IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MIKHAIL FRIDMAN, PETR AVEN, and GERMAN KHAN, **Plaintiffs,** **v.** **BEAN LLC a/k/a FUSION GPS, and GLENN SIMPSON,** **Defendants.**	**Civil Action No. 17-2041-RJL**

MOTION BY AO ALFA-BANK, ABH HOLDINGS S.A., LETTERONE HOLDINGS S.A., AND LETTERONE INVESTMENT HOLDINGS S.A. FOR LEAVE TO INTERVENE FOR THE LIMITED PURPOSE OF LITIGATING DEFENDANTS' MOTION TO COMPEL PLAINTIFFS' PRODUCTION OF THEIR DOCUMENTS

AO Alfa-Bank ("Alfa Bank"), ABH Holdings S.A. ("ABHH"), LetterOne Holdings S.A., and LetterOne Investment Holdings S.A., (together with LetterOne Holdings S.A. "LetterOne," and collectively the "Companies"), by and through undersigned counsel, move for leave to intervene under Rules 24(a)(2) and 24(b) of the Federal Rules of Civil Procedure for the limited purpose of litigating Defendants Bean LLC's and Glenn Simpson's Motion to Compel Plaintiffs' Production of Their Documents ("Defendants' Motion"). The Companies seek only limited intervention to litigate the specific matter of Defendants' Motion. As discussed in detail below, the D.C. Circuit has made clear that in such limited circumstances, applicants seeking limited intervention do not subject themselves to the general jurisdiction of the court. Accordingly, by filing this motion, the Companies are not subject to the Court's jurisdiction, and expressly object to the Court's exercise of jurisdiction over them. Respectfully, the Companies file this motion on the condition that the Companies shall be deemed and treated as a non-party to this action, and the

Companies shall be immune from all forms of party discovery, service of process, claims of liability, and all other obligations of a party.

Defendants seek to compel Plaintiffs Mikhail Fridman, Petr Aven, and German Khan (collectively, "Plaintiffs") to produce documents that are in the possession, custody, or control of the Companies. The materials that Defendants seek contain privileged, confidential, and sensitive commercial information of the Companies that the Companies have a substantial interest in protecting. The Companies' interests would be impaired by a judgment in Defendants' favor, and the Companies are not adequately represented by the positions that Plaintiffs may advance in this action. For these reasons, and for the reasons set forth in the attached memorandum of points and authorities, the Companies respectfully request that this Court grant their motion to intervene.

Pursuant to Local Rule 7(m), counsel for the Companies has conferred with counsel for Plaintiffs and Defendants. Plaintiffs' counsel does not oppose the motion at this time. Defendants' counsel stated its intention to oppose this motion. In accordance with Local Rule 7(c), a proposed order is attached to this motion. Also attached to this motion are declarations from foreign counsel in Luxembourg and Russia as well as the Companies' brief in opposition to Defendants' Motion.

Dated: July 2, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to Intervene for the Limited Purpose of Litigating Defendants' Motion to Compel Plaintiffs' Production of Documents was filed electronically by the Clerk of Court on July 2, 2020, using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Margaret E. Krawiec
Margaret E. Krawiec

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY AO ALFA-BANK, ABH HOLDINGS S.A., LETTERONE HOLDINGS S.A., AND LETTERONE INVESTMENT HOLDINGS S.A. FOR LEAVE TO INTERVENE FOR THE LIMITED PURPOSE OF RESPONDING TO DEFENDANTS' MOTION TO COMPEL PLAINTIFFS' PRODUCTION OF DOCUMENTS

INTRODUCTION

Plaintiffs Mikhail Fridman, Petr Aven, and German Khan (collectively, the "Plaintiffs") filed a lawsuit in their individual capacities seeking damages for defamation against Defendants Bean LLC and Glenn Simpson ("Defendants") on October 3, 2017. The defamatory statements were found in an "intelligence" report titled Company Intelligence Report 2016/112 ("CIR 112") that Defendants commissioned as part of an opposition research engagement. Defendants subsequently distributed CIR 112 and similar reports, which BuzzFeed published as the so-called Trump Dossier.

