

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  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

	)	Misc. Case No. C 10-80034 JW (PVT)
	)	
IN RE BELUGA SHIPPING GMBH &	)	<b>ORDER GRANTING IN PART AND</b>
CO. KS "BELUGA FANTASTIC" V.	)	<b>DENYING IN PART SUZLON'S</b>
SUZLON ENERGY LTD., FEDERAL	)	<b>PETITION FOR LEAVE TO CONDUCT</b>
COURT PROCEEDINGS, NSD 1670 OF	)	<b>DISCOVERY; ORDER GRANTING</b>
2008 BEFORE THE FEDERAL COURT,	)	<b>NON-PARTY GOOGLE, INC.'S</b>
NEW SOUTH WALES, AUSTRALIA	)	<b>MOTION TO INTERVENE</b>
_____	)	

**[Docket No. 19]**

**INTRODUCTION**

Suzlon Energy, Ltd., Suzlon Energy Australia PTY Ltd., Suzlon Infrastructure Limited, Suzlon Wind Energy Corporation, USA, Suzlon Structures PTE, Ltd., and SE Shipping PTE Ltd. petition for leave to conduct discovery in aid of foreign judicial proceedings pursuant to 28 U.S.C. § 1782. (collectively "Suzlon"). Non-party Google, Inc. moves to intervene, and opposes the petition. ("Google"). The parties appeared for a hearing on May 18, 2010. Having reviewed the papers and considered the arguments of counsel,

IT IS HEREBY ORDERED that petitioner Suzlon's petition is granted in part and denied in

1 part without prejudice to a renewed motion upon proper showing.<sup>1</sup>

2 **FACTUAL BACKGROUND**

3 Suzlon designs and manufactures wind turbines and is the third largest wind turbine  
4 manufacturer in the world. In an action proceeding in the Federal Court in New South Wales,  
5 Australia, Suzlon represents that its former employees, Rajagpalan Sridhar (Chief Manufacturing  
6 Officer) and Sanjeev Bangad (General Manager, Logistics), have been named as cross-defendants  
7 and allegations against them include claims for fraud and breach of fiduciary duty. (collectively  
8 “individual cross-defendants”). Specifically, Suzlon alleges that individual cross-defendants Sridhar  
9 and Bangad misrepresented to the company whether Suzlon could procure sufficient ships to  
10 transport Suzlon’s cargo, and instead themselves, formed and incorporated several companies to  
11 financially benefit from transporting Suzlon’s cargo. Individual cross-defendants Sridhar and  
12 Bangad further misrepresented to the company that they were not associated with any of the  
13 companies contracted to ship Suzlon’s cargo, and that they did not financially benefit from  
14 contracting with these companies to ship Suzlon’s cargo.

15 Suzlon petitions to subpoena the contents of certain electronic mail accounts hosted by non-  
16 party Google. Suzlon believes that those email accounts were used by the individual cross-  
17 defendants to facilitate their egregious conduct. Suzlon also petitions to depose a representative  
18 from Google to authenticate the emails from those email accounts and for a preservation order.<sup>2</sup>  
19 Because Google’s headquarters is located in Mountain View, California and in this district, Suzlon  
20 petitions this court for leave to take discovery.

21 On February 12, 2010, the court issued an order denying without prejudice Suzlon’s petition  
22 for leave to conduct discovery in aid of foreign judicial proceedings pursuant to 28 U.S.C. § 1782.  
23 Suzlon was instructed to serve the individual cross-defendants Sridhar and Bangad, who were  
24 believed to reside in Australia. Order Denying without Prejudice Suzlon’s Petition for Leave to

---

26 <sup>1</sup> The holding of this court is limited to the particular facts and particular circumstances  
27 underlying the present motion.

28 <sup>2</sup> In the reply, Suzlon withdrew without prejudice its request to depose Google. Reply at  
5.

1 Take Discovery in Aid of Foreign Judicial Proceedings Pursuant to 28 U.S.C. § 1782 dated February  
2 12, 2010. (“February 12, 2010 Order”). (Docket No. 8).

