbosa Filho, who acted in good faith, and reward BEC for obfuscation.

**D. BEC's request are not narrowly tailored to Vega's contract breaches and impermissibly seek privileged, private, financial, corporate, and personal information that colors rights against self-incrimination.**

The fourth *Intel* factor is to consider whether the scope of the discovery requests themselves create undue intrusion or burden. The discovery must be relevant to the actual causes of action and narrowly tailored. *Kang v. Noro-Mosely Partners*, 246 F. App'x 662, 664 (11th Cir. 2007) (denial on § 1782). Requests into confidential financial information and corporate structure are improper and must be quashed. *See Ochoa v. Empresas ICA, S.A.B. de C.V.*, 2012 WL 3260324, at *6–9 (S.D. Fla. Aug. 8, 2012) (denying attenuated § 1782 requests).

Here, the majority of requests are on-their-face overbroad, using "relating to" and "involving;" "[a]s such, the subpoenas, as drafted, cannot stand." *See* Requests no. 1–3; 8–15; *In re Bernal*, 2018 WL 6620085 at *9 (S.D. Fla. 2018). BEC fails to narrowly tailor its requests to Vega's alleged breach of agreements. This is an improper post-judgment inquiry to pierce corporate veil through non-parties, including Interlagos Holding (Request 5, 10–17), Sebring Capital (Request 6, 8, 10, 11, 15–17), and Daytona Investment (Request 7, 10, 11, 15–17). Experts opined the whole subpoena is illegal on self-incrimination. Ex. B, C, D. This weighs against BEC.

## CONCLUSION

For the stated reasons, the Court should vacate its *ex parte* order authorizing the subpoena to Mr. Barbosa Filho, quash the subpoena, or otherwise provide relief as requested.

[9] The cases cited by BEC in its Response have nothing to do with the third *Intel* factor, any *Intel* factor, or the issues in this case. Resp. at *15. The courts reject BEC's refusal to specifically address any Brazil, Getulio, or IBA proof-gathering restrictions at all as a circumvention by omission of information. *IPC Do Nordeste* at *12. This Court should as well.

Respectfully submitted,

By: */s/ Andrew J. Bernhard, Esq.*
Florida Bar No. 084031
E-mail: abernhard@bernhardlawfirm.com
**BERNHARD LAW FIRM PLLC**
Counsel for Mr. Barbosa Filho
333 SE 2nd Avenue, Suite 2000
Miami, Florida 33131
Telephone: 786.871.3349

**CERTIFICATE OF SERVICE**

I CERTIFY that a copy of this document was served on December 20, 2019 upon all counsel of record via the Clerk of the Court's CM/ECF system.

By: */s/ Andrew J. Bernhard, Esq.*
Florida Bar No. 084031