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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Republic of Kazakhstan,

10 Petitioner,

11 v.

12 William Scott Lawler,

13 Respondent.
14

No. CV-20-00090-PHX-DWL

ORDER

15 Pending before the Court is a motion by William Scott Lawler to quash a subpoena
16 served by the Republic of Kazakhstan (“Kazakhstan”). (Doc. 29-1 [redacted version]; Doc.
17 32 [sealed, unredacted version].) The Court previously granted Kazakhstan’s application
18 under 28 U.S.C. § 1782 for permission to serve the subpoena, without prejudice to Lawler’s
19 ability to oppose it after being served. (Docs. 16, 17.) For the following reasons, the
20 motion to quash will be granted.

21 **BACKGROUND**

22 In 2017, Big Sky Energy Corporation (“Big Sky”), a Nevada corporation,
23 commenced arbitration proceedings against Kazakhstan before the International Centre for
24 Settlement of Investment Disputes (“Centre”), alleging that the Kazakhstani courts’
25 invalidation of an earlier transfer of oil rights violated a bilateral investment treaty between
26 the United States and Kazakhstan. (Doc. 7 at 6.)

27 The bilateral investment treaty denies protection “to any company that is controlled
28 by non-U.S. nationals if that company does not conduct substantial business activities in

1 the United States.” (*Id.* at 7.) Accordingly, Kazakhstan wishes to explore whether Big Sky
2 is secretly controlled by non-U.S. nationals—a jurisdictional defense that, if substantiated,
3 would preclude Big Sky from asserting claims under the treaty.

4 On October 22, 2019, Kazakhstan filed an application under 28 U.S.C. § 1782 to
5 secure documentary and testimonial evidence from Lawler, Big Sky’s sole officer and
6 director, to help establish this jurisdictional defense. (*Id.* at 14.) In a nutshell, Kazakhstan
7 asserted that it had made multiple attempts during the arbitration proceeding to obtain such
8 evidence directly from Big Sky, that Big Sky had ignored those requests, that its only
9 alternative was to obtain the evidence from Lawler, and that the tribunal overseeing the
10 arbitration proceeding (“the Tribunal”) lacked authority to order Lawler to do anything
11 because he is not a party to the proceeding. (Doc. 16, citing Doc. 7 at 7-11.)

12 On October 28, 2019, the Court granted Kazakhstan’s application. (Doc. 16.) The
13 Court also clarified that, because it had granted the application on an *ex parte* basis, Lawler
14 would remain “free to challenge the subpoena once Kazakhstan serves it.” (Doc. 17.)

15 On October 30, 2019, Kazakhstan served Lawler with the subpoena. (Doc. 18.)

16 Between November 1 and 8, 2019, Big Sky produced 114 additional documents to
17 Kazakhstan as part of the discovery process in the arbitration proceeding. (Doc. 19-5 [Big
18 Sky’s November 1, 2019 letter to Kazakhstan, enclosing 18 additional documents]; Doc.
19 19-6 [Big Sky’s November 8, 2019 letter to Kazakhstan, enclosing 96 additional
20 documents].) The accompanying letters explained that Lawler had sent his entire Big Sky
21 email archive to Big Sky’s counsel, that Big Sky’s counsel had reviewed the archive in an
22 effort to locate any potentially responsive documents that had not been previously
23 produced, and that the 114 newly disclosed documents constituted the entire universe of
24 relevant documents. (*Id.*)

25 On November 11, 2019, counsel for Lawler requested that Kazakhstan withdraw the
26 subpoena given that all responsive documentary evidence had been produced. (Doc. 19-1
27 ¶ 3.) Kazakhstan declined to do so. (*Id.*)

28 On November 22, 2019, the Tribunal issued a ruling in which it declined to require

1 Big Sky to take additional efforts to gather and produce responsive documents. (Doc. 37-
2 1 ¶ 6; Doc. 37-4 [redacted version]; Doc. 41-3 [sealed, unredacted version].)¹

3 On November 22, 2019, Lawler filed a redacted motion to quash (Doc. 19) and
4 simultaneously filed a motion to seal (Doc. 20). On December 10, 2019, the Court granted
5 in part and denied in part Lawler's motion to seal. (Doc. 27.) On December 11, 2019,
6 Lawler re-filed his redacted motion to quash. (Doc. 29-1.)

