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12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14

15 In re Ex Parte Application of Fredric N.  
Eshelman,  
16 Applicant,  
17 For an Order Pursuant to 28 U.S.C. § 1782  
18 Granting Leave to Obtain Discovery for Use in  
19 Foreign Proceedings.

Case No. 5:23-mc-80015-EJD  
**NON-PARTY GOOGLE LLC'S  
RESPONSE TO ORDER TO CONSENT  
OR DECLINE MAGISTRATE JUDGE  
JURISDICTION**  
District Judge Edward J. Davila

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1 Respondent and Non-Party Google LLC (“Google”) hereby responds to this Court’s Order  
2 to Consent or Decline Magistrate Judge Jurisdiction, Dkt. 4 (“Order”).

3 Google understands that Applicant is seeking authorization to serve two subpoenas on  
4 Google, one seeking information regarding a particular Gmail account, and another seeking  
5 deposition testimony. Google does not oppose issuance of the subpoenas, but it reserves all rights  
6 and objections with respect to the subpoenas. *See, e.g., In re Nagatsuki Ass’n*, No. 20-MC-80030-  
7 SVK, 2020 WL 887890, at \*2 (N.D. Cal. Feb. 24, 2020) (“orders granting § 1782 applications  
8 typically only provide that discovery is ‘authorized,’ and thus the opposing party may still raise  
9 objections and exercise its due process rights by challenging the discovery after it is issued”)  
10 (quotation omitted); *see also CPC Pat. Techs. Pty Ltd. v. Apple, Inc.*, 34 F.4th 801, 809 (9th Cir.  
11 2022) (recognizing that there may be subsequent motion to quash proceedings following the grant  
12 of a Section 1782 application).

13 Even where non-parties have been served with Section 1782 applications, courts routinely  
14 recognize that non-parties may raise challenges to subpoenas after their issuance. *See, e.g., In re*  
15 *Ex Parte Application of Kakedzuka Mfg. Co., Ltd.*, Case No. 22-mc-80133-NC, Dkt. 11 (N.D.  
16 Cal. July 29, 2022) (granting Section 1782 application with consent of the parties but allowing  
17 provider and account holder a period of time to move to quash the subpoena following service);  
18 *In re Ex Parte Application of Team Co., Ltd.*, Case No. 22-mc-80183-VKD, Dkt. 14 (N.D. Cal.  
19 Sept. 7, 2022) (same); *In re Ex Parte Application of Medical Corporation Seishinkai*, Case No.  
20 22-mc-80136-NC, Dkt. 12 (N.D. Cal. Sept. 8, 2022) (same). Indeed, because a subpoena has not  
21 been issued, it would be premature for Google to challenge the subpoenas or give notice of the  
22 subpoenas to any affected account holders.

23 Thus, Google respectfully requests that any order granting the Application expressly  
24 provide Google with 30 days from the date of service of the subpoenas and order to file a motion  
25 to quash or modify the subpoenas. Should the subpoenas issue, Google intends to meet and confer  
26 regarding the requests and, if necessary, seek intervention from the Court. Specifically, Google  
27 intends to object, in part, on the following grounds:

- 28
- **Insufficient Showing that the Discovery is “for use” in a Foreign Tribunal:** Applicant has not shown that the discovery material sought is “for use in a foreign or international

1 tribunal.” 28 U.S.C. § 1782(a). Applicant declares only that he “intend[s] to file  
 2 defamation suits against the person behind the messages.” Declaration of Fredric N.  
 3 Eshelman in Support of Application at ¶ 10. This falls short of showing objective  
 4 indications that the discovery sought is actually “for use” in a foreign proceeding. *See*  
 5 *Certain Funds, Accts. &/or Inv. Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 123–25 (2d Cir.  
 2015) (“the applicant *must have more than a subjective intent* to undertake some legal  
 action, and instead must provide some objective indicium that the action is being  
 contemplated.”) (emphasis added).