3 On February 24, 2010, Suzlon informed the court that cross-defendants Sridhar and Bangad  
4 were located and imprisoned in India. *See* Docket No. 9. On March 1, 2010, the court ordered  
5 Suzlon to serve them there. Order Regarding Suzlon’s Amended Order for Leave to Conduct  
6 Discovery in Aid of Foreign Judicial Proceeding Pursuant to 28 U.S.C. § 1782 filed on March 1,  
7 2010. (“March 1, 2010 Order”). (Docket No. 10). On March 3, 2010, Suzlon served the individual  
8 cross-defendants Bangad and Sridhar pursuant to Hague Convention protocols. Although the court  
9 later received a letter from individual cross-defendant Bangad’s brother, which indicated that  
10 Bangad has received notice of the service, no official confirmation from the Indian Central  
11 Authority has been received for either cross defendant. *See* Docket No. 18. Moreover, Suzlon has  
12 not confirmed service on the individual cross-defendants.

13 In the subpoenas, Suzlon petitions for the following information:

- 14 1. All emails sent, received, and/or drafted whether or not they are relevant to the  
15 Australian proceedings, from the following email addresses: [Ybangad@gmail.com](mailto:Ybangad@gmail.com);  
[sanjeevbangad@gmail.com](mailto:sanjeevbangad@gmail.com); [rsridhar1998@gmail.com](mailto:rsridhar1998@gmail.com); [g01p36b@gmail.com](mailto:g01p36b@gmail.com).
- 16 2. Ability to depose a representative from Google regarding:
  - 17 A. When each of the Gmail accounts at issue was created;
  - 18 B. The name provided to Google by the user of each account during the account  
19 creation process;
  - 20 C. The country in which each account was created;
  - 21 D. How Google stores or saves emails in Gmail accounts;
  - 22 E. How information regarding when emails sent to and from a Gmail account is  
23 recorded and stored.

### 24 **LEGAL STANDARD**

25 28 U.S.C. § 1782 provides the mechanism for foreign tribunals or interested persons to  
26 request assistance from a district court to conduct discovery for use in foreign proceedings.

27 It states in pertinent part:

- 28 (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations

1 conducted before formal accusation. The order may be made pursuant to a letter  
2 rogatory issued, or request made, by a foreign or international tribunal or upon the  
3 application of any interested person and may direct that the testimony or statement be  
4 given, or the document or other thing be produced, before a person appointed by the  
5 court. By virtue of his appointment, the person appointed has power to administer any  
6 necessary oath and take the testimony or statement. The order may prescribe the  
7 practice and procedure, which may be in whole or part the practice and procedure of  
8 the foreign country or the international tribunal, for taking the testimony or statement  
9 or producing the document or other thing. To the extent that the order does not  
10 prescribe otherwise, the testimony or statement shall be taken, and the document or  
11 other thing produced, in accordance with the Federal Rules of Civil Procedure.

12  
13 A person may not be compelled to give his testimony or statement or to produce a  
14 document or other thing in violation of any legally applicable privilege.

15  
16 *See* § 1782(a).

17  
18 There are three basic requirements: (1) the applicant must be a foreign tribunal or an  
19 “interested person;” (2) discovery must be for use in a proceeding before the foreign tribunal; and  
20 (3) the application for discovery must be made in the district where the person from whom discovery  
21 is sought resides. *See Esses v. Hanania (In re Esses)*, 101 F.3d 873, 875 (2nd Cir. 1996). Courts  
22 have ascribed two goals to the statute: first, it provides an efficient means for federal courts to assist  
23 foreign tribunals and litigants before such tribunals; and second, it encourages foreign countries to  
24 provide similar assistance by setting an example. *See, e.g., Euromepa v. R. Esmerian*, 154 F.3d 24,  
25 28 (2nd Cir. 1998); *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2nd Cir.  
26 1992). District courts have broad discretion to achieve those goals. *See Four Pillars Enters. v.*  
27 *Avery Dennison Corp.*, 308 F. 3d 1075, 1078 (9th Cir. 2002).