7 On December 9, 2019, Kazakhstan filed a redacted response to Lawler's motion to
8 quash (Doc. 24) and simultaneously filed a motion to seal (Doc. 26). The Court granted in
9 part and denied in part the motion to seal. (Doc. 30.) On December 16, 2019, Kazakhstan
10 re-filed its redacted response to the motion to quash. (Doc. 33.)

11 On December 16, 2019, Lawler filed a redacted reply to Kazakhstan's response
12 (Doc. 37) and simultaneously filed a motion to seal (Doc. 38), which the Court later granted
13 (Doc. 40).

14 On January 7, 2020, the Court provided the parties with a tentative ruling on
15 Lawler's motion. (Doc. 42.)

16 On January 13, 2020, the Court heard oral argument. (Doc. 43.) During the hearing,
17 the parties informed the Court that they might be able to reach a stipulation that would
18 narrow the scope of their dispute. (*Id.*) However, the parties subsequently informed the
19 Court that they were unable to agree to such a stipulation. (Doc. 44.)

20 DISCUSSION

21 I. Scope Of Review

22 Kazakhstan argues, as a threshold matter, that because the Court already granted its
23 application under 28 U.S.C. § 1782 for leave to serve a subpoena on Lawler, the only issue
24 that remains to be resolved is whether the subpoena complies with Rule 45 of the Federal
25 Rules of Civil Procedure. (Doc. 33 at 3-5.) Lawler disagrees, arguing that the Court can
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27 ¹ Although the Court previously granted Lawler's request to redact information
28 pertaining to the Tribunal's November 22, 2019 ruling, the Court has now determined, after
considering the merits of the parties' dispute, that this ruling is essential to the public's
understanding of the proceedings in this Court.

1 and should reconsider the applicability of the § 1782 factors in light of the new information
2 raised in his motion. (Doc. 37 at 10-11.)

3 Lawler has the better side of this argument. The Court specifically noted in a prior
4 order that, because it had granted Kazakhstan’s initial § 1782 application on an *ex parte*
5 basis, Lawler would remain “free to challenge the subpoena once Kazakhstan serves it.”
6 (Doc. 17 at 1.) Courts routinely reconsider the applicability of the § 1782 factors when
7 ruling on motions to quash § 1782 subpoenas that were initially issued and approved
8 without adversarial briefing. *See, e.g., In re Ex Parte Application of Kleimar N.V.*, 220 F.
9 Supp. 3d 517, 520-22 (S.D.N.Y. 2016) (court initially granted § 1782 application on *ex*
10 *parte* basis, then permitted respondent to dispute applicability of § 1782 factors in motion
11 to quash); *IPCom GMBH & Co. KG v. Apple Inc.*, 61 F. Supp. 3d 919, 921-23 (N.D. Cal.
12 2014) (same); *Pott v. Icicle Seafoods, Inc.*, 945 F. Supp. 2d 1197, 1198-200 (W.D. Wash.
13 2013) (same). *See also Khrapunov v. Prosyankin*, 931 F.3d 922, 924 (9th Cir. 2019)
14 (magistrate judge initially granted § 1782 application without adversarial briefing, then
15 allowed recipients to file motion to quash and eventually narrowed subpoena’s scope). *See*
16 *generally In re Letter of Request from Supreme Court of Hong Kong*, 138 F.R.D. 27, 32
17 n.6 (S.D.N.Y. 1991) (“[E]x parte applications are typically justified by the fact that the
18 parties will be given adequate notice of any discovery taken pursuant to the request and
19 will then have the opportunity to move to quash the discovery or to participate in it.”).

20 Kazakhstan’s argument to the contrary is based on a misreading of *Heraeus Kulzer*,
21 *GmbH v. Biomet, Inc.*, 633 F.3d 591 (7th Cir. 2011). Although the Seventh Circuit did
22 observe in *Heraeus Kulzer* that, once courts complete the “section 1782 screen,” that statute
23 “drops out” and “the ordinary tools of discovery management . . . come into play,” the
24 district court in that case allowed both parties to be heard before ruling on the initial § 1782
25 application. *Id.* at 597-98.

