

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

IN RE *EX PARTE* APPLICATION OF DR.  
FREDRIC ESHELMAN FOR AN ORDER  
PURSUANT TO 28 U.S.C. § 1782,

Applicant.

Case No. [5:23-mc-80015-EJD](#)

**ORDER GRANTING *EX PARTE*  
APPLICATION PURSUANT TO 28  
U.S.C. § 1782**

Re: ECF No. 1

Before the Court is Dr. Fredric N. Eshelman’s *ex parte* application for an order pursuant to 28 U.S.C. § 1782 to authorize discovery for use in a foreign proceeding (“*Ex Parte* Application” or “Application”). Specifically, Dr. Eshelman seeks documents from Google, LLC to identify the Gmail user who had published allegedly defamatory remarks about Dr. Eshelman. For the reasons stated below, the Application is GRANTED.

**I. BACKGROUND**

Dr. Eshelman is a United States-educated pharmacist who founded Pharmaceutical Product Development (a research organization providing drug discovery, development, and lifecycle management services) and Eshelman Ventures, LLC (an investment company primarily investing in health care companies). Decl. Fredric N. Eshelman (“Eshelman Decl.”) ¶¶ 2–4, ECF No. 1-4.

On December 4, 2022, Dr. Eshelman and various pharmaceutical and investment companies received an email from “terrynewsome@gmail.com” that called Dr. Eshelman a “piece of shit” and accused him of “abus[ing] police resources by repeatedly sending game wardens and officers after hunters that were ‘corner crossing’ into public land.” Eshelman Decl., Ex. 1. Dr. Eshelman has expressed an intention to file defamation suits in Germany and India

1 against the person behind these messages but is unable to do so without the sender's identity.  
2 Eshelman Decl. ¶ 10.

3 Dr. Eshelman requests permission to serve two subpoenas on Google, LLC. First, he seeks  
4 documents "sufficient to show identifying information associated with the Gmail account  
5 terrynewsomee@gmail.com, including the name(s) registered to the account, IP addresses that  
6 accessed the account and telephone numbers used to register or otherwise access the account." *Ex*  
7 *Parte* Application, Ex. B, Attachment A, ECF No. 1-3, at 5-7. Second, he requests a deposition to  
8 authenticate and explain all documents that would be produced pursuant to the document  
9 subpoena. *Ex Parte* Application, Ex. A, Attachment A, ECF No. 1-2, at 5.

10 The target of the § 1782 Application, Google LLC, has filed a response in this matter,  
11 indicating that it does not oppose issuance of the subpoenas. ECF No. 17. Google, however,  
12 requests that the Court include in its § 1782 order a requirement for Google to provide notice to  
13 the accountholder in question and to permit both Google and the accountholder 30 days after  
14 service to file a motion to quash or modify the subpoenas. *Id.*

## 15 **II. LEGAL STANDARDS**

16 Title 28 United States Code § 1782(a) permits federal district courts to assist in gathering  
17 evidence for use in foreign proceedings. 28 U.S.C. § 1782(a); *Intel Corp. v. Advanced Micro*  
18 *Devices, Inc.*, 542 U.S. 241, 247 (2004). The statute specifically authorizes a district court to  
19 order a person residing or found within the district "to give his testimony or statement or to  
20 produce a document or other thing for use in a proceeding in a foreign or international tribunal."  
21 28 U.S.C. § 1782(a). The statute may be invoked where: (1) the discovery is sought from a person  
22 residing in the district of the court to which the application is made; (2) the discovery is for use in  
23 a proceeding before a foreign tribunal; and (3) the applicant is a foreign or international tribunal or  
24 an "interested person." *Intel Corp.*, 542 U.S. at 246; *Khrapunov v. Prosyankin*, 931 F.3d 922, 925  
25 (9th Cir. 2019).

