

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
For the Northern District of California

UNITED STATES DISTRICT COURT
Northern District of California
San Francisco Division

In the Matter of the Application of
KIMBERLY V. ROEBERS

No. C12-80145 MISC RS (LB)

For an Order to Conduct Discovery for Use in
a Foreign Legal Proceeding Pursuant to 28
U.S.C. § 1782

**ORDER DENYING WITHOUT
PREJUDICE PETITIONER'S
APPLICATION FOR AN ORDER TO
CONDUCT DISCOVERY FOR USE IN
A FOREIGN LEGAL PROCEEDING
PURSUANT TO 28 U.S.C. § 1782**

I. INTRODUCTION

Petitioner Kimberly Roebbers filed an *ex parte* application to take discovery pursuant to 28 U.S.C. § 1782. That statute allows a district court to order a person residing or found within its district to produce documents or provide testimony for use in a foreign legal proceeding, unless the disclosure would violate a legal privilege. The petition was assigned to District Court Judge Richard Seeborg, who referred the matter to the undersigned for resolution. Upon consideration of Ms. Roebbers's application and the relevant legal authority, the court DENIES WITHOUT PREJUDICE her application.

II. BACKGROUND

Ms. Roebbers is a party in a divorce proceeding in Dublin, Ireland. Ex Parte Application for Order to Conduct Discovery, ECF No. 1 at 2. The divorce proceeding, *Dr. Johannes Roebbers v. Kim Roebbers (née Knight)*, file no. 01125/2011, is pending before the Circuit Family Court of the County of Dubin, Ireland. *Id.*

1 Mr. Roeber filed an ex parte motion with the Circuit Court on or about February 8, 2012, in
2 which he asked the Circuit Court for discovery into six months' worth of Ms. Roeber's private
3 communications, including email messages, text messages, and other forms of communication. *Id.*
4 Mr. Roeber's affidavit laid out what he believed had transpired during Ms. Roeber's sexual activities
5 during their marriage and after they were separated. *Id.* at 3. Ms. Roeber alleges that the affidavit
6 made it plain that Mr. Roeber and his hired investigator, Ms. De Benedittis, illegally accessed her
7 private communications, as information contained in Ms. De Benedittis' investigation report could
8 not have been obtained through any method other than logging into a private profile on a website
9 using Ms. Roeber's personal login information. *Id.* at 3, 5-6. Ms. Roeber claims that after Mr.
10 Roeber filed his motion and affidavit, she discovered that he stole or made a copy of a document that
11 contained all the information needed to access her private communications. *Id.* at 4.

12 On June 20, 2012, Ms. Roeber filed the instant application requesting authorization to conduct
13 discovery pursuant to 28 U.S.C. § 1782. *Id.* at 1. Specifically, Ms. Roeber seeks an order
14 authorizing her to issue subpoenas to eight different companies allegedly in possession of
15 information relating to user data in their systems, including the IP address from which a user's email
16 account or other information was accessed. *Id.* at 9. She attaches to her application, as Exhibit A,
17 drafts of the subpoenas she wants the court to issue. *Id.*, Ex. A. Essentially, she seeks three sets of
18 documents from each recipient: (1) documents sufficient to identify who accessed her accounts; (2)
19 document sufficient to identify the IP addresses that accessed her accounts; and (3) documents
20 sufficient to identify what those persons did when they accessed her accounts. *See id.* Presumably,
21 this information will tell Ms. Roebers whether Mr. Roebers (or his agent) accessed any of her
22 accounts without her permission, as she suspects.

23 III. LEGAL STANDARD

24 28 U.S.C. § 1782(a) provides, in pertinent part:

25 The district court of the district in which a person resides or is found may order him
26 to give his testimony or statement or to produce a document or other thing for use in a
27 proceeding in a foreign or international tribunal, including criminal investigations
28 conducted before formal accusation. The order may be made pursuant to a letter
rogatory issued, or request made, by a foreign or international tribunal or upon the
application of any interested person and may direct that the testimony or statement be
given, or the document or other thing be produced, before a person appointed by the

1 court.