26 Thus, the issue now before the Court is whether, with the benefit of adversarial
27 briefing, Kazakhstan ought to be allowed to pursue discovery from Lawler under § 1782
28 (not simply whether the subpoena complies with Rule 45).

1 II. Merits

2 The decision whether to grant a § 1782 application is a two-step inquiry. First, the
3 application must meet the statutory requirements in § 1782. *See, e.g., Schmitz v. Bernstein*
4 *Liebhard & Lifshitz, LLP*, 376 F.3d 79, 83-84 (2d Cir. 2004). Second, several discretionary
5 factors bear on whether relief ought to be granted. *Intel Corp. v. Advanced Micro Devices,*
6 *Inc.*, 542 U.S. 241, 264 (2004).

7 Lawler concedes the statutory requirements are met but argues the discretionary
8 *Intel* factors support his position. (Doc. 29-1 at 8.) In *Intel*, the Supreme Court identified
9 the following four “factors that bear consideration in ruling on a § 1782(a) request”:

- 10 (1) Whether “the person from whom discovery is sought is a participant in the
11 foreign proceeding,” because “nonparticipants in the foreign proceeding may
12 be outside the foreign tribunal’s jurisdictional reach; hence, their evidence,
13 available in the United States, may be unobtainable absent § 1782(a) aid”;
- 14 (2) “[T]he nature of the foreign tribunal, the character of the proceedings
15 underway abroad, and the receptivity of the foreign government or the court
16 or agency abroad to U.S. federal-court judicial assistance”;
- 17 (3) Whether the request “conceals an attempt to circumvent foreign proof-
18 gathering restrictions or other policies of a foreign country or the United
19 States”; and
- 20 (4) Whether the request is “unduly intrusive or burdensome.”

21 542 U.S. at 264. “The *Intel* factors involve overlapping considerations, are considered
22 collectively by the court in exercising its discretion, and are not stand-alone categorical
23 imperatives.” *In Matter of Application of Action & Prot. Found. Daniel Bodnar*, 2014 WL
24 2795832, *5 (N.D. Cal. 2014). “[T]he decision to grant an application is made in light of
25 the twin aims of § 1782: to provide ‘efficient means of assistance to participants in
26 international litigation in our federal courts’ and to encourage ‘foreign countries by
27 example to provide similar means of assistance to our courts.’” *Pott*, 945 F. Supp. 2d at
28 1199.

1 A. **Participant In The Proceeding**

2 In its § 1782 application, Kazakhstan argued that because Lawler is not a party to
3 the arbitration and is therefore outside the jurisdictional reach of the Tribunal, the first *Intel*
4 factor weighed in its favor. (Doc. 7-1 at 13-14.) In his motion, Lawler concedes he is not
5 a formal party to the arbitration. (Doc. 29-1 at 8-10.) However, he argues that the crux of
6 the first *Intel* requirement is whether the evidence being sought is within the jurisdictional
7 reach of the Tribunal and points to the recent success of Kazakhstan in obtaining materials
8 in Lawler’s possession (via Big Sky) as proof that he is effectively within the jurisdictional
9 reach of the Tribunal. (*Id.*) He also contends the documents at issue are, in reality, Big
10 Sky’s documents—he simply has possession of them by virtue of his position as a Big Sky
11 officer and director. (*Id.*) In response, Kazakhstan reiterates its earlier point that Lawler
12 is not a participant in the proceedings and further argues that Lawler previously refused to
13 provide evidence in the proceedings and has not committed to do so in the future. (Doc.
14 33 at 11.) Lawler replies that the documentary evidence Kazakhstan seeks is obviously
15 obtainable in the arbitration proceeding because, following Big Sky’s productions of
16 November 1 and 8, 2019, Kazakhstan has now obtained all of the documentary evidence
17 identified in the subpoena. (Doc. 37 at 6-8.) Finally, as for availability of his testimony in
18 the arbitration proceeding, Lawler states that he may choose to testify in the form of a
19 witness statement and would, in any event, comply with the Tribunal’s “invitation” to
20 provide a statement if asked. (*Id.* at 8-9.)