During the discovery process, Defendants have repeatedly requested that Plaintiffs produce documents from AO Alfa-Bank ("Alfa Bank"), ABH Holdings S.A. ("ABHH"), LetterOne Holdings S.A., and LetterOne Investment Holdings S.A. (together with LetterOne Holdings S.A. "LetterOne," and collectively the "Companies"). Plaintiffs sought permission from the Companies to produce the requested documents, but the Companies denied their requests on the ground that the documents are within the exclusive possession, custody, or control of the Companies. At the same time, however, the Companies reached out to Defendants, offering to negotiate in good faith, to produce documents in the absence of a subpoena, and to produce documents without forcing Defendants to proceed under the Hague Evidence Convention or the letters rogatory process. The Companies also offered to produce documents central to the truth or falsity of the defamatory statements at issue. Specifically, the Companies' counsel communicated the following to Defendants' counsel: "As a further sign of good faith, we note that we are prepared to search for and produce documents from the plaintiffs' Alfa and LetterOne email accounts that relate to the truth or falsity of the allegedly defamatory allegations in CIR 112 and are dated within a reasonable time period." Dkt. 78-33, at 2 (May 8, 2020 email). Instead of engaging with the Companies'

counsel and seeking to resolve these issues without burdening the Court with motions practice, Defendants refused to engage with the Companies and filed a motion to compel Plaintiffs to produce the Companies' documents ("Defendants' Motion").

Despite best efforts to avoid burdening the Court with this issue and offering to provide Defendants with Company documents relevant to this litigation in the absence of a subpoena and not requiring adherence to the Hague Evidence Convention or the letters rogatory process, the Companies now seek to intervene in this matter for the limited purpose of participating in the briefing and argument concerning Defendants' Motion. Respectfully, the Court should grant the Companies' motion for limited intervention given the significant Company interests implicated by Defendants' motion to compel.

First, the Companies' motion is timely. The timeliness of the motion is measured from the point where the Companies' interest may have diverged from Plaintiffs' interest. This occurred when Defendants filed their motion to compel Plaintiffs to produce documents in the possession, custody, or control of the Companies. Prior to this point, the Companies had intended to, and attempted to, negotiate in good faith with Defendants to produce documents without the need to involve the Court. Indeed, the Companies proactively attempted to resolve this issue but such good faith efforts were repeatedly rebuffed by the Defendants. After Defendants flatly refused to resolve this dispute outside of court, the Companies moved quickly to protect their interests by filing this motion.

Second, the Companies have a clear interest related to the subject of this action. Defendants are seeking to compel Plaintiffs to produce documents that are the property of the Companies. These documents contain privileged, confidential, and sensitive commercial information that the Companies have a right to protect.

Third, Defendants' Motion threatens to impair the Companies' interest in protecting their documents. If Defendants' Motion were granted, Plaintiffs would be ordered by this Court to produce the Companies' documents This disclosure would cause irreparable harm to the Companies. The documents, which contain privileged, confidential, or sensitive commercial information, would be delivered to Defendants without the assurances that the Companies' privileges and any objections would be preserved. Such documents also would be susceptible to further public dissemination either in this litigation or through other means.[1]

Fourth, the Companies' interests are not adequately represented by the existing parties. While each Plaintiff owns an indirect minority interest in the Companies, the Companies are large, complicated business entities located abroad, with a multitude of interests—including, most notably, the protection of Company privileges—that may diverge from those of any individual plaintiff. Further, Defendants' Motion raises the possibility that Plaintiffs may be ordered by this Court to produce the Companies' documents, which would be a clear divergence of interests, and obviously adverse to the interests of the Companies.

[1] Defendants have extensive ties to various media platforms and distributing materials to the media for the purpose of having embarrassing stories published about certain targets is part of Defendants' normal business practices. *See* Glenn Simpson and Peter Fritsch, *Crime in Progress*, 31 (2019) (describing the objectives of their research as "to expose an opponent's vulnerabilities, provide source material for the media, and feed attack ads"). Defendants' targeted dissemination of information also occurs in the shadows, as their firm makes "many of its findings available to interested reporters as background material that could be confirmed with their own reporting." *Id.* Indeed, even Defendants' motion to dismiss cites to media articles for, what appears to be, the sole purpose of engaging in unprovoked mudslinging aimed at Plaintiffs, the Companies, and even Company counsel on issues wholly irrelevant to the merits of their motion. If produced, privileged, confidential, or sensitive commercial information from the Companies' documents could therefore be disseminated to Defendants' many media contacts and reported on without any indication that the source material was initially provided by Defendants.