28  
29 The Federal Rules of Civil Procedure apply to 28 U.S.C. § 1782. *See* 28 U.S.C. § 1782  
30 (2010). The legislative history of the statute states that “[i]f the court fails to prescribe the  
31 procedure, the appropriate provisions of the Federal Rules of Civil Procedure are to be followed,  
32 irrespective of whether the foreign or international proceeding or investigation is of a criminal, civil,  
33 administrative, or other nature.” *See* S. Rep. No. 1580, 88th Cong., 2d Sess. (1964), *reprinted in*  
34 1964 U.S.C.C.A.N. 3782, 3789.

35  
36 Rule 1 of the Federal Rules of Civil Procedure states that the Rules are intended “to secure  
37 the just, speedy, and inexpensive determination of every action and proceeding.” *See* FED. R. CIV. P.  
38 1. Rule 5 states that “[u]nless these rules provide otherwise, each of the following papers must be  
39 served on every party[,] [including] . . . a written motion, except one that may be heard ex parte.”

1 See FED. R. CIV. P. 5(a)(1)(D). Thus, unless a § 1782 motion is *ex parte*, service of notice must be  
2 given to all parties.

### 3 DISCUSSION

#### 4 I. Suzlon Satisfies the Three Requirements Under 28 U.S.C. § 1782

5 The present action satisfies the requirements for 28 U.S.C. § 1782 action. *See Intel Corp. v.*  
6 *Advanced Micro Devices, Inc.*, 542 U.S. 241, 256-58 (2004). First, petitioner Suzlon is a litigant in  
7 a foreign action that qualifies as an “interested person” under the statute. *See id.* Second, the  
8 discovery sought is for use in the Australian proceedings, and lastly, Google is located in the  
9 Northern District of California. *See id.* Therefore, petitioner Suzlon satisfies the three requirements  
10 set forth above.

#### 11 II. Google May Intervene, and Under the Electronic Communications Privacy Act, the 12 Subpoenas are Futile without Consent from the Individual Cross-Defendants

13 Suzlon seeks, *inter alia*, the contents of the individual cross-defendants’ email accounts.  
14 Pursuant to Electronic Communications Privacy Act (18 U.S.C §§ 2701-2712), non-party Google  
15 states that consent from the individual cross-defendants is required, and that until, and unless, their  
16 consents are obtained, it is unable to comply with the subpoenas. *See* 18 U.S.C. § 2702 (the ECPA’s  
17 description of the voluntary disclosure of customer communications or records); *see also Theofel v.*  
18 *Farey-Jones*, 359 F.3d 1066, 1073 (9th Cir. 2004) (the ECPA protects users whose electronic  
19 communications are in electronic storage with an ISP or other electronic communications facility);  
20 *O’Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1447 (2006) (the discovery must be directed to  
21 the owner of the data, not the bailee to whom it was entrusted). A subpoena can be permissible if it  
22 seeks the identity of specific emails or of accounts. *See O’Grady*, 139 Cal. App. 4th at 1447. The  
23 ECPA, however, prohibits a subpoena if it seeks the content of any email account absent a consent.  
24 *See* 28 U.S.C. § 1782 (2010). Because Google knows that it cannot comply with the subpoenas, it  
25 seeks to intervene at this stage of the proceedings and to oppose the petition, even though the  
26 subpoenas or deposition requests have not yet been issued.

27 Suzlon contends that the ECPA does not apply to foreign citizens, and therefore, Google may  
28 comply with the subpoenas. Specifically, Suzlon relies on *Zheng v. Yahoo! Inc.*, which held that the  
ECPA does not apply to electronic communications of foreign citizens. *See Zheng v. Yahoo, Inc.*,

1 2009 U.S. Dist. LEXIS 111886 (N.D. Cal. Dec. 2, 2009) (M. Chesney). However, the court in  
2 *Zheng* found that because the email interceptions and disclosures occurred outside of the United  
3 States by a company whose servers for were located outside the United States, the ECPA would not  
4 apply or extend to the foreign nationals. In the present case, however, Google and its servers are  
5 located within the United States and therefore, the ECPA applies. As such, the ECPA prohibits  
6 Google from disclosing the contents of those email accounts until it receives consents from the email  
7 account holders. Therefore, it is futile for the subpoenas to issue until notice has been served and  
8 consent has been obtained from the cross-defendants. Accordingly, it is appropriate for non-party  
9 Google to intervene at this juncture to oppose the petition and to deny the petition insofar as it seeks  
10 the content of the specific email accounts set forth above.