2 A litigant in a foreign action qualifies as an “interested person” under § 1782. *See Intel Corp. v.*
3 *Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004). In order to apply for discovery pursuant
4 to § 1782, a formal proceeding in the foreign jurisdiction need not be currently pending, or even
5 imminent. *Id.* at 258- 59. Instead, all that is necessary is that a “dispositive ruling” by the foreign
6 adjudicative body is “within reasonable contemplation.” *Id.* at 259 (holding that discovery was
7 proper under § 1782 even though the applicant’s complaint against the opposing party was only in
8 the investigative stage). An *ex parte* application is an acceptable method for seeking discovery
9 pursuant to § 1782. *See In re Letters Rogatory from Tokyo Dist., Tokyo, Japan*, 539 F.2d 1216,
10 1219 (9th Cir. 1976) (holding that the subpoenaed parties may raise objections and exercise their
11 due process rights by bringing motions to quash the subpoenas).

12 A district court has wide discretion to grant discovery under § 1782. *Intel*, 542 U.S. at 260- 61.
13 In exercising its discretion, a district court should consider the following factors: (1) whether the
14 “person from whom discovery is sought is a participant in the foreign proceeding”; (2) “the nature of
15 the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the
16 foreign government or the court or agency abroad to U.S. federal court judicial assistance”; (3)
17 whether the request “conceals an attempt to circumvent foreign proof-gathering restrictions or other
18 policies of a foreign country or the United States”; and (4) whether the request is “unduly intrusive
19 or burdensome.” *See id.* at 264- 65.

20 A district court’s discretion is to be exercised in view of the twin aims of § 1782: providing
21 efficient assistance to participants in international litigation, and encouraging foreign countries by
22 example to provide similar assistance to our courts. *See Schmitz v. Bernstein Liebhard & Lifshitz,*
23 *LLP*, 376 F.3d 79, 84 (2004). There is no requirement that the party seeking discovery establish that
24 the information sought would be discoverable under the governing law in the foreign proceeding or
25 that United States law would allow discovery in an analogous domestic proceeding. *See Intel*, 542
26 U.S. at 247, 261-63.

27 IV. DISCUSSION

28 A. Statutory Requirements

1 Ms. Roeber’s application satisfies most, but not all, of the minimum requirements of § 1782: the
2 requested discovery is for use in her divorce proceeding before the Circuit Court of Ireland, which
3 clearly qualifies as a proceeding before a foreign tribunal; there is no question that Ms. Roeber is an
4 “interested person” as she is a litigant in the proceeding; and the instant *ex parte* application is an
5 acceptable method of requesting discovery under § 1782. *See In re Letters Rogatory*, 539 F.2d at
6 1219.

7 But Ms. Roeber has not demonstrated that the subpoenaed parties reside in this district. As
8 described above, Ms. Roeber’s application attaches eight subpoenas. Those subpoenas are
9 addressed to: (1) Active Bytes Software, LLC c/o Worldwide Incorporators Ltd., 3411 Silberside
10 Road, Rodney Bldg., Ste 104, Wilmington, DE 19810; (2) Apple Inc. c/o CT Corporation System,
11 818 W. Seventh St., Los Angeles, CA 90017; (3) Domains by Proxy, LLC c/o Sherlynn Delgado,
12 14455 N. Hayden Rd., Suite 219, Scottsdale, AZ 85260; (4) Google Inc. c/o CSC - Lawyers
13 Incorporating Service, 2710 Gateway Oaks Dr., Ste 150 N. Sacramento, CA 95833; (5) Microsoft
14 Inc. c/o CSC - Lawyers Incorporating Service, 2710 Gateway Oaks Dr., Ste 150 N. Sacramento, CA
15 95833; (6) SDC Marketing Inc. c/o Dave Vandewouw, 2054 Kildaire Farm Rd., Suite 428, Cary, NC
16 27511; (7) Various Inc. c/o CSC - Lawyers Incorporating Service, 2710 Gateway Oaks Dr., Ste 150
17 N. Sacramento, CA 95833; and (8) Yahoo! Inc. c/o CT Corporation System, 818 W. Seventh St.,
18 Los Angeles, CA 90017. *See* Application, ECF No. 1, Ex. A. None of these addresses are within
19 the Northern District of California, and Ms. Roeber cites no authority suggesting or demonstrating
20 that a court in the Northern District of California may issue subpoenas to entities with addresses
21 outside of the district.