Finally, the grant of the Companies' motion will not delay this matter. The Companies are submitting this motion at this point in the process so that all relevant parties can be heard as the Court considers Defendants' Motion. The Companies are also best suited to address certain questions of law surrounding how the Companies are constructed and the implications under the corresponding foreign law as to control as well as to provide factual responses to clarify the interactions between the Companies' counsel and Defendants' counsel. Resolving this issue with all interested parties involved will expedite this matter upon the Court's decision, rather than require possible further litigation on this issue at a later date.

For all these reasons, and as further explained below, the Court should grant the Companies' motion to intervene for the limited purpose of litigating Defendants' Motion.[2]

BACKGROUND

A. The Companies

AO Alfa-Bank ("Alfa Bank") is a joint stock company formed under Russian law with its headquarters in Russia. Alfa Bank is part of a larger group of entities informally referred to as the Alfa Group ("Alfa"). ABH Holdings S.A. ("ABHH"), a Luxembourg company formed under Luxembourg law, serves as Alfa Bank's indirect parent company.

LetterOne is comprised of LetterOne Investment Holdings S.A. and LetterOne Holdings S.A. The LetterOne entities are formed under Luxembourg law, with headquarters in Luxembourg and offices in England and Gibraltar.

[2] To ensure that the Companies' intervention does not delay resolution of this matter, the Companies have attached their substantive brief in opposition to Defendants' Motion at Exhibit 1.

B. Plaintiffs' Suit for Defamation

In 2016, Defendants published a series of reports that it compiled as opposition research on then-candidate Donald Trump. The reports were commissioned by Trump's political opponents. Among the reports was CIR 112, which contained a number of statements about Plaintiffs. These reports were compiled by Orbis Intelligence Ltd. ("Orbis"), a British opposition research firm that Defendant Fusion commissioned. The reports were distributed by Defendants and were published both before and after the 2016 Presidential election. The reports came to be known as the "Trump Dossier" or "Dossier" and were widely reported on in the U.S. media.

Plaintiffs filed a lawsuit in their individual capacities in this Court against Defendants on October 3, 2017, seeking damages for the defamatory statements found in CIR 112. Plaintiffs then filed an amended complaint on December 12, 2017. The Companies are not a party to the lawsuit.

C. Current Dispute

During the discovery process, Defendants repeatedly have requested that Plaintiffs produce Company documents (the "Documents"). Plaintiffs expressly requested the Documents from the Companies for use in this litigation, but the Companies expressly refused. The Companies' clear position is that the Documents are within their exclusive possession, custody, or control. After being advised of the same by the Companies, Plaintiffs have maintained that the Documents are within the possession, custody, or control of the Companies and that Plaintiffs therefore have no legal right to produce them.[3] *See* Dkt. 78-9 (Apr. 2, 2020 email). The Companies have a strong interest in maintaining their control over the Documents, including any possible production of privileged, confidential, or sensitive commercial information. The Documents contain attorney-

[3] For a more detailed analysis for why the documents are in the possession, custody, or control of the Companies and not Plaintiffs, see the Companies' brief in opposition to Defendants' Motion at Exhibit 1.

client communications and other documents protected by the work product doctrine related to this litigation as well as other matters over which the Companies have a right to assert applicable privilege. The Documents also contain confidential business information, such as communications regarding potential and actual transactions. The Documents also contain data protected under foreign data protection laws, such as the personal identifying information of employees or others, that the Companies have a legal obligation to protect and that the Companies would face liability for if improperly disclosed. In addition, the Documents also contain other sensitive commercial information that the Companies have an interest in protecting. In order to protect their interests while not prejudicing Defendants in this litigation, the Companies have attempted to work with Defendants to produce the Documents in an efficient process that would still protect the Companies' interests.