21 “[W]hen the person from whom discovery is sought is a participant in the foreign
22 proceeding . . . the need for § 1782(a) aid generally is not as apparent as it ordinarily is
23 when evidence is sought from a nonparticipant in the matter arising abroad.” *Intel*, 542
24 U.S. at 264. Although the identity of the party is instructive, the analysis turns on whether
25 the *evidence* is “unobtainable absent § 1782(a) aid.” *Id.* See also *In re Judicial Assistance*
26 *Pursuant to 28 U.S.C. 1782 by Macquarie Bank Ltd.*, 2015 WL 3439103, *6 (D. Nev.
27 2015) (“Although the case law at times refers to whether the ‘person’ is within the foreign
28 tribunal’s jurisdictional reach, the key issue is whether the material is obtainable through

1 the foreign proceeding.”); *In re Ex Parte Application of Qualcomm Inc.*, 162 F. Supp. 3d
2 1029, 1039 (N.D. Cal. 2016) (“[W]hether an entity is a participant . . . is not dispositive;
3 *Intel* puts it in the context of whether the foreign tribunal has the authority to order an entity
4 to produce the disputed evidence.”).

5 Here, although Kazakhstan may have had a good-faith basis for suspecting, at the
6 time it filed its application, that documentary evidence within Lawler’s possession fell
7 outside the Tribunal’s reach, that suspicion has proved unfounded. As noted, in early
8 November 2019, Big Sky produced 114 responsive documents that had been in Lawler’s
9 possession and made the following two certifications: (1) “it has thoroughly reviewed all
10 documents/files/boxes provided to Mr. Lawler by [Big Sky’s] former officers and directors,
11 and . . . any responsive documents have been provided to [Kazakhstan]”; and (2) “it has
12 produced all responsive documents from Mr. Lawler’s email archive.” (Doc. 28-4 at 3.)
13 These are tantamount to a certification that all responsive documents in Lawler’s
14 possession have now been produced.² Moreover, the Tribunal accepted this certification
15 and declined to require Big Sky to search for or produce any additional evidence.

16 Although Kazakhstan understandably harbors suspicions about the timing of Big
17 Sky’s production, given that it occurred almost immediately after the § 1782 subpoena was
18 served on Lawler, the production nevertheless undermines Kazakhstan’s assertion (Doc. 7
19 at 3) that Lawler “cannot be compelled to . . . provide evidence” in the arbitration. *Cf.*
20 *Khrapunov*, 931 F.3d at 926 (it is appropriate for courts to consider “developments” in the
21 foreign litigation that occurred after the § 1782 application was initially filed when
22 evaluating “the discretionary factors” under *Intel*).

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24 ² During oral argument, Kazakhstan argued that these “very specific certifications”
25 do not necessarily amount to an unqualified certification “that Mr. Lawler has produced all
26 documents relevant and responsive to the requests here that he possesses or controls.” The
27 Court respectfully disagrees. Kazakhstan assured the Tribunal, in its letter requesting
28 permission to file a § 1782 application, that “the Petition seeks to obtain evidence whose
production has already been ordered by this Tribunal” (Doc. 28-6 at 4) and later certified
to this Court that “this Application would not have been necessary if Big Sky had simply
produced this information as the Tribunal directed it to do” (Doc. 13 at 14). Moreover,
near the end of oral argument, Kazakhstan could not specifically identify any category of
relevant documents that might fall outside the two certifications and acknowledged that
“those two certifications . . . may well be . . . what we’ve asked for.”

1 As for Kazakhstan’s ability to obtain testimonial evidence from Lawler in the
2 arbitration proceeding, the analysis is more complicated. As an initial matter, both parties
3 appear to be taking positions in this case that differ from the arguments they advanced to
4 the Tribunal. For example, although Lawler now contends “[t]he Tribunal has the power
5 to invite [his] witness testimony if it believes it would aid in the proceeding” and avows
6 that he would comply with such a request (Doc. 37 at 7), Big Sky appeared to take a
7 somewhat different position during the arbitration proceeding, questioning the Tribunal’s
8 power to compel non-party testimony. (Doc. 33 at 6, citing Doc. 24-2 at 2 n.22.)
9 Meanwhile, although Kazakhstan has argued in this proceeding that “there is no
10 mechanism in the Arbitration for [Kazakhstan] to compel Lawler to give evidence . . . [so]
11 if Big Sky declines to proffer Lawler as a witness in the Arbitration, and this Application
12 is not granted, then Lawler’s evidence will remain concealed” (Doc. 7-1 at 8), Kazakhstan
13 effectively argued during the arbitration proceeding that the Tribunal had the power to
14 require Lawler to provide a witness statement (Doc. 29-1 at 5, citing Doc. 19-2).

