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

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9 Alberto Salcido-Romo, et al.,
10 Petitioners,
11 v.
12 Southern Copper Corporation,
13 Respondent.

No. CV-16-01639-PHX-DLR
ORDER

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16 Before the Court is Petitioners Alberto Salcido-Romo, Francisco Ramón Miranda,
17 Francisca Garcia-Enriquez, and Oscar Ramírez-Gamez’s Application for an Order
18 Granting Leave to Issue Subpoenas for the Taking of Discovery Pursuant to 28 U.S.C. §
19 1782 (Application) (Doc. 1). The Application is fully briefed, and the Court heard oral
20 argument on May 26, 2016. For the following reasons, Petitioners’ Application is
21 granted in part.

22 **BACKGROUND**

23 Petitioners are residents of agricultural communities near the Sonora and
24 Bacanuchi Rivers in Sonora, Mexico (Doc. 1-1 at 24, ¶ 1). Respondent Southern Copper
25 Corporation (SCC) is a copper mining company incorporated in Delaware and
26 headquartered in Phoenix, Arizona (*Id.* at 31). SCC owns over 99% of Minera Mexico,
27 S.A. de C.V. (Minera), a Mexican mining company (*Id.* at 35). Minera, in turn, owns
28 99.99% of Operadora de Minas e Instalaciones Mineras, S.A. de C.V. (Operadora),

1 another Mexican mining company that operates the Buenavista del Cobre (BVC) mine in
2 Cananea, just north of Petitioners' communities (*Id.* at 28, ¶ 12).

3 On August 6, 2014, over 10 million gallons of toxic mining waste spilled from a
4 BVC copper leaching plant into the Bacanuchi River, a tributary of the Sonora River.
5 The spill contaminated nearly 120 miles of the Sonora River and affected over 24,000
6 people, including Petitioners (*Id.* at 24, ¶ 1; Doc. 1 at 3). In 2015, Petitioners filed seven
7 writ of *amparo* actions regarding the spill in Mexican courts (Doc. 1-1 at 24, ¶ 2).¹ The
8 writ of *amparo* actions are against various governmental entities and, in two cases,
9 against BVC (Doc. 13-1, ¶ 2). Petitioners also plan to file an environmental lawsuit
10 against BVC and Operadora, for which they currently are conducting a pre-suit
11 investigation (Doc. 1-1 at 26, ¶ 4; Doc. 13-1, ¶ 12). Petitioners seek this Court's
12 assistance in obtaining certain documents and testimony from SCC for use in their writ of
13 *amparo* proceedings and forthcoming environmental lawsuit (Doc. 1).

14 LEGAL STANDARD

15 Upon application by any interested person, 28 U.S.C. § 1782(a) allows a district
16 court to order a person residing within its district to produce documents or give testimony
17 for use in a foreign proceeding. "There are thus three threshold requirements for
18 compelling discovery under § 1782: (1) the person from whom discovery is sought must
19 'reside' or be 'found' in the district; (2) the discovery must be for use in a proceeding in a
20 foreign tribunal; and (3) the applicant must be an 'interested person.'" *In re Godfrey*, 526
21 F. Supp. 2d 417, 418 (S.D.N.Y. 2007). If these requirements are met, "[t]he statute
22 authorizes, but does not require," the district court to compel the requested discovery.
23 *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255 (2004). In exercising its
24 discretion to grant or deny a request under § 1782, the court considers several factors,
25 including: (1) whether the "person from whom discovery is sought is a participant in the

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27 ¹ A writ of *amparo* is a type of constitutional action in which a claimant seeks a
28 judicial order compelling a government or corporate entity to either take or cease a
particular action. The proceeding is analogous to a request for injunctive relief in the
United States' judicial system (Doc. 1-1 at 24, ¶ 2).