The Companies reached out to Defendants on multiple occasions, offering to work with them in good faith to collect and produce responsive documents. As a show of good faith and in recognition of Defendants' concerns about obtaining documents from foreign entities, the Companies offered to produce documents without a subpoena and without requiring Defendants to proceed under the Hague Evidence Convention or letters rogatory process. The Companies further advised that they were prepared to search for and produce documents from the Plaintiffs' Alfa Bank and LetterOne email accounts that relate to the truth or falsity of the allegedly defamatory allegations in CIR 112 and are dated within a reasonable time period. Defendants, however, refused to engage in conversation with counsel for the Companies on this issue. *See* Dkt. 78-33 (May 8, 2020 email). Instead, Defendants chose to prematurely burden this Court and file Defendants' Motion. Recognizing that their legally protected interests would be impaired if Defendants' Motion were successful, the Companies filed this motion for limited intervention to

participate in the briefing and argument regarding the question of whether Plaintiffs have possession, custody, or control of the Documents.

ARGUMENT

I. The Companies are Entitled to Intervene as a Matter of Right

A. The Companies' Motion Satisfies the Requirements of Fed. R. Civ. P. 24(a)(2)

Federal Rule of Civil Procedure 24(a)(2) ("Rule 24(a)(2)") allows for intervention as a matter of right when the applicant "claims an interest relating to the property or transaction which is the subject of the action, and is so situated that the disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest." The D.C. Circuit has set forth four factors which a court must consider when determining if an applicant may intervene as a matter of right under Rule 24(a)(2): "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008) (quoting *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)). Each factor is met here.[4]

[4] Intervenors must also demonstrate Article III standing by establishing injury in fact, causation, and redressability. *Waterkeeper Alliance, Inc. v. Wheeler*, 330 F.R.D. 1, 6 (D.D.C. 2018). However, "[i]n most instances . . . the standing inquiry will fold into the underlying inquiry under Rule 24(a); generally speaking, when a putative intervenor has a 'legally protected' interest under Rule 24(a), it will also meet the constitutional standing requirements." *Id.* (quoting *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 13 n.5 (D.D.C. 2010)); *see also Roedar v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("With respect to intervention as of right in the district court, the matter of standing may be purely academic . . . . [A]ny person who satisfies Rule 24(a) will also meet Article III's standing requirement."). As explained below, the Companies have a "protected interest" under the requirements of Rule 24(a) and therefore also have standing.

1. The Companies' Motion is Timely

The Companies' motion to intervene is timely. In the D.C. Circuit, timeliness is "to be judged in consideration of all the circumstances." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (quoting *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001)). Timeliness is not determined by the length of time that has elapsed since the suit was filed but rather "the requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation." *Id.* (stating "we do not require timeliness for its own sake"). The Companies' limited intervention in this matter will not unduly disrupt litigation—to the contrary, it will facilitate resolution of the current dispute—and it was brought when it became clear that the Companies' interests may diverge from Plaintiffs.

The Companies' limited intervention will not disrupt—let alone "unduly disrupt"—this litigation or "disadvantage the original parties." *Id.* (quoting *NRDC v. Costle*, 561 F.2d 904, 908 (D.C. Cir. 1977)). Courts in this Circuit have recognized that a motion to intervene is not unduly disruptive and parties are not disadvantaged when the motion will not disrupt the court's schedule in resolving a case on the merits and resolving the underlying substantive issue will be more efficient over the course of the litigation. *See Amador Cty, Cal. v. U.S. Dep't of the Interior*, 772 F.3d 901, 905-06 (D.C. Cir. 2014) (motions for intervention are untimely when they would "delay resolution of the merits") (collecting cases); *Gov't Accountability Project v. FDA*, 181 F. Supp. 3d 94, 95 n.1 (D.D.C. 2015) (finding motion timely when intervenor's entry would not alter the summary judgment briefing schedule); *United States. v. Phillip Morris USA Inc.*, No. Civ. A. 99-2496 (GK), 2003 WL 25572283, at *2 (D.D.C. Dec. 5, 2003) (finding that intervention was appropriate when resolving the underlying substantive issue "may well, in the long run, prove more effective and productive"). Here, the Companies have attached their brief in opposition to Defendants' Motion so that, in the event this Court determines that the Companies' intervention is