15 In any event, it appears, based on the sealed materials submitted by the parties, that
16 the Tribunal believes it could require Big Sky to produce witness statements from corporate
17 officers (in this case, Lawler is the only such officer) if it believed such statements would
18 be helpful to the resolution of the arbitration proceeding. Moreover, during oral argument,
19 Kazakhstan conceded that the Tribunal effectively possesses the power (via the threat of
20 an adverse inference) to require Big Sky to make Lawler available to testify—it simply
21 argued that an exercise of that power was “very unlikely” because, as a “practical matter,”
22 tribunals overseeing investor-state arbitrations are hesitant to impose adverse-inference
23 sanctions against parties that fail to produce witnesses: “[W]e would suggest that that is an
24 unlikely possibility. It is like many things in life, yes, it is a possibility, but it is a very
25 unlikely one.”³

26 ³ The treatise materials submitted by the parties following oral argument confirm this
27 point. Although Kazakhstan cites treatise provisions stating that “only exceptionally will
28 the tribunal suggest or require that a particular witness be designated” and that
“international arbitral tribunals appear to be hesitant, often overly hesitant to draw adverse
inferences from non-production of evidence and non-compliance with disclosure orders”
(see Case No. 19-mc-35, Doc. 43 at 2, citations omitted), these are statements about

1 Given this clarification, the Court is not persuaded that a § 1782 subpoena is the
2 only way for Kazakhstan to obtain testimony from Lawler. The test under the first *Intel*
3 factor isn't whether there's a *likelihood* a party would be able to obtain the requested
4 evidence in the foreign proceeding, it's whether the evidence is "unobtainable" in that
5 proceeding. Thus, the Court now concludes, with the benefit of adversarial briefing and in
6 light of recent developments in the arbitration proceeding, that the first *Intel* factor cuts
7 against Kazakhstan's request for assistance, both with respect to documentary and
8 testimonial evidence.

9 **B. Character Of The Proceedings And Receptivity Of Tribunal**

10 In its application materials, Kazakhstan argued that because the Tribunal had
11 authorized its § 1782 application, the Tribunal had "clearly signaled its receptivity" to the
12 discovery it seeks. (Doc. 7-1 at 14.) Lawler disputes this claim, arguing that the Tribunal's
13 non-opposition to Kazakhstan's request shouldn't be viewed as an affirmative expression
14 of support because (1) "[n]o tribunal constituted by the [Centre] has the power to stop a
15 party from filing a § 1782 petition" and (2) the Tribunal "pointedly refused to extend the
16 briefing schedule for the Arbitration" to await the results of the § 1782 proceeding. (Doc.
17 29-1 at 6-7.) Thus, Lawler characterizes the Tribunal's position toward Kazakhstan's
18 application as one of "unenthusiastic tolerance." (*Id.* at 11-12.)

19 Courts differ as to what kind of proof is required under the second *Intel* factor. *See*
20 *generally In re Schlich*, 893 F.3d 40, 49 (1st Cir. 2018) ("Some courts have ruled that the
21 party opposing discovery bears the burden of proving that the foreign tribunal would be
22 unreceptive to the evidence and that, absent such proof, the factor weighs in favor of
23 granting discovery. Other courts have required 'authoritative proof' of the receptivity of
24 the foreign tribunal before finding that this factor weighs in favor of discovery. Still other
25 courts have not specifically placed a burden of proof on either party as to any of the *Intel*

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27 probability, not availability. Moreover, Lawler cites provisions verifying that "a tribunal
28 presumptively possesses the power to order a party to produce persons within its control
for examination at an evidentiary hearing. The classic examples of such witnesses are
corporate officers, directors, or senior employees of a party to the arbitration . . ." (Doc.
45 at 1, citation omitted).

