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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIASUPER VITAMINAS, S. A.,
Applicant.

Case No.17-mc-80125-SVK

**ORDER GRANTING SUPER
VITAMINAS'S EX PARTE
APPLICATION**

Re: Dkt. No. 1

Before the Court is an ex parte application by Super Vitaminas, S.A. (“Super Vitaminas”) for an order to obtain discovery from Google, Inc. (“Google”) and Microsoft Corporation (“Microsoft”) for use in foreign criminal proceedings in Guatemala. On November 9, 2017, this Court ordered Super Vitaminas to provide supplemental briefing or evidence regarding the Stored Communications Act. ECF 6. On November 13, 2017, Super Vitaminas filed two declarations in further support of its application. ECF 7, 8. Having considered Super Vitaminas’s brief and declarations, the Court GRANTS the application.

I. BACKGROUND

Super Vitaminas is a Guatemalan company headquartered in Guatemala City. It is a franchisee of GNC, a U.S.-based global retailer of specialty health and wellness products, including vitamins, herbal supplements, sports nutritional products and diet products. Super Vitaminas imports these products from GNC through freight-forwarders for resale in Guatemala. Super Vitaminas has recently become the target of a criminal complaint and prosecution by Guatemalan taxing authorities alleging that the company failed to report and pay certain taxes on products imported in 2012. Super Vitaminas believes that information its former freight forwarder emailed the company in 2012 at the time of the imports will exonerate the company from the criminal charges. The freight forwarder sent the information to Super Vitaminas’s employees,

United States District Court
Northern District of California

1 Magdalena Herrera and Juan Roberto Castro, from a Microsoft Hotmail email account. Super
2 Vitaminas’s employees received the emails on their company Google Gmail accounts. Super
3 Vitaminas no longer has access to these emails. ECF 4 at ¶ 4 (Declaration of Juan Miguel
4 Martinez Lemus, IT Manager for Super Vitaminas). Super Vitaminas now seeks to obtain emails
5 between its two employees and the freight manager from Google and Microsoft.

6 **II. LEGAL STANDARD**

7 Super Vitaminas’s application is brought pursuant to 28 U.S.C. § 1782, which states as
8 follows:

9 The district court of the district in which a person resides or
10 is found may order him to give his testimony or statement or to
11 produce a document or other thing for use in a proceeding in a
12 foreign or international tribunal, including criminal investigations
13 conducted before formal accusation. The order may be made ...upon
14 the application of any interested person and may direct that the
15 testimony or statement be given, or the document or other thing be
16 produced, before a person appointed by the court...To the extent
17 that the order does not prescribe otherwise, the testimony or
18 statement shall be taken, and the document or other thing produced,
19 in accordance with the Federal Rules of Civil Procedure.

20 28 U.S.C. § 1782(a). The purpose of § 1782 is “to provide federal-court assistance in the
21 gathering of evidence for use in foreign tribunals.” *Intel Corp. v. Advanced Micro Devices, Inc.*,
22 542 U.S. 241, 247 (2004); see also *Schmitz v. Bernstein Liebhart & Lifshitz, LLP*, 376 F.3d 79, 84
23 (2d Cir. 2004) (noting that Section 1782 has the “twin aims” of “providing efficient means of
24 assistance to participants in international litigation in our federal courts and encouraging foreign
25 countries by example to provide similar means of assistance to our courts”) (citation and internal
26 quotation marks omitted).

27 A district court is authorized to grant a § 1782 application where (1) the person from
28 whom the discovery is sought resides or is found in the district of the district court to which the
application is made, (2) the discovery is for use in a proceeding before a foreign tribunal, and (3)
the application is made by a foreign or internal tribunal or “any interested person.” 28 U.S.C. §
1782(a); see also *In re Republic of Ecuador*, No. C–10–80255–CRB (EMC), 2010 WL 3702427 at
*2 (N.D. Cal. Sept. 15, 2010).

“However, simply because a court has the authority under § 1782 to grant an application

1 does not mean that it is required to do so.” In re Republic of Ecuador, 2010 WL 3702427 at *2
2 (citing Intel, 542 U.S. at 264). The Supreme Court has identified several discretionary factors that
3 a court should take into consideration in ruling on a § 1782 request:

- 4 (1) whether the material sought is within the foreign tribunal's
5 jurisdictional reach and thus accessible absent Section 1782 aid; (2)
6 the nature of the foreign tribunal, the character of the proceedings
7 underway abroad, and the receptivity of the foreign government or
8 the court or agency abroad to U.S. federal-court jurisdictional
assistance; (3) whether the Section 1782 request conceals an attempt
to circumvent foreign proof-gathering restrictions or other policies
of a foreign country or the United States; and (4) whether the
subpoena contains unduly intrusive or burdensome requests.

9 Id. (citing Intel, 542 U.S. at 264–65). It is both common and proper to conduct an ex parte
10 process for a request to obtain an order authorizing discovery pursuant to § 1782. Id.
11 (summarizing cases).

12 **III. DISCUSSION**

13 **a. Authority to Issue Subpoena**

14 The Court has reviewed Super Vitaminas’s application and determines that the statutory
15 requirements have been satisfied.

16 First, Google is headquartered in this District and is “found” here for purposes of § 1782.
17 See ECF 3 at ¶ 2 (Google is headquartered in Mountain View, California). Similarly, Microsoft is
18 also “found” in this district for purposes of § 1782 because it maintains two offices in this District.
19 See ECF 3 at ¶ 4; <https://www.microsoft.com/en-us/about/officelocator> (Microsoft operates
20 corporate sales offices in Mountain View and San Francisco, California). See also In re Ex Parte
21 Application of TPK Touch Sols. (Xiamen) Inc., No. 16-MC-80193-DMR, 2016 WL 6804600, at *2
22 (N.D. Cal. Nov. 17, 2016) (finding subpoenaed party was “found” within Northern District for
23 purposes of § 1782 because it maintained an office in the District); In re Ex Parte Application of
24 Qualcomm Inc., 162 F. Supp. 3d 1029, 1036 (N.D. Cal. 2016) (same); In re Republic of Ecuador,
25 Nos. C 11-80171 CRB, C 11-80172 CRB, 2011 WL 4434816, at *2 (N.D. Cal. Sept. 23, 2011)
26 (same).¹

27 _____
28 ¹ Other districts apply a more stringent standard for determining whether a corporation is “found”
in a district for purposes of § 1782. See In re Sargeant, No. 17MC374, 2017 WL 4512366, at *4

1 Second, this discovery is sought for use in a “proceeding before a foreign tribunal.” 28
 2 U.S.C. § 1782(a). Section 1782 is intended to provide assistance “whether the foreign or
 3 international proceeding or investigation is of a criminal, civil, administrative, or other nature.”
 4 Intel, 541 U.S. at 259 (quoting S. Rep. No. 1580, at 9, U.S. Code Cong. & Admin. News 1964, pp.
 5 3782, 3789) (emphasis omitted); see also 28 U.S.C. § 1782(a) (includes “criminal investigations
 6 conducted before formal accusation”). Here, the information is being sought in connection with an
 7 on-going criminal prosecution of Super Vitaminas by the Guatemalan SAT. See Paiz Decl., ¶ 7;
 8 Alegria Decl., ¶¶ 3-4; see also Intel, 541 U.S. at 258 (the types of proceedings for which discovery
 9 may be sought include “investigating magistrates, administrative and arbitral tribunals, and quasi-
 10 judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts”).

11 Third, Super Vitaminas is an “interested person” because it is the subject of criminal
 12 investigations and a party to the proceedings. See *In re Ex Parte Application of Jommi*, 2013 WL
 13 6058201, at *3 (N.D. Cal. Nov. 15, 2013) (“Petitioner is the complainant in the criminal
 14 proceeding and thus an interested person for purposes of § 1782(a).”). Therefore, all three
 15 statutory requirements are met.

16 **b. Discretionary Factors**

17 The discretionary factors weigh in favor of granting the application. First, neither Google
 18 nor Microsoft is a participant in the foreign proceeding and thus “may be outside the foreign
 19 tribunal’s jurisdictional reach; hence, [its] evidence, available in the United States, may be
 20 unobtainable absent § 1782(a) aid.” *Intel Corp.*, 542 U.S. at 264. Therefore the first factor weighs
 21 in Super Vitaminas’s favor.

22 With respect to the nature and receptivity of the foreign tribunal, Super Vitaminas avers
 23 that it expects that Guatemalan courts will be receptive to the information obtained by these
 24 requests. Alegria Decl. at ¶ 5; see also *In re Google Inc.*, No. 14-mc-80333-DMR, 2014 WL

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 27 (S.D.N.Y. Oct. 10, 2017) (adopting Daimler AG standard such that a corporation must have
 28 “continuous and systematic as to render [it] essentially at home in the forum [s]tate,” in order to be
 found in the district under § 1782). However, the Court is unaware of any Northern District of
 California cases adopting this standard, and thus finds that Microsoft is found in this District.

1 7146994, at *3 (N.D. Cal. Dec. 15, 2014) (finding second discretionary factor met for purpose of
2 §1782 where the applicant averred that the foreign tribunals “[could] be receptive” to the
3 discovery sought). At the very least, there is no evidence suggesting that Guatemalan courts
4 would be unreceptive to the discovery Super Vitaminas seeks. See Alegria Decl. at ¶ 5; In re Ex
5 Parte Application Varian Medical Sys. Int’l AG, No. 16-mc-80048-MEJ, 2016 WL 1161568, at *4
6 (N.D. Cal. Mar. 24, 2016) (finding second discretionary factor met where there was no evidence or
7 case law suggesting the German district court would be unreceptive to the discovery sought).
8 Accordingly, this factor also weighs in Super Vitaminas’s favor.

9 Third, there is no evidence that the request is an attempt to circumvent foreign proof-
10 gathering restrictions or any country’s policies. Super Vitaminas asserts that there are no
11 Guatemalan legal restrictions against seeking the discovery requested in the subpoenas. See In re
12 Ex Parte Application of TPK Touch Sols. (Xiamen) Inc., 2016 WL 6804600, at *3 (finding third
13 discretionary factor met where there was no evidence that the request was an attempt to
14 circumvent foreign proof-gathering restrictions and applicant represented that “no such restrictions
15 or policies exist [ed]”). The third fact also weighs in favor of Super Vitaminas.

16 Fourth, the request does not appear “unduly intrusive or burdensome.” The application
17 does not seek voluminous discovery, only the correspondence between two Super Vitaminas’s
18 employees (two specific Gmail accounts) and the freight forwarder (one specific Hotmail account)
19 during the limited time period of 2012, along with some general account subscriber information
20 for the Hotmail account to lay the foundation for admission of the emails in the Guatemalan
21 proceeding. Therefore the Court finds the fourth factor weighs in favor of Super Vitaminas.

22 **c. Stored Communications Act**

23 It is well-established that civil subpoenas, including those issued pursuant to § 1782, are
24 subject to the prohibitions of the Stored Communications Act (“SCA”). See Optiver Australia Pty.
25 Ltd. & Anor. v. Tibra Trading Pty. Ltd. & Ors., No. C 12-80242 EJD PSG, 2013 WL 256771, at
26 *1 (N.D. Cal. Jan. 23, 2013). The SCA provides in relevant part that “(1) a person or entity
27 providing an electronic communication service to the public shall not knowingly divulge to any
28 person or entity the contents of a communication while in electronic storage by that service.” 18

1 U.S.C. § 2702(a)(1). However, exceptions exist for disclosure of communications “(1) to an
2 addressee or intended recipient of such communication or an agent of such addressee or intended
3 recipient;” or “(3) with the lawful consent of the originator or an addressee or intended recipient of
4 such communication, or the subscriber in the case of remote computing service.” 18 U.S.C.A. §
5 2702(b).

6 In support of its application, Super Vitaminas submitted declarations from the two
7 employees who used the email addresses for which it seeks communication contents, Herrera and
8 Castro. ECF 7, 8. Both Herrera and Castro consented to the disclosure of the contents of the
9 emails. ECF 7 at ¶ 7; ECF 8 at ¶ 7. Therefore the exception provided for disclosure applies here
10 and disclosure of the contents of the emails would not violate the SCA. See 18 U.S.C.A. §
11 2702(b)(3).

12 **IV. CONCLUSION**

13 Because the statutory requirements of 28 U.S.C. § 1782 are met, the discretionary factors
14 weigh in favor of granting the application, and the subpoena does not violate the SCA, the
15 subpoenas attached as Exhibits 1 and 2 to the application shall be issued by the Clerk of the Court.

16 Super Vitaminas shall serve Google and Microsoft with this Order and the respective
17 subpoena, and shall file proofs of service on the day service is affected. Google and Microsoft
18 may move to modify or quash the subpoena within 14 days of service. Any return date for the
19 subpoena shall be at least 14 days after the date Google and Microsoft are served so that Google
20 and Microsoft may have a reasonable amount to file any motion; the return date shall be stayed if
21 such a motion is filed. Super Vitaminas shall file any response within 14 days of any motion by
22 Google or Microsoft.

23 **SO ORDERED.**

24 Dated: November 20, 2017

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SUSAN VAN KEULEN
United States Magistrate Judge