proper, the parties can move forward with no delay. This case is not currently poised for a decision on the merits; summary judgment briefing does not begin until June 2021. Consent Order Modifying the Scheduling Order, *Fridman v. Bean*, No. 1:17-cv-02041-RJL (D.D.C. Jan. 9, 2020), Dkt. 74. The Companies have also only asked this Court for a limited intervention to litigate the specific issue of whether the Documents are in the possession, custody, or control of Plaintiffs. The Companies do not seek to participate in the litigation outside of this discrete issue. Further, similar to the intervention in *Phillip Morris*, the original parties would not only not be disadvantaged, but would likely *benefit* from the Companies' intervention as resolving the underlying substantive issue of whether Plaintiffs have possession, custody, or control of the Documents after hearing from all interested parties will likely "prove more effective and productive" in "the long run." *Phillip Morris*, 2003 WL 25572283, at *2.

The Companies' motion is also timely because it was filed soon after the Companies' interests diverged from Plaintiffs. *See Smoke*, 252 F.3d at 471 (finding intervention timely when potential intervenor waited until it was informed by the government, with whom it had a common interest, that it would not pursue an appeal); *United States v. Am. Tel. & Tel. Corp.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980) (hereinafter "*AT&T*") (finding intervention timely when it was filed "soon after it became reasonable to expect inadequate representation" by the original parties). Here the Companies filed a motion for intervention promptly after their interest in protecting the Documents could no longer adequately be represented by Plaintiffs. Defendants' Motion raised the possibility that Plaintiffs could be compelled by this Court to produce the Documents. *See Phillip Morris*, 2003 WL 25572283, at *2 (determining that intervenor's interests "sharply diverged" from party when the Court compelled production of its documents). The Companies therefore promptly filed a motion for limited intervention to protect their interests, which was timely.

2. The Companies Have a Legally Protected Interest

In determining whether a potential intervenor has a legally protected interest, the courts in this Circuit view the test "in large part as a 'practical guide,' with the aim of disposing of disputes with as many concerned parties as may be compatible with efficiency and due process." *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 12-13 (D.D.C. 2010). Defendants seek to compel Plaintiffs to produce the Documents. The Documents contain the Companies' privileged, confidential, and other sensitive commercial information. The Companies have a legally protected interest in maintaining their privilege and preventing disclosure of any confidential or sensitive commercial information.

The Companies have a legally protected interest in protecting their privileged documents. *See AT&T*, 642 F.2d at 1291-93 (finding that intervenor had a legally protected interest in claiming work product over documents in discovery); *Phillip Morris*, 2003 WL 25572283, at *2 (recognizing that intervenor had a cognizable interest under Rule 24 in "protecting any privilege its documents may deserve"). As the D.C. Circuit noted in *AT&T*, "[w]ithout the right to intervene in discovery proceedings, a third party with a claim of privilege in otherwise discoverable materials could suffer 'the obvious injustice of having his claim erased or impaired by the court's adjudication without ever being heard.'" *AT&T*, 642 F.2d at 1292. Here, Defendants' Motion would remove the Companies from the discovery process for its own documents, which contain attorney-client privileged communications, attorney work product, and confidential business information. Defendants' Motion would therefore put the Companies at risk of having their claims of privilege "erased or impaired" by the Court's adjudication. *Id.*

Courts in this Circuit also recognize a legal interest in preventing disclosure of confidential or sensitive commercial information. *See Gov't Accountability Project*, 181 F. Supp. 3d at 96 (noting that "preventing the disclosure of commercially-sensitive and confidential information is

a well-established interest sufficient to justify intervention under Rule 24(a)") (quoting *100Reporters LLC v. U.S. Dep't of Justice*, 307 F.R.D. 269, 275-76 (D.D.C. 2014)). As this Court recognized, "federal courts regularly have recognized preserving confidentiality as a sufficient interest under Rule 24(a), both when a statutory privilege is as stake or, more relevantly, when there exists a general interest in protecting the confidentiality of information without relation to a specific right." *100Reporters*, 307 F.R.D. at 277-78 (collecting cases). Here, the Documents contain privileged matters and confidential and sensitive commercial information that would be potentially harmful to the Companies if it were disclosed during discovery. This is especially troubling to the Companies considering the general inadequacy of the protective order governing litigation in this matter. If Defendants' Motion is successful, the Documents would likely be produced to the Defendants, at which point confidential information may be disclosed publicly through this litigation or possibly other means.[5]