1 factors and, instead, seem to have neutrally analyzed the contentions and supporting
2 evidence presented by all the parties in deciding whether to exercise their discretion.”)
3 (citations omitted). *See also In re Application Pursuant to 28 U.S.C. § 1782 to Take*
4 *Discovery of ASML U.S., Inc.*, 707 F. App’x 476, 477 (9th Cir. 2017) (“[T]he second *Intel*
5 factor is met because Nikon’s experts stated, in unrebutted declarations, that the foreign
6 tribunals would welcome the discoverable evidence.”).

7 Here, neither party has mustered authoritative evidence of the Tribunal’s receptivity
8 to the evidence sought. On the one hand, the Tribunal was offered the opportunity to object
9 to Kazakhstan’s request for leave to file the § 1782 application and chose not to do so. On
10 the other hand, it’s not clear whether the Tribunal could have objected—Lawler asserts in
11 his motion that the Tribunal isn’t empowered to oppose such requests and Kazakhstan
12 doesn’t address this argument in its response. Also, Lawler may be overstating things by
13 arguing the Tribunal “pointedly refused” to delay the arbitration schedule during the
14 pendency of the § 1782 litigation—Kazakhstan noted during oral argument that the
15 Tribunal simply retained the existing schedule, without making any comment about why it
16 was doing so, and argued that such inaction shouldn’t be viewed as a sign of disinterest
17 because the schedule rarely gets changed in investor-state arbitrations. Thus, the Court
18 concludes the second *Intel* factor is neutral.⁴

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22 ⁴ Lawler raises an additional argument concerning factor two, but the Court will
23 consider it separately for the sake of analytical clarity (noting also that *Intel* does not
24 purport to provide an exclusive and exhaustive list of factors). *See* 542 U.S. at 264
25 (describing the discretionary factors as topics that “bear consideration”). Lawler argues
26 that because reciprocal discovery privileges are not being granted to him, ordering his
27 deposition would amount to “one-sided discovery” that could skew the result of the
28 arbitration. (Doc. 29-1 at 11-12.) The Seventh Circuit rejected an analogous argument
where one party was confined to narrow German discovery rules and the other could use
broad U.S. procedures. *Heraeus Kulzer*, 633 F.3d at 595. The court, while noting the
potential for unequal discovery, stated that the party opposing the § 1782 application
“hasn’t indicated that there is anything in [its opponent’s] files that would help the
defense.” In other words, without a showing that allowing Kazakhstan to “shield its own
witnesses” obstructs Big Sky from making its best case, it’s difficult to see how this lack
of reciprocity is unfair, confusing, or would tend to skew results. (Doc. 29-1 at 13.)

1 **C. Circumvention Of Foreign Proof-Gathering Restrictions**

2 Lawler identifies two reasons why the § 1782 application is an attempt to
3 circumvent the Tribunal’s discovery orders: first, because the Tribunal previously rejected
4 Kazakhstan’s request to obtain a witness statement from Lawler regarding the sufficiency
5 of Big Sky’s document production efforts, and second, because the subpoena would force
6 Lawler to produce, without redaction, documents that the Tribunal previously allowed Big
7 Sky to produce after redacting certain sensitive information. (Doc. 29-1 at 12-14.)
8 Kazakhstan’s response is that, because the Tribunal approved its request to file a § 1782
9 application, the application cannot amount to circumvention of the Tribunal’s proof-
10 gathering restrictions. (Doc. 7-1 at 14-15; Doc. 33 at 9-11.)

11 “[A] district court could consider whether the § 1782(a) request conceals an attempt
12 to circumvent foreign proof-gathering restrictions or other policies of a foreign country.”
13 *Intel*, 542 U.S. at 265. Courts in this circuit have rejected a “quasi-exhaustion
14 requirement,” but an applicant “side-stepp[ing] less-than-favorable discovery rules by
15 resorting immediately to § 1782 may . . . be a factor in the analysis.” *Nikon Corp. v. ASML*
16 *US Inc.*, 2017 WL 4024645, *3 (D. Ariz. 2017).