1 foreign proceeding;” (2) the nature and character of the foreign proceeding, and whether
2 the foreign court is receptive to judicial assistance from the United States; (3) whether the
3 request is an attempt to circumvent foreign proof-gathering restrictions; and (4) whether
4 the discovery request is “unduly intrusive or burdensome.” *Id.* at 264-66. The court may
5 also consider whether the requested materials are located outside the United States. *See*
6 *Four Pillars Enter. Co., Ltd. v. Avery Dennison Corp.*, 308 F.3d 1075, 1079-80 (9th Cir.
7 2002).² In weighing these factors, the court must be mindful of “the twin aims of the
8 statute: providing efficient means of assistance to participants in international litigation
9 in our federal courts and encouraging foreign countries by example to provide similar
10 means of assistant to our courts.” *In re Metallgesellschaft AG*, 121 F.3d 77, 79 (2d Cir.
11 1997) (internal quotations and citation omitted).

12 DISCUSSION

13 **A. Statutory Requirements**

14 Petitioners meet the statutory requirements for invoking § 1782. They are
15 interested persons because they are parties to the pending writ of *amparo* actions and will
16 be parties in the forthcoming environmental lawsuit. Petitioners seek documents and
17 testimony for use in these proceedings, which are being conducted in Mexican courts.
18 Finally, Petitioners request discovery from SCC, a corporation headquartered in this
19 District. Accordingly, the Court is authorized to grant Petitioners’ request if it deems the
20 request appropriate and if doing so will serve the twin aims of the statute.

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22 ² Whether extraterritorial discovery is categorically barred under § 1782 is the
23 subject of disagreement among federal courts. *Compare In re Gemeinschaftspraxis*, No.
24 Civ. M19-88 (BSJ), 2006 WL 3844464, at *5 (S.D.N.Y. Dec. 29, 2006) (“[A]bsent any
25 express statutory language, the location of the documents at issue should at most be a
26 discretionary consideration”) with *In re Godfrey*, 526 F. Supp. 2d at 423-24
27 (concluding that § 1782 should be limited to discovery within the United States) and *In*
28 *Re Microsoft Corp.*, 428 F. Supp. 2d 188, 194 n.5 (S.D.N.Y. 2006) (“[Section] 1782 does
not authorize discovery of documents held abroad.”). The Ninth Circuit has not
addressed whether § 1782 is territorially limited, but has at least endorsed considering the
location of the requested materials as a discretionary factor. *See Four Pillars*, 308 F.3d at
1079-80; *Astronics Adv. Electronics Sys. Corp. v. Lufthansa Technik AG*, 561 F. App’x.
605, at *606 (9th Cir. 2014). Absent contrary guidance from the Ninth Circuit or the
Supreme Court, this Court will not impose requirements that are not found within the
statutory text and, instead, will consider the extraterritorial location of any requested
documents as a discretionary factor.

1 **B. Discretionary Factors**

2 Two of the discretionary factors favor Petitioners. First, SCC is not a participant
3 in any of the foreign proceedings. Five of the seven writ of *amparo* actions are brought
4 only against Mexican governmental entities (Doc. 13-1, ¶ 2). Although two of its
5 Mexican subsidiaries—BVC and Operadora—are parties or prospective parties to some
6 of the Mexican proceedings, SCC is not. Moreover, according to Mexican attorney Luis
7 Miguel Cano, who submitted two declarations in support of Petitioners' Application,
8 SCC "will not and cannot be a party to the environmental lawsuit," because Mexican
9 "environmental responsibility law does not permit . . . a lawsuit against a parent
10 corporation of the responsible entities," (*Id.*, ¶ 12). Second, Petitioners have adequately
11 shown that the Mexican proceedings are still in the proof-gathering stages and that the
12 Mexican courts are receptive to judicial assistance from the United States. Cano explains
13 that "[u]nder the *amparo* system, judges are willing to admit a wide variety of evidence
14 brought to them by a party and obtained by other means," and that "in each of the *amparo*
15 actions . . . the litigation is at a point in which [Petitioners] can still present evidence to
16 the tribunal," (*Id.*, ¶¶ 3-4). Regarding the environmental lawsuit, Cano states "the
17 general rule is that the bulk of evidence supporting a case must be presented when the
18 lawsuit is filed," (*Id.*, ¶ 8). Because the environmental lawsuit has not yet been filed, it
19 follows that Mexican courts will be receptive to evidence gathered now.