3. Defendants' Motion Threatens to Impair the Companies' Interests

Defendants' Motion threatens to impair the Companies' interests because it would require that Plaintiffs produce the Documents, which contain the Companies' privileged, confidential, and sensitive commercial information. In the D.C. Circuit, "[t]he inquiry is not a rigid one: consistent with the Rule's reference to dispositions that may 'as a practical matter' impair the putative intervenor's interest, Fed. R. Civ. P. 24(a)(2), courts look to the 'practical consequences' of denying intervention." *Wildearth Guardians*, 272 F.R.D. at 13 (citing *Funds for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003)). The "practical consequences" of denying the Companies' motion is that the Companies would not be able to oppose Defendants' Motion, which,

[5] Defendants' business model includes feeding reporters sensitive information "on background" so that it can be used in the publication of news articles. *See, supra* note 1.

if successful, would lead to a court order compelling Plaintiffs to produce the Documents, which contain the Companies' privileged, confidential, and sensitive commercial information.

Courts in this Circuit have recognized that an action which could lead to the forced disclosure of an intervenor's privileged, confidential, or sensitive commercial information threatens a legally protected interest. *See Gov't Accountability Project*, 181 F. Supp. 3d at 96 (finding the impairment prong satisfied when action would lead to the "disclosure of commercially-sensitive and confidential information"); *Appleton v. FDA*, 310 F. Supp. 2d 194, 197 (D.D.C. 2004) (finding that impairment requirement satisfied when "disclosures resulting from the disposition of this action could impair the applicants' ability to protect their trade secrets or confidential information"); *see also Phillip Morris*, 2003 WL 25572283, at *2 (finding impairment prong satisfied when party was ordered to produce potential intervenor's potentially privileged documents). Here, Defendants' Motion could lead to the production of the Documents, which contain the Companies' privileged, confidential, and sensitive commercial information. The Companies would lose their ability to assert privilege over their documents and would lose the ability to protect their commercially confidential or sensitive information from production to Defendants, including possible public disclosure. A ruling that the Documents are in the possession, custody, or control of Plaintiffs could also impair or impede the Companies' ability to protect their privileged and confidential documents from disclosure in future litigation as well.

4. No Party Adequately Represents the Companies' Interests

No party adequately represents the Companies' interests in protecting their documents. The Supreme Court has explained that the adequate representation requirement under Rule 24(a) "is satisfied if the applicant shows that representation of his interest '*may be*' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (emphasis added). Similarly, the D.C. Circuit has described the

requirement as "not onerous." *Diamond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). A potential intervenor "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee." *AT&T*, 642 F.2d at 1293 (citation omitted).

The interests of Plaintiffs and the Companies began to diverge in this litigation when Defendants filed their motion to compel Plaintiffs to produce the Documents. *See Phillip Morris*, 2003 WL 25572283, at *2 (stating that interests "sharply diverged" when party was compelled to produce potential intervenor's documents and that the threat of sanctions prevented party from adequately representing the potential intervenor's interests). Prior to Defendants' Motion, Plaintiffs maintained—after requesting permission from the Companies to produce the requested documents and the Companies denying such request on the ground that the documents are within the exclusive possession, custody, or control of the Companies—that the Documents were in the possession, custody, or control of the Companies and that it was the Companies' right to control any production of the Documents. The Companies planned to address production of the Documents through negotiation. However, attempts to resolve this issue with Defendants were completely rebuffed as the Companies were told that Defendants would only engage with Plaintiffs on such issues. Even the offer to produce documents in the absence of a subpoena, without forcing Defendants to proceed under the Hague Evidence Convention or the letters rogatory process and agreeing to produce documents relevant to the truth or falsity of the defamatory statements in CIR 112 within a reasonable time period was entirely ignored. Now, however, Plaintiffs face a motion to compel and the possibility of repercussions if they continue to assert that the Documents can only be produced by the Companies. This divergence is enough to find that it is no longer "clear that the party will provide adequate representation for the absentee," *AT&T*, 642 F.2d at 1293, and