- 6 ● **Insufficient First Amendment Safeguards:** Applicant has made no showing that the  
 7 safeguards generally applicable to anonymous speech have been satisfied here. *See, e.g.,*  
 8 *Tokyo Univ. of Soc. Welfare v. Twitter, Inc.*, No. 21-MC-80102-DMR, 2021 WL 4124216,  
 9 at \*4 (N.D. Cal. Sept. 9, 2021) (applying *Highfields* unmasking test in a Section 1782  
 10 action); *cf. Zuru, Inc. v. Glassdoor, Inc.*, 2022 WL 2712549 (N.D. Cal. July 11, 2022)  
 11 (declining to apply *Highfields* in a Section 1782 matter because the anonymous speakers  
 did not appear to be U.S. citizens). Such analysis is applicable here, because the speaker  
 appears to a United States citizen, as they state that they “have a message for Fred *from*  
*one American* to another.” Declaration of Fredric N. Eshelman in Support of Application,  
 Ex. 1 (emphasis added).
- 12 ● **Application Attempts to Circumvent Policies of the United States:** The Application  
 13 and the subpoenas “conceal[] an attempt to circumvent foreign proof-gathering  
 14 restrictions or other policies of a foreign country or the United States.” *Intel Corp. v.*  
 15 *Advanced Micro Devices, Inc.*, 542 U.S. 241, 246–47 (2004). As noted above, the speaker  
 16 explicitly identifies as an American in the statements presented by the Application, but  
 17 Applicant is attempting to unmask the speaker without mentioning or addressing  
 18 applicable First Amendment safeguards. *See In re Plan. & Dev. of Educ., Inc.*, 2022 WL  
 228307, at \*4, n.3 (“an attempt to contravene the First Amendment’s purpose without  
 justification” weighs heavily against granting the application); *In re Tagami*, 2021 WL  
 5322711, at \*3, n.1 (a court should decline to exercise “its discretion to aid in punishing  
 speech that would be protected in this country.”).
- 19 ● **Improper Disclosure of Confidential or Privileged Information:** The proposed  
 20 subpoenas improperly purport to require testimony and the disclosure of documents  
 21 containing proprietary or confidential information, trade secrets, or information implicating  
 third parties’ privacy rights. For example, the deposition subpoena seeks an “explanation of  
 all documents” that may be produced in response to the records subpoena. This expansive  
 and undefined request potentially reaches confidential and proprietary information.
- 22 ● **Lack of Relevance & Proportionality:** The proposed subpoena is vague, overbroad, and  
 23 unduly burdensome, including because it is unclear how the requests are relevant and  
 24 proportional to the needs of the case. For instance, Applicant states that he seeks “IP  
 25 addresses that accessed the account and telephone numbers used to register or otherwise  
 26 access the account” without any limitation on time. It is therefore unclear how this  
 unlimited request is relevant and proportional to the needs of the case, especially given  
 that the Applicant’s allegations concern communications only on December 4, 2022.
- 27 ● **Undue Burden:** The proposed subpoena seeks deposition testimony for “Authentication  
 28 and explanation” of records produced, if any, by Google. Producing a witness and  
 providing such testimony is unnecessary and unduly burdensome as records can be  
 authenticated by Certificate of Authenticity. Moreover, the information could be obtained

1 from another less burdensome and less costly source, rather than a non-party like Google,  
2 which has limited knowledge about the underlying dispute and no involvement in the  
3 proposed litigation. *See Intermarine, LLC v. Spliethoff Bevrachtingskantoor, B.V.*, 123 F.  
Supp. 3d 1215 (N.D. Cal. 2015); *Young v. U.S.*, 181 F.R.D. 344, 346 (W.D. Tex. 1997).

4 Accordingly, as set forth above, Google respectfully requests that any order to grant the  
5 Application should direct Google to provide notice of the subpoenas and order to the account  
6 holder, and expressly provide that both Google and the account holder shall each have 30 days  
7 from the date of service of the subpoenas to file a motion to quash or modify the subpoenas.

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9 Dated: February 16, 2023

**PERKINS COIE LLP**

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11 By: *s/Julie E. Schwartz*  
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