

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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

IN RE EX PARTE APPLICATION OF  
MEDICAL INCORPORATED  
ASSOCIATION SMILE CREATE dba  
JINGUMAE ORTHODONTICS,

Applicant.

Case No. 21-mc-80111-VKD

**ORDER DENYING WITHOUT  
PREJUDICE EX PARTE  
APPLICATION FOR DISCOVERY  
PURSUANT TO 28 U.S.C. § 1782**

Re: Dkt. No. 1

Applicant Medical Incorporated Association Smile Create dba Jingumae Orthodontics (“Smile Create”) has filed an ex parte application for an order pursuant to 28 U.S.C. § 1782 authorizing service of a subpoena for documents on Google LLC (“Google”). Dkt. No. 1. Although the proposed subpoena is directed to Google, Smile Create will use the subpoena to obtain identifying and contact information for several individuals in Japan who have Google accounts.

The Court denies without prejudice the proposed subpoena. Smile Create may submit an amended or supplemental application that addresses the Court’s concerns about the scope of the proposed subpoena, as described below.

**I. BACKGROUND**

According to the application, Smile Create operates an orthodontic dental office in Tokyo, Japan. Dkt. No. 1 at 2. Between June 2019 and November 2020, Google users posted eight anonymous, negative reviews on Smile Create’s Google Map review page. Dkt. No. 2, Ex. A–H. The reviews describe poor dental care, rude employees, unskilled staff, and difficulty scheduling

1 appointments, among other grievances.<sup>1</sup> *Id.* Smile Create says that it intends to assert claims for  
 2 defamation in Japan against the person or persons responsible for writing the eight negative  
 3 Google reviews about Smile Create. Dkt. No. 4 ¶ 1. Smile Create requests permission to serve a  
 4 subpoena on Google seeking, for each account from which a negative review was posted, “[a]ll  
 5 DOCUMENTS identifying the user(s) of [the ACCOUNT] . . . , including all IP addresses, names,  
 6 addresses, e-mail addresses, and e-mail address or telephone numbers for recovery or alternate  
 7 purpose, and the name, address, and telephone number of [the ACCOUNT].” For each account,  
 8 the subpoena asks for documents from the month and year of each negative review to the present  
 9 date. Dkt. No. 5 at 7–9.

10 Smile Create’s application is supported by the declarations of Dr. Yasuhiro Itsuki,  
 11 Marianne Mu, and Yuichi Nakazawa. Dkt. Nos. 2–4.

## 12 **II. LEGAL STANDARD**

13 Pursuant to 28 U.S.C. § 1782, a district court may order the production of documents or  
 14 testimony for use in a foreign legal proceeding, unless the disclosure would violate a legal  
 15 privilege. 28 U.S.C. § 1782(a); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246–  
 16 47 (2004). The statute may be invoked where: (1) the discovery is sought from a person residing  
 17 in the district of the court to which the application is made; (2) the discovery is for use in a  
 18 proceeding before a foreign tribunal; and (3) the applicant is a foreign or international tribunal or  
 19 an “interested person.” *Intel*, 542 U.S. at 246.

20 A district court is not required to grant an application that meets the statutory criteria, but  
 21 instead retains discretion to determine what discovery, if any, should be permitted. *Id.* at 264. In  
 22 exercising that discretion, the court considers several factors:

- 23 (1) whether “the person from whom discovery is sought is a participant in the foreign  
 24 proceeding”;
- 25 (2) “the nature of the foreign tribunal, the character of the proceedings underway abroad,  
 26 and the receptivity of the foreign government or the court or agency abroad to U.S.

27  
 28 

---

<sup>1</sup> The Court relies on English translations of reviews written in Japanese. *See* Dkt. No. 3.

1 federal-court judicial assistance”;

2 (3) whether the discovery request “conceals an attempt to circumvent foreign proof-  
3 gathering restrictions or other policies of a foreign country or the United States”; and

4 (4) whether the discovery requested is “unduly intrusive or burdensome.”

5 *Id.* at 264–65.

6 A district court’s discretion is guided by the twin aims of § 1782: providing efficient  
7 assistance to participants in international litigation, and encouraging foreign countries by example  
8 to provide similar assistance to U.S. courts. *Schmitz v. Bernstein Liebhard & Lifshitz LLP*, 376  
9 F.3d 79, 84 (2d Cir. 2004). The party seeking discovery need not establish that the information  
10 sought would be discoverable under the governing law in the foreign proceeding or that United  
11 States law would allow discovery in an analogous domestic proceeding. *See Intel*, 542 U.S. at  
12 247, 261–63.