it meets the "minimal" burden of showing that the Companies' interests "may be" inadequately represented. *Trbovich*, 404 U.S. at 538 n.10 (1972). Therefore, the Companies have established that no party adequately represents the Companies' interests in litigating Defendants' Motion.

B. Intervention is Appropriate Because the Companies are the Proper Source of Several Key Arguments

Intervention is also appropriate because the Companies are well-positioned to make arguments about the control of the Documents that Plaintiffs are not. The issue of control involves an analysis of foreign law and a clear understanding of the complex corporate structure of the Companies. The Companies, and their counsel, who are familiar with these issues, are better suited to providing this Court the proper information on which to base its decision. The Companies are also the proper party to clarify the interactions between the Companies' counsel and Defendants' counsel. As explained in more detail in the Companies' substantive brief, which is attached to this motion at Exhibit 1, the Companies are better positioned than Plaintiffs to make the arguments listed briefly here.

1. Defendants' Motion is Premature

Defendants' Motion should be denied because it is premature. The crux of Defendants' Motion is that they are unable to obtain potentially beneficial documents from the Companies. However, the record shows that this is not the case. The Companies proactively reached out to Defendants and made concerted and substantial efforts to accommodate Defendants' document requests and clear any impediments that might stand in the way of a meaningful production. As a sign of good faith, the Companies offered to produce relevant documents in the absence of a subpoena and without forcing Defendants to invoke the Hague Evidence Convention or letters rogatory process. Dkt 78-32, at 2 (May 1, 2020 email). The Companies also proposed a universe of documents it was willing to produce, offering to produce documents related to the truth or falsity

of the allegations in CIR 112 dated within a "reasonable time period." Dkt. 78-33, at 2 (May 8, 2020 email). If Defendants had any concern about the Companies' production proposal, the Companies urged counsel for Defendants to begin a dialogue with the Companies to resolve any outstanding issues. However, Defendants refused to even discuss the issue with counsel for the Companies and instead ran to this Court.

The Court need not burden itself with what Defendants themselves concede is a "highly fact-specific" inquiry. Defs.' Br. at 18 (devoting over a page simply to listing the "number of factors" that courts must analyze when determining whether a party has possession, custody, or control of specified documents). This expenditure of judicial resources is especially unnecessary when Defendants' claims of prejudice are insufficient and speculative at this stage. Rather than expend considerable judicial resources to wade through the multiple factors of this fact-specific analysis, the Court should require Defendants first to negotiate with the Companies in an effort to resolve this dispute out of court.

2. Plaintiffs Lack the Legal Right or Authority to Obtain the Companies' Documents

In addition to being premature, Defendants' Motion should also be denied because Plaintiffs do not have the legal right or authority to obtain the Documents from the Companies. In assessing whether a litigant has the legal right or authority to obtain documents in the possession of a foreign company, a court should consider the effect that foreign law has on the litigant's ability to obtain the documents. *See Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 139 (2d Cir. 2007) (reversing the district court's order granting sanctions against plaintiff, a chairman and shareholder of a Russian company, for failing to produce documents in the possession of the Russian company, and concluding that "remand is … necessary to explore Russian law"). The legal and practical inability of a litigant to obtain documents from a non-party, by reason of foreign law, may place

the documents beyond the control of the litigant who has been served with a request under Federal Rule of Civil Procedure 34. *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571 (RJH) (HBP), 2009 WL 8588405, at *2 (S.D.N.Y. July 10, 2009).

Here, as declarations from foreign counsel explain, Plaintiffs do not have the legal right or authority to obtain the Companies' documents under the laws of either Russia or Luxembourg. *See* Decl. of Aleksandr V. Berezin (July 2, 2020); Decl. of Philippe Hoss (July 2, 2020). The Companies' documents are therefore "beyond the control" of the Plaintiffs in light of Plaintiffs' legal inability to obtain the Companies' documents under foreign law.