20 The remaining factors, however, caution against granting the full extent of
21 Petitioners' request, especially given the likely location of some of the requested
22 materials. Petitioners' proposed Request for Production of Documents (Document
23 Request) and Notice of Rule 30(b)(6) Deposition (30(b)(6) Notice) define "SCC" to
24 include "any company directly or indirectly controlled by, or under common control with
25 SCC," including "all operating companies, joint ventures, divisions and/or units,
26 controlled directly or indirectly by SCC," (Doc. 1-1 at 6, 17). Additionally, the
27 Document Request and 30(b)(6) Notice define "Possession, Custody or Control" to
28 include the possession, custody, or control of SCC's subsidiaries (*Id.* at 5-6, 18). Minera,

1 Operadora, and BVC fall under these broad definitions. According to the declaration of
2 Gregory Evans, SCC's attorney, "[a]ll of the documents requested in the Document
3 Requests relate to events and communications that took place entirely in Mexico," (Doc.
4 12-2, ¶ 4). Based on his knowledge of SCC's corporate structure,³ Evans states that "all
5 or nearly all documents responsive to the Document Requests would be located in
6 Mexico and would be held by Operadora . . .," (*Id.*). Moreover, Evans states that the
7 30(b)(6) Notice would require SCC "to produce a representative of SCC, or its
8 subsidiaries, that can testify as to events that took place entirely in Mexico," and that
9 based on his knowledge of SCC's corporate structure, "it is likely that SCC would have
10 to designate a corporate officer of Operadora That person would likely be a
11 Mexican national," (*Id.*, ¶ 6). Petitioners themselves suggest that at least some of the
12 materials they have requested are located extraterritorially (Doc. 13-1, ¶ 9 ("[T]he
13 documents requested are not *all* in the possession of Operadora" (emphasis added)).
14 In its current form, Petitioners' Application likely seeks some materials located outside
15 the United States, and potentially testimony from a Mexican national. This weighs
16 against granting Petitioners' full request.⁴

17 Further, to the extent some of the requested materials are in the custody of
18 Operadora or BVC, Petitioners have not adequately explained why they should be
19 permitted to circumvent Mexican proof-gathering restrictions and obtain the information
20 indirectly from SCC in the United States. Cano informs the Court that "both BVC and
21 Operadora have appealed [Petitioners'] efforts to seek information from the government
22 regarding any alleged environmental remediation that took place after the August 6, 2014
23 spill," (Doc. 13-1, ¶ 10; *see also Id.*, ¶ 15 ("BVC and Operadora are both actively

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25 ³ Petitioners suggest that Evans' declaration is unreliable because it is based solely
26 on his knowledge of SCC's corporate structure, (Doc. 13 at 4, 7), yet Cano likewise relies
27 on his knowledge of SCC's corporate structure to contend that some of the requested
28 materials are in the possession of SCC, (Doc. 13-1, ¶ 9).

⁴ Indeed, because Petitioners' Application defines SCC to encompass Minera,
Operadora, and BVC, it does not seek materials solely from a person residing in this
District; SCC's Mexican subsidiaries are not headquartered here. Moreover, Operadora
and BVC are parties to some of the Mexican proceedings.

1 appealing [Petitioners’] right to obtain certain information from government sources.”)).
2 Although Petitioners are taking steps to obtain some of this information through Mexican
3 proof-gathering procedures, they do not explain why it would be appropriate for this
4 Court to undermine that process, including any appeals by Operadora or BVC, by
5 ordering production indirectly from SCC in the United States. That foreign proof-
6 gathering procedures are more burdensome does not, alone, justify this Court’s
7 intervention. Moreover, although Cano states that he is “not aware of any mechanism by
8 which a court would approve to conduct any investigations prior to the filing of the
9 lawsuit similar to what is being asked of SCC in this Application,” (*Id.*, ¶ 13), he does not
10 explain why he cannot seek information from BVC through the Mexican courts in the
11 context of the two writ of *amparo* proceedings to which BVC presently is a party, nor
12 does Cano address the other Mexican proof-gathering mechanisms described by attorney
13 Juan Carlos Bolaños Silva in his declaration submitted in support of SCC’s opposition
14 brief, (Doc. 12-1, ¶¶ 8-17, 19). In sum, these circumstances suggest that Petitioners’
15 request might be motivated, at least in part, by a desire to circumvent less favorable or
16 more onerous proof-gathering restrictions in Mexico.

17 Finally, SCC contends that Petitioners’ discovery requests are unduly burdensome
18 to the extent they require SCC to obtain materials possessed by its foreign subsidiaries for
19 production in the United States. Specifically, Evans’ explains:

20 Responding to the Document Requests would be expensive
21 and time-consuming. SCC would have to first obtain the
22 cooperation of officers of its corporate subsidiaries and
23 conduct searches for documents responsive to the thirteen
24 separate categories listed in the Document Requests. SCC
25 would then have to transfer any potentially relevant
documents to the United States and engage U.S. attorneys to
review documents, nearly all of which would be written in
Spanish, to determine if any documents would be protected
from production by U.S. discovery rules.

26 (Doc. 12-2, ¶ 5).⁵ The Court agrees. *See Krestrel Coal Pty. Ltd. v. Joy Global, Inc.*, 362

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28 ⁵ Notably, SCC does not argue that the discovery requests would be unduly
burdensome if limited to materials possessed by SCC and located in the United States.
Instead, during oral argument counsel for SCC suggested that SCC would be amenable to

1 F.3d 401, 402-03 (7th Cir. 2004) (reversing § 1782 order that required documents to be
2 shipped from foreign jurisdictions to the United States, only to be returned again for use
3 in the foreign proceeding); *In re Kreke Immobilien KG*, No. 13 Misc. 110 (NRB), 2013
4 WL 5966916, at *7 (S.D.N.Y. Nov. 8, 2013) (same).

5 Petitioners suggest that the Court limit production to documents that are readily
6 accessible to SCC employees in the United States, should it conclude that the
7 extraterritorial discovery is inappropriate (Doc. 13 at 7-8, n.5). During oral argument,
8 SCC indicated that it would be amendable to such a request. Accordingly, the Court will
9 grant Petitioners’ Application only to the extent it seeks materials that are readily
10 accessible to SCC employees in the United States. The Court is mindful, however, that
11 electronically stored information (ESI) presents special circumstances. During oral
12 argument, the parties appeared to dispute the ease with which SCC could access ESI, and
13 the manner in which the location of ESI should be determined. The Court lacks sufficient
14 information about SCC’s electronic storage and accessibility capability to craft an
15 appropriate discovery order. Accordingly, the parties are directed to meet and confer
16 regarding the production of responsive ESI, and to submit to the Court a joint proposed
17 Document Request and a joint proposed 30(b)(6) Notice that are territorially limited.

18 **IT IS ORDERED** that Petitioners’ Application, (Doc. 1), is **GRANTED IN**
19 **PART** as explained herein.

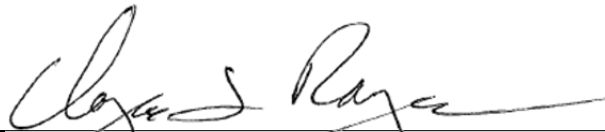
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cooperating with a request that is territorially limited.

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IT IS FURTHER ORDERED that the parties shall meet and confer and, within seven (7) days of the date of this order, submit to the Court a joint proposed Document Request and a joint proposed 30(b)(6) Notice that are territorially limited and that seek the production of responsive ESI consistent with this Order.

Dated this 10th day of June, 2016.



Douglas L. Rayes
United States District Judge