17 Here, although Kazakhstan’s application did not constitute an effort to engage in
18 circumvention at the time it was filed, the landscape has now changed, at least with respect
19 to Kazakhstan’s request for documentary evidence. As noted, on November 22, 2019, the
20 Tribunal declined to require Big Sky to undertake additional efforts to review Lawler’s
21 email archive for responsive documents. Nevertheless, Kazakhstan acknowledges that it
22 wishes to use the § 1782 subpoena as a tool to confirm that Big Sky’s document production
23 was complete. (Doc. 33 at 13 [“[I]t is in no way burdensome for Lawler to produce the
24 limited number of documents he claims he already has—if that is in fact the entire universe
25 of responsive documents he possesses—and to require him to do so in his individual
26 capacity while subject to this Court’s sanction powers. Lawler has already shown that he
27 has no problem withholding documents relevant to the Arbitration until this Court demands
28 he produce them, so forcing him to commit on the record here that he has produced all

1 relevant documents has become an unfortunate necessity that is in no way burdensome.”).

2 The analysis concerning Kazakhstan’s request for testimony from Lawler is less
3 clear-cut. Although Lawler has identified prior instances where the Tribunal declined to
4 require Big Sky, via Lawler, to provide witness statements concerning the sufficiency of
5 its evidence-gathering efforts, Kazakhstan’s request in this proceeding isn’t limited to
6 testimony on that particular subject area.

7 For these reasons, the Court now concludes, with the benefit of adversarial briefing
8 and in light of recent developments in the arbitration proceeding, that the third *Intel* factor
9 cuts strongly against Kazakhstan’s request to require Lawler to produce documentary
10 evidence and is neutral with respect to Kazakhstan’s request to depose Lawler.

11 D. Unduly Intrusive Or Burdensome

12 Lawler argues the subpoena is unduly intrusive and burdensome because Big Sky
13 has now produced all of the documents that Kazakhstan seeks. (Doc. 29-1 at 15; Doc. 37
14 at 5-6.) Kazakhstan responds by painting Lawler as an unsavory character and arguing that
15 “given Lawler’s unquestionable history of hiding the ball, neither the Court nor
16 [Kazakhstan] should have to accept his lawyer’s representation that those are the only
17 documents that exist.” (Doc. 33 at 12-14.)

18 The analysis here dovetails with the analysis concerning the third *Intel* factor. To
19 the extent Kazakhstan simply wishes to require Lawler to re-produce all of the documents
20 Big Sky has already produced in the arbitration proceeding, such a request would be unduly
21 burdensome. *Macquarie Bank*, 2015 WL 3439103 at *9 (“When the information sought is
22 equally available through the foreign proceeding from a party to that proceeding, such
23 requests targeting a different person in the United States are by their very nature unduly
24 burdensome.”). Meanwhile, to the extent Kazakhstan wishes to require Lawler to produce
25 more documents than Big Sky has produced, although that request might not be unduly
26 burdensome, it is at odds with the Tribunal’s previous discovery rulings. Finally, as for
27 testimony, to the extent Kazakhstan wishes to require Lawler to testify about his evidence-
28 gathering efforts, such a request would be unduly burdensome, but to the extent the


1 requested testimony would touch upon other topics, there would be no undue burden.

2 III. Summary

3 The landscape has changed dramatically since Kazakhstan filed its § 1782
4 application in October 2019. Soon after Lawler was served with the subpoena, Big Sky
5 produced the very documents Kazakhstan wishes to compel Lawler to produce. Although
6 the Court shares Kazakhstan's skepticism toward Lawler's claim that this timing was
7 coincidental, the bottom line is that the *Intel* factors no longer support Kazakhstan's request
8 for assistance in obtaining evidence from Lawler—(1) Kazakhstan obviously can obtain
9 (because it has obtained) the very documents it seeks in this proceeding via the arbitration
10 proceeding, and the Tribunal could effectively compel Lawler to provide testimony, too;
11 (2) the Tribunal did not postpone the arbitration's briefing schedule to await the results
12 here; (3) the Tribunal declined to require Big Sky to undertake additional efforts to review
13 Lawler's email archive for responsive documents; and (4) it would be unduly burdensome
14 to require Lawler to re-produce documents Kazakhstan already has in its possession.

15 Accordingly, **IT IS ORDERED** that Lawler's motion to quash (Doc. 29-1) is
16 **granted**.

17 Dated this 27th day of January, 2020.

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22 Dominic W. Lanza
23 United States District Judge
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