13 Applications brought pursuant to 28 U.S.C. § 1782 typically are considered on an *ex parte*  
14 basis, since “parties will be given adequate notice of any discovery taken pursuant to the request  
15 and will then have the opportunity to move to quash the discovery or to participate in it.” *IPCom*  
16 *GmbH & Co. KG v. Apple, Inc.*, 61 F. Supp. 3d 919, 922 (N.D. Cal. 2014) (quoting *In re Republic*  
17 *of Ecuador*, No. C10-80225 MISC CRB (EMC), 2010 WL 3702427, at \*2 (N.D. Cal. Sept. 15,  
18 2010)). “Consequently, orders granting § 1782 applications typically only provide that discovery  
19 is ‘authorized,’ and thus the opposing party may still raise objections and exercise its due process  
20 rights by challenging the discovery after it is issued via a motion to quash, which mitigates  
21 concerns regarding any unfairness of granting the application *ex parte*.” *In re Varian Med. Sys.*  
22 *Int’l AG*, No. 16-mc-80048-MEJ, 2016 WL 1161568, at \*2 (N.D. Cal. Mar. 24, 2016).

23 Unless the district court orders otherwise, the discovery the court authorizes must be  
24 obtained in accordance with the Federal Rules of Civil Procedure. 28 U.S.C. § 1782(a); *In re*  
25 *Letters Rogatory from Tokyo Dist. Prosecutor’s Office, Tokyo, Japan*, 16 F.3d 1016, 1020 (9th  
26 Cir. 1994).

### III. DISCUSSION

#### A. Statutory Requirements

Smile Create's application satisfies the statutory requirements of 28 U.S.C. § 1782(a). First, the subpoena seeks discovery from Google, which has its principal place of business in this district. *See* Dkt. No. 4, Ex. I. Second, Smile Create requests this discovery for use in a civil action for defamation that it anticipates filing in Japan as soon as it learns the identities of the Google account holders responsible for the negative review postings. Dkt. No. 4 ¶ 1. This proceeding before a foreign tribunal appears to be within reasonable contemplations. *See Intel*, 542 U.S. at 259 (adjudicative proceedings need not be pending or imminent, so long as they are within reasonable contemplation). Third, Smile Create, as the putative plaintiff in the contemplated civil action, is an interested person within the meaning of the statute.

#### B. *Intel* Factors

Even if the Court has the authority to grant Smile Create's § 1782 application, that does not mean the Court is required to do so. *Intel*, 542 U.S. at 247. In determining whether judicial assistance under § 1782 is appropriate, the Court must consider the additional *Intel* factors.

##### 1. Participation of Target in the Foreign Proceeding

Although this factor addresses whether the person from whom discovery is sought is a party to the foreign proceeding, "the key issue is whether the material is obtainable through the foreign proceeding." *In re Varian Med. Sys.*, 2016 WL 1161568, at \*3 (internal quotations and citation omitted).

According to the application, Google will not be a party to the civil action Smile Create plans to bring in Japan, and the documents Smile Create seeks by subpoena are located within the United States. Dkt. No. 1 at 21; Dkt. No. 4 ¶ 29. Smile Create further contends that such evidence is outside the reach of a Japanese court's jurisdiction. *Id.* Under these circumstances, the need for assistance pursuant to § 1782(a) is greater than it would be in circumstances where the foreign tribunal may order parties appearing before it or third parties within the jurisdiction to produce evidence. *Intel*, 542 U.S. at 264. The Court finds this factor weighs in favor of authorizing service of the subpoena.

## 2. Receptivity of Foreign Tribunal to U.S. Judicial Assistance

1 Under this factor, the Court considers “the nature of the foreign tribunal, the character of  
2 the proceedings underway abroad, and the receptivity of the foreign government or the court or  
3 agency abroad to U.S. federal-court judicial assistance.” *Intel*, 542 U.S. at 264. “This factor  
4 focuses on whether the foreign tribunal is willing to consider the information sought.” *In re*  
5 *Varian Med. Sys.*, 2016 WL 1161568, at \*4. “[I]f there is reliable evidence that the foreign  
6 tribunal would not make any use of the requested material, it may be irresponsible for the district  
7 court to order discovery, especially where it involves substantial costs to the parties involved.” *Id.*  
8 (internal quotations and citation omitted). Courts have denied requests for discovