

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

IN RE: ALPINE PARTNERS (BVI)  
L.P.

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ALPINE PARTNERS (BVI) L.P.,

Petitioner,

v. Case No.: 2:24-mc-5-SPC-KCD

MARK GUINAN,

Respondent.

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**ORDER**

Before the Court is Alpine Partners L.P.'s Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in a Foreign Proceeding. (Doc. 1, Doc. 31.)<sup>1</sup> Mark Guinan has responded in opposition. (Doc. 30, Doc. 35.) For the reasons below, the application is granted in part and denied in part.

**I. Background**

This application stems from a legal proceeding in Bermuda. (Doc. 2 at 5.) The Bermuda Supreme Court is appraising shares in a company called

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<sup>1</sup> Unless otherwise indicated, all internal quotation marks, citations, and alterations have been omitted in this and later citations.

Myovant Sciences Ltd. (*Id.*) Alpine was a minority investor in Myovant. But its shares were supposedly “forcibly canceled” when the controlling shareholder, Sumitovant Biopharma Ltd., orchestrated a merger and took Myovant private. (*Id.* at 5-6.)

Alpine received \$27 for each of its shares. (Doc. 2 at 14-15.) That price was approved by a special committee of three independent directors, selected by Myovant, “to evaluate the fairness of and decide whether to approve of any proposed transaction by Sumitovant.” (*Id.* at 10.) After receiving the special committee’s blessing, the price was approved again by Myovant’s board. (*Id.* at 14-15.) Alpine disputes whether \$27 was “fair value” and has sued Myovant in Bermuda. (*Id.* at 6.)

That brings us to the current application. Alpine seeks to depose Mark Guinan, a Florida resident who was “the lead member of the Special Committee that approved the Merger.” (Doc. 2 at 5, 10, 16-17, 19-20.)<sup>2</sup> Alpine wants to use his testimony in the Bermuda litigation. (*Id.* at 5.) But Alpine claims it cannot obtain his testimony in Bermuda because Guinan is not a resident of Bermuda, is no longer with Myovant, and is not a participant in the appraisal proceeding. (*Id.* at 18, 23-24.)

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<sup>2</sup> Alpine initially sought documents in addition to Guinan’s deposition but has since withdrawn those requests. (Doc. 31 at 10, Doc. 35-1.)

## II. Legal Standards

“Federal Statute 28 U.S.C. § 1782 authorizes this Court to order the production of evidence for use in a foreign tribunal.” *Matter of Gov’t of Mongolia v. Itera Int’l Energy, L.L.C.*, No. 3:08-MC-46-J-32MCR, 2009 WL 10712603, at \*3 (M.D. Fla. Nov. 10, 2009). “A district court has the authority to grant an application for judicial assistance if the following statutory requirements in § 1782(a) are met: (1) the request must be made by a foreign or international tribunal, or by any interested person; (2) the request must seek evidence, whether it be the testimony or statement of a person or the production of a document or other thing; (3) the evidence must be for use in a proceeding in a foreign or international tribunal; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.” *In re Clerici*, 481 F.3d 1324, 1331-32 (11th Cir. 2007).

## III. Discussion

Alpine’s request to depose Guinan satisfies the four requirements to conduct discovery under § 1782. The parties do not dispute that Guinan resides in the Middle District of Florida. (Doc. 2 at 18.) And as the plaintiff in the Bermuda litigation, Alpine is one of the interested persons who may request his deposition. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004); *In re Bahamas Island Consortium Ltd.*, No. 6:23-MC-2-WWB-DCI,

2023 WL 1469370, at \*1 (M.D. Fla. Feb. 1, 2023). The second and third requirements are also satisfied because Alpine intends to offer the deposition testimony in the appraisal proceeding to help the Bermuda court determine the “fair value” of its shares. (Doc. 2 at 17-18); *In re Accent Delight Int’l Ltd.*, 869 F.3d 121, 132 (2d Cir. 2017) (“[T]he term ‘for use’ in Section 1782 has only its ordinary meaning—that the requested discovery is something that will be employed with some advantage or serve some use in the proceeding.”). Accordingly, the Court may order Guinan’s deposition.