22 In her application, Ms. Roeber conclusorily states that the records she seeks are located and
23 stored in the Northern District of California (presumably by the entities she seeks to subpoena), but
24 she provides no evidence to demonstrate this to be true. Application, ECF No. 1 at 8-9.¹ Nowhere
25

26 ¹ Specifically, Ms. Roeber states:

27 The emails and other communications illegally accessed and obtained by [Mr.
28 Roeber] were created, transmitted, stored, or otherwise located within the Northern

1 does she show that “Google, Microsoft, Yahoo!, and other communications services” “maintain
2 operations, electronic storage facilities, and/or transmission facilities in the Northern District of
3 California,” as she asserts.

4 Accordingly, Ms. Roeber has failed to satisfy the statutory requirements to allow this court to
5 grant her application.

6 B. Exercise of the Court’s Discretion

7 If Ms. Roeber had satisfied the statutory requirements, the court likely would have found good
8 cause to exercise its discretion to authorize the requested discovery. The first *Intel* factor is
9 satisfied: Ms. Roeber is a participant in a foreign proceeding, as she is a litigant in a divorce
10 proceeding before the Circuit Court of Ireland.

11 The second *Intel* factor also is satisfied. Ms. Roeber provided authorities showing the prior
12 receptivity of Irish courts to discovery acquired with the assistance of American courts, and the
13 Court has no reason to believe that the reception to the discovery requested here would differ in any
14 significant manner. *See, e.g., McKevitt v. Pallasch*, 339 F.3d 530, 532, and *In re Charter*
15 *Communications, Inc.*; 393 F.3d 771.

16 With regard to the third *Intel* factor, the Court does not view Ms. Roeber’s request as an attempt
17 to circumvent any foreign restrictions related to the discoverability of the requested information, as
18

19
20 District of California. Many of the emails and communications at issue in the Circuit
21 Court proceedings were sent or received through email accounts and profiles operated
22 or hosted by Google, Microsoft, Yahoo!, and other communications services that
23 maintain operations, electronic storage facilities, and/or transmission facilities in the
24 Northern District of California. Like all communications systems, those services
25 maintain backups and electronic records relating to the accessing of user data on their
26 systems, including such information as the IP (“Internet Protocol”) address from
27 which a user’s email account or other information was accessed (which IP address
28 indicates the physical location from which the access was conducted); the date and
time of each access to the system; the functions that were performed during each
access (e.g., whether an email was deleted, composed, sent, etc.); and other such
information. Those records are also located and stored within the Northern District
of California.

Application, ECF No. 1 at 8-9. No declaration was submitted in support of these facts.

1 the information she seeks is related to her own personal accounts. Furthermore, Ms. Roeber
2 provides authority to show that Irish litigants are permitted to initiate discovery of evidence under
3 Irish procedure. *See* Circuit Court Rules, Order: 24, Rules 1-7, Order: 32, Rules 1-9.

4 Finally, the fourth *Intel* factor also is satisfied. Internet service providers and operators of
5 communications systems are generally familiar with this type of discovery request. Ms. Roeber's
6 request does not appear to be unduly intrusive or burdensome.

7 **V. CONCLUSION**

8 Based on the foregoing, the court DENIES WITHOUT PREJUDICE Ms. Roeber's application.
9 Should Ms. Roeber choose to file another application, she may notice it for hearing before the
10 undersigned in accordance with this district Civil Local Rule 7.

11 **IT IS SO ORDERED.**

12 Dated: July 3, 2012



13 _____
14 LAUREL BEELER
15 United States Magistrate Judge
16
17
18
19
20
21
22
23
24
25
26
27
28