### 11 **III. Suzlon Must Serve Notice Pursuant to the Federal Rules of Civil Procedure**

12 Until a subpoena or deposition request has been issued, petitioner Suzlon asserts that 28  
13 U.S.C. § 1782 does not require notice to any party of a petition to conduct discovery in aid of a  
14 foreign proceeding. Suzlon further asserts that requests for assistance under 28 U.S.C. § 1782 are  
15 made *ex parte*, in which case notice is not required.

16 Rule 1 states:

17 These rules govern the procedure in all civil actions and proceedings in the United  
18 States district courts . . . They should be construed and administered to secure the just,  
speedy, and inexpensive determination of every action and proceeding.

19 *See* FED. R. CIV. PRO. 1. Rule 1 governs all civil actions and therefore applies to 28 U.S.C. §1782.

20 Rule 5 states:

21 (a) Service: When Required.

22 (1) In General.

23 Unless these rules provide otherwise, each of the following papers must be  
24 served on every party:

25 (A) an order stating that service is required;

26 (B) a pleading filed after the original complaint, unless the court  
27 orders otherwise under Rule 5(c) because there are numerous  
defendants;

28 (C) a discovery paper required to be served on a party, unless the  
court orders otherwise;

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

- (D) a written motion, except one that may be heard *ex parte*; and
- (E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

*See* FED. R. CIV. PRO. 5(a). Here, Rule 5 applies to a Section 1782 petition. The Rules emphasize service of notice. *See* Schwarzer, Tashima & Wagstaffe, Cal. Prac. Guide: Fed Civ. Pro. Before Trial (The Rutter Group 2008), § 12:27.

**A. Suzlon’s petition is not *ex parte***

Suzlon asserts that the present action should be considered *ex parte*. The court in *Mission Power Engineering Co.* defined the terms of a valid *ex parte* motion. *See Mission Power Eng'g Co. v. Continental Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995). First, the moving party must show that its cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures. *See id.* Second, the moving party must be without fault in creating the crisis or that the crisis occurred as a result of excusable neglect. *See id.*

Even though Suzlon has shown that it is not at fault for creating the crisis, Suzlon has not shown that its cause will be irreparably prejudiced if the underlying motion is not heard according to regular noticed motion procedures. Based on this alone, the motion should not be considered *ex parte*.

Additional considerations further emphasize that the present motion should not be considered *ex parte*. First, the practice of *ex parte* undermines the impartiality of the court. *See* 8B J. Moore, Moore's Federal Practice 43.03 [2], at 43-23 (1983). The court has a limited view of the situation with only input from one party to the conflict. *See United States v. Earley*, 746 F.2d 412, 416 (8th Cir. 1984).

Google has adequately asserted that it should be permitted to intervene at this stage of the proceedings, thereby giving the court a fuller view of the issues in the action. Second, the petition should not be considered *ex parte* simply by labeling it as such. *See United States v. R.F. Ball Const. Co.*, 355 U.S. 587, 593 (1958) (“Substance, not form or labels, controls the nature and effect of legal instruments”); *W.B. Worthen Co. ex. rel. Board of Commissioners v. Kavanaugh*, 295 U.S. 56, 62 (1935) (“What controls our judgment. . . is the underlying reality rather than the form or label”).

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

**CONCLUSION**


For the foregoing reasons, non-party Google may intervene at this juncture in the proceedings. Because the subpoenas would be futile without the consent of the cross-defendants, Suzlon's petition is granted in part and denied in part without prejudice to a renewed showing that consents have been obtained.

Non-party Google shall disclose documents that reflect the following: (1) when the specific email accounts set forth above were created; (2) the actual names of the email account holders provided to Google during the account creation process; and (3) the countr(ies) from which the specific email accounts set forth above were created.

Pending further showing of consent by the email account holders, Google is instructed to continue to preserve the snapshot of the emails in the specific Gmail accounts set forth above.

IT IS SO ORDERED.

Dated: September 23, 2010

  
PATRICIA V. TRUMBULL  
United States Magistrate Judge