26 In addition to the mandatory statutory requirements, the district court retains discretion in  
27 determining whether to grant an application under § 1782(a) and may impose conditions it deems

1 desirable. *Intel Corp.*, 542 U.S. at 260–61. In *Intel Corp.*, the Supreme Court created a non-  
 2 exhaustive list of factors to consider in ruling on a § 1782(a) request, including (1) whether the  
 3 person from whom discovery is sought is a participant in the foreign proceeding; (2) the nature of  
 4 the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the  
 5 foreign government or the court or agency abroad to U.S. federal-court judicial assistance; (3)  
 6 whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering  
 7 restrictions or other policies of a foreign country or the United States; and (4) whether the request  
 8 is unduly intrusive or burdensome. *Id.* at 264–66.

### 9 **III. DISCUSSION**

#### 10 **A. Statutory Factors**

11 The Court finds that Dr. Eshelman has satisfied the three statutory criteria of § 1782(a).

12 First, the Application satisfies the residence requirement because Google is headquartered  
 13 in and has its principal place of business in Mountain View, California. *See, e.g., In re Todo*, 2022  
 14 WL 4775893, at \*2 (N.D. Cal. Sept. 30, 2022) (“In this district, business entities are ‘found’ where  
 15 the business is incorporated, is headquartered, or where it has a principal place of business.”)  
 16 (collecting cases); *In re Med. Inc. Ass’n Takeuchi Dental Clinic*, 2022 WL 10177653, at \*2 (N.D.  
 17 Cal. Oct. 17, 2022) (Google met residence requirement under 28 U.S.C. § 1782(a) due to  
 18 headquarters and principal location in Mountain View). Therefore, Google resides or can be  
 19 found in this district for the purposes of § 1782.

20 Second, the Court finds that the discovery is sought for use in foreign proceedings. If a §  
 21 1782(a) request is made when there is no currently pending proceeding, such a proceeding must be  
 22 “likely to occur” or is “within reasonable contemplation.” *Intel Corp.*, 542 U.S. 241 at 258–59.

23 Dr. Eshelman has attested by sworn declaration that he intends to file defamation suits in Germany  
 24 and India. Eshelman Decl. ¶ 10. Additionally, his counsel has similarly stated that Dr. Eshelman  
 25 retained his firm to send a cease-and-desist letter to the anonymous Gmail email address and to  
 26 submit the present Application in connection with contemplated lawsuits in Germany and India.

27 Decl. Daniel P. Watkins (“Watkins Decl.”) ¶¶ 3–6, ECF No. 1-5.

1 Finally, Dr. Eshelman is plainly an “interested person” in the contemplated foreign  
 2 proceedings, as he would be the party bringing the defamation action. *See Intel Corp.*, 542 U.S. at  
 3 256 (“No doubt litigants are included among, and may be the most common example of, the  
 4 interested persons who may invoke § 1782”) (internal quotation marks and brackets omitted).

5 Based on the foregoing, the Court finds that the Application satisfies the statutory factors  
 6 to warrant an order pursuant to § 1782.

7 **B. Discretionary *Intel* Factors**

8 At this stage, the Court also finds that the discretionary *Intel* factors weigh in favor of  
 9 granting Dr. Eshelman’s *ex parte* application with limitations.

10 **1. Participation of Target in the Foreign Proceeding**

11 Turning to the first factor, which addresses whether the discovery target is or will be a  
 12 participant in the foreign proceeding, the relevant inquiry is “whether the foreign tribunal has the  
 13 authority to order an entity to produce the . . . evidence.” *In re Qualcomm Inc.*, 162 F. Supp. 3d  
 14 1029, 1039 (N.D. Cal. 2016); *see also In re Varian Med. Sys. Int’l AG*, 2016 WL 1161568, at \*4  
 15 (N.D. Cal. Mar. 24, 2016) (“[T]he first *Intel* factor militates against allowing § 1782 discovery  
 16 when the petitioner effectively seeks discovery from a participant in the foreign tribunal even  
 17 though it is seeking discovery from a related, but technically distinct entity.”) (quotation marks  
 18 and citation omitted). Here, Google would not be a party in the German or Indian proceedings,  
 19 and therefore, those foreign tribunals would be unable to compel Google to produce discovery  
 20 without the aid of § 1782. *Ex Parte* Application, at 6. “In these circumstances, the need for  
 21 assistance pursuant to § 1782(a) is greater than it would be in circumstances where the foreign  
 22 tribunal may order parties appearing before it or third parties within its jurisdiction to produce  
 23 evidence.” *In re Med. Corp. Takeuchi Dental Clinic*, 2022 WL 1803373, at \*3 (N.D. Cal. June 2,  
 24 2022) (citing *Intel*, 542 U.S. at 264). Accordingly, the first *Intel* factor weighs in favor of granting  
 25 Dr. Eshelman’s request.