3. Plaintiffs Do Not Have the Practical Ability to Obtain the Companies' Documents

Finally, Defendants' Motion should be denied because their claim that Plaintiffs have the practical ability to obtain the Companies' documents is unavailing. It is Defendants' burden as movant to establish that Plaintiffs have control of the documents they seek. *Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada*, 384 F. Supp. 2d 45, 56 (D.D.C. 2005) ("The burden of establishing control over the documents sought is on the party seeking production.") (quoting 7 Moore's Federal Practice § 34.14(2)(b) (2004)). However, Defendants' arguments contain a number of crucial factual errors about the nature of the Companies and Plaintiffs' alleged interests in the Companies as well as pure speculation about Plaintiffs' control over the Companies' documents. Defendants also cite to inapposite law and ignore relevant factors such as the Companies' good faith attempts to produce the documents without court intervention and the obstacles posed by foreign law and the Companies' internal policies. Defendants cannot meet their burden based on these arguments.

C. Limited Intervention is Appropriate

The Companies seek only limited intervention to litigate the specific matter of Defendants' Motion and are not subjecting themselves to the general jurisdiction of the Court. The D.C. Circuit recognizes that limited intervention is "favored . . . for individual issues when appropriate to protect particular interests." *AT&T*, 642 F.2d at 1291. In *AT&T*, the D.C. Circuit allowed limited intervention for the purpose of appealing a discovery order. *Id.* at 1295. Similarly, in *Phillip Morris*, limited intervention was granted for the purpose of asserting privilege on the intervenor's documents. *Phillip Morris*, 2003 WL 25572282, at *3. Here, limited intervention is appropriate as the Companies' legal interests involve litigating Defendants' Motion and not the other issues in this matter.

Courts in this Circuit have allowed applicants to seek limited intervention without submitting to the general jurisdiction of the court. *See id.* at *1 (granting limited intervention after noting that "[potential intervenor] has made it very clear in its Motion papers that it is not submitting to the general jurisdiction of this Court and is seeking intervention upon condition that it be protected against 'discovery, service of process, claims of liability, and all other vulnerabilities of an existing or potential party to this action.'"). Similarly, the Companies are seeking a limited intervention to protect their interests in their documents and are not submitting to the general jurisdiction of this Court.

II. In the Alternative, the Court Should Permit the Companies to Intervene Under Rule 24(b)

In the alternative, the Court should grant the Companies permissive intervention under Rule 24(b) to allow the Companies to intervene for the limited purpose of litigating Defendants' Motion. District courts have "wide latitude" to allow permissive intervention under Rule 24(b). *In re Endangered Species Act Section 4 Deadline Litig.*, 704 F.3d 972, 980 (D.C. Cir. 2013).

Courts may permit permissive intervention under Rule 24(b) where (1) the intervenor has a claim or defense that raises questions of law or fact in common with those raised by the original parties, and (2) the intervention will not unduly delay or prejudice the original parties to the action. Fed. R. Civ. P. 24(b). Both requirements are met here. First, the Companies seek to participate in the parties' preexisting dispute regarding whether the Documents are in the possession, custody, or control of Plaintiffs. Second, as explained above, a limited intervention will not cause undue delay or prejudice to the original parties. The Companies should therefore be granted permissive intervention for the limited purpose of litigating Defendants' Motion.

CONCLUSION

For the foregoing reasons, the Court should grant the Companies' Motion for Leave to Intervene for the Limited Purpose of Litigating Defendants' Motion to Compel Plaintiffs' Production of Their Documents.

Dated: July 2, 2020

Respectfully submitted,

/s/ Margaret E. Krawiec

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum of Points and Authorities in Support of AO Alfa-Bank, ABH Holdings S.A., and LetterOne's Motion for Leave to Intervene for the Limited Purpose of Litigating Defendants' Motion to Compel Plaintiffs' Production of Their Documents was filed electronically by the Clerk of Court on July 2, 2020, using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Margaret E. Krawiec
Margaret E. Krawiec