But that does not mean the Court must do so. “Once the prima facie requirements are satisfied, the Supreme Court in *Intel* noted [four] factors to be considered in exercising the discretion granted under § 1782(a)[.]” *In re Clerici*, 481 F.3d at 1334. They are:

(1) whether the person from whom discovery is sought is a participant in the foreign proceeding, because the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance; (3) whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the request is otherwise unduly intrusive or burdensome.

*Id.* Guinan argues that “at least three of the discretionary factors weigh against granting discovery[.]” (Doc. 30 at 7.) However, he cites only the first and fourth factors in opposition to his deposition.

According to Guinan, the first *Intel* factor weighs against Alpine's application because he is a participant in the Bermuda matter and thus his "oral evidence is [already] available." (Doc. 30 at 15, 17.) The Court is unconvinced that an *unaffiliated, potential witness*, like Guinan, can be labeled a participant in the foreign proceeding. The Supreme Court's opinion in *Intel Corp.* differentiates between participants and nonparticipants by reference to the foreign court's jurisdiction. *Intel Corp.*, 542 U.S. at 264. The foreign tribunal can order participants to produce evidence. *Id.* Yet it cannot do the same for nonparticipants if they are "outside the foreign tribunal's jurisdictional reach." *Id.* Thus, the need for assistance is greater when a non-participant is involved because the evidence in the United States "may be unobtainable absent § 1782(a) aid." *Id.* The Bermuda court has jurisdiction over Alpine and Sumitovant as parties to the appraisal proceeding. But it lacks jurisdiction over Guinan, who "is no longer affiliated with any party to the Appraisal Proceeding and is not a resident of Bermuda." (Doc. 31 at 6, Doc. 2-2 ¶ 38.)

Guinan suggests the Bermuda court's lack of jurisdiction can be overcome by assurances he will testify at the appraisal proceeding. The Court remains unconvinced. Guinan hedges about his availability. He starts by definitively stating he "**will testify** before the Bermuda Court and therefore be subject to cross-examination by [Alpine]'s counsel." (Doc. 30 at 2 (emphasis

added).) Elsewhere, however, Guinan says he “**intends** to testify” and Sumitovant “**plans to offer** [him] as a witness.” (Doc. 35 at 3, Doc. 30 at 10 (emphasis added).) At best, these are unenforceable promises to appear. Guinan could later refuse to attend the Bermuda proceeding, or Sumitovant could decide it is better off without his testimony. Should that happen, Alpine will be left holding the bag and have no ability to ask Guinan about “the fairness of the [m]erger price [or] the process that led to the Merger.” (Doc. 2 at 6, Doc. 35 at 4.) All things considered, the Court is satisfied that Guinan’s testimony “may be unobtainable absent § 1782(a) aid.” *Intel Corp.*, 542 U.S. at 264.

Turning to the fourth *Intel* factor, Guinan argues the Court should deny Alpine’s application because he “is already providing pre-trial and trial testimony in the Bermuda Proceedings, [and] it would be unduly and needlessly burdensome to require him to testify twice.” (Doc. 35 at 8.) This argument comes too late. “The Court does not consider arguments raised for the first time on reply.” *Connectus LLC v. Ampush Media, Inc.*, No. 8:15-CV-2778-T-33JSS, 2017 WL 2620541, at \*8 (M.D. Fla. June 16, 2017); *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 682 (11th Cir. 2014); *Tafel v. Lion Antique Invs. & Consulting Servs.*, 459 F. App’x 847, 849 (11th Cir. 2012). In any event, because Guinan’s appearance at trial cannot be mandated by the Bermuda court, this is another unenforceable promise that will leave Alpine in

the lurch should it not come to fruition. Given Guinan's relevance to the Bermuda suit, requiring him to sit for a deposition is not unduly burdensome. *See, e.g., Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979) ("It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error.").

Weighing the *Intel* factors against the circumstances of this dispute, the Court is satisfied that permitting the discovery requested is appropriate. Accordingly, it is **ORDERED**:

1. Alpine's application for documents under 28 U.S.C. § 1782 is **DENIED** as moot.
2. Alpine's application to depose Mark Guinan under 28 U.S.C. § 1782 is **GRANTED**. The parties must confer to jointly select a date, time, and location for Guinan's deposition.

**ORDERED** in Fort Myers, Florida on April 15, 2024.



Kyle C. Dudek  
United States Magistrate Judge

Copies: All Parties of Record