26 **2. Receptivity of Foreign Tribunal to U.S. Judicial Assistance**

27 The second *Intel* factor also favors granting the Application. “Courts conducting this

1 analysis focus on the utility of the evidence sought and whether the foreign tribunal [or court] is  
 2 likely to receive the evidence.” *In re Qualcomm Inc.*, 162 F. Supp. 3d at 1040. “In the absence of  
 3 authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section  
 4 1782, courts tend to err on the side of permitting discovery.” *In re Varian*, 2016 WL 1161568, at  
 5 \*4 (internal quotation marks omitted). Here, the Court is unaware of any evidence that foreign  
 6 courts in Germany would reject evidence obtained via § 1782, which is consistent with findings  
 7 made by other courts in this district granting § 1782 applications for assistance in German courts.  
 8 *See, e.g., Palantir Techs., Inc. v. Abramowitz*, 415 F. Supp. 3d 907, 915 (N.D. Cal. 2019) (finding  
 9 there to be “no basis to conclude that the German court would be unreceptive to the information  
 10 requested by [the applicant]”). The Court notes that Dr. Eshelman has not adduced any  
 11 affirmative evidence as to whether an Indian court would be receptive to U.S. judicial assistance,  
 12 though the Court finds that it is sufficient that German courts would be receptive. Accordingly,  
 13 given that there is no authoritative proof that a German court would reject evidence obtained under  
 14 § 1782, the second *Intel* factor weighs in favor of granting the Application.

### 15 3. Circumvention of Proof-Gathering Restrictions

16 The third factor—whether an applicant seeks “to circumvent foreign proof-gathering  
 17 restrictions or other policies of a foreign country or the United States”—is inconclusive at this  
 18 stage and is neutral with respect to the Application. *Intel Corp.*, 542 U.S. at 265.

19 “Courts have found that this factor weighs in favor of discovery where there is nothing to  
 20 suggest that the applicant is attempting to circumvent foreign proof-gathering restrictions.” *Med.*  
 21 *Inc. Ass'n Smile Create*, 547 F. Supp. 3d 894, 899 (N.D. Cal. 2021) (quotations and citations  
 22 omitted). Here, Dr. Eshelman and counsel have represented that they are not aware of any  
 23 restrictions on proof-gathering procedures in Germany or India that would prohibit obtaining the  
 24 discovery they seek through the Application. *Ex Parte* Application 7. The Court does not find  
 25 that there is any reason to doubt Dr. Eshelman’s or his counsel’s representations. That said, the  
 26 Court will remark that it is somewhat curious as to Dr. Eshelman’s reasons for bringing a  
 27 defamation suit in Germany or India as opposed to the United States, given that both of Dr.

1 Eshelman’s companies appear to be headquartered in the United States and the anonymous  
 2 speaker also appears to be American. *See* Eshelman Decl., Ex. 2 (“I have a message for Fred from  
 3 one American to another.”). However, on an *ex parte* application and without the assistance of  
 4 adversarial briefing, the Court will not raise such arguments *sua sponte*.

5 Accordingly, although there are some peculiarities present, there is nothing to indicate that  
 6 the third *Intel* factor should weigh against granting the Application.

#### 7 4. Unduly Intrusive or Burdensome

8 The fourth factor the Court must consider is whether the discovery sought is “unduly  
 9 intrusive or burdensome.” *Intel Corp.*, 542 U.S. at 265. Discovery requests may be intrusive or  
 10 burdensome if “not narrowly tailored temporally, geographically or in their subject matter.” *In re*  
 11 *Qualcomm Inc.*, 162 F. Supp. 3d at 1044.

12 Dr. Eshelman’s proposed document subpoena seeks “[d]ocument sufficient to show  
 13 identifying information associated with the Gmail account” at issue, including the names and  
 14 phone numbers registered to the account and IP addresses used to access the account. ECF No. 1-  
 15 3, at 7. He also seeks to depose Google to authenticate and explain the documents produced in  
 16 response to the document subpoena. ECF No. 1-2, at 5.

17 The Court finds that Dr. Eshelman has sufficiently shown that he endeavored to identify  
 18 the anonymous sender through other means and tailored his subpoena request to avoid being  
 19 unduly intrusive or burdensome. Dr. Eshelman has represented that he needs the sender’s identity  
 20 in order to bring suit in India and Germany. *Ex Parte* Application 9 n.4. To that end, Mr. Watkins  
 21 has attempted to send a cease-and-desist letter to the anonymous email address and researched the  
 22 phone number used to call Eshelman Ventures, without any luck in identifying the sender.

23 Watkins Decl. ¶¶ 4–6. Furthermore, the document subpoena appears to be narrowly tailored to  
 24 only seek documents “sufficient to show” the identifying information associated with the Gmail  
 25 account in question, as opposed to a request seeking “all documents” relating to the account. *See*,  
 26 e.g., *In re Plan. & Dev. of Educ., Inc.*, 2022 WL 228307, at \*5 (N.D. Cal. Jan. 26, 2022)

27 (modifying § 1782 subpoena from seeking “all” identifiers to only seek information “sufficient to

1 identify” the users). Similarly, Dr. Eshelman represents that he is only seeking a one-hour  
 2 deposition of Google’s corporate representative to authenticate the records. *Ex Parte* Application  
 3 8. These limitations on the subpoena’s scope suggest that the requested discovery is not “unduly  
 4 intrusive or burdensome.” The fourth *Intel* factor, accordingly, favors granting the Application.

5 \* \* \*

6 In sum, the Court finds that three of the *Intel* discretionary factors favor granting the  
 7 Application and one factor is neutral. Accordingly, the Court will exercise its discretion in  
 8 granting the Application with certain requirements and without prejudice to any subsequent  
 9 motion to quash or modify the subpoena.

#### 10 **IV. CONCLUSION AND ORDER**

11 Based on the foregoing, the Court finds that Dr. Eshelman’s § 1782 Application satisfies  
 12 the statutory factors, and that the discretionary *Intel* factors—at this stage, at least—also favor  
 13 granting the Application.

14 Accordingly, the § 1782 Application is GRANTED. Dr. Eshelman may serve the  
 15 proposed subpoenas (ECF Nos 1-2, 1-3) on Google, with the following requirements:

- 16 1. Dr. Eshelman SHALL serve a copy of this Order on Google with the proposed subpoenas;
- 17 2. No later than 10 days after service of the subpoenas, Google SHALL NOTIFY all account  
 18 users whose personal identifying information is affected by the subpoenas that their  
 19 identifying information is being sought by Dr. Eshelman and PROVIDE a copy of this  
 20 Order to each account user;
- 21 3. Google SHALL use all means of communications associated with the Gmail address to  
 22 contact and notify the affected individuals of the subpoenas;
- 23 4. Google and each account user whose information is sought may file—no later than 30 days  
 24 after service or notice—a motion to quash or modify the subpoenas before this Court;
- 25 5. Any account user seeking to quash or modify the subpoenas may appear and proceed  
 26 before this Court under a pseudonym;

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6. If any party disputes the subpoenas, Google SHALL PRESERVE BUT NOT DISCLOSE the information sought by the subpoena pending resolution of that dispute;
7. This Order is WITHOUT PREJUDICE to any argument that may be raised in a motion to quash or modify the subpoena from Google or any account users.

**IT IS SO ORDERED.**

Dated: May 9, 2023



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EDWARD J. DAVILA  
United States District Judge

United States District Court  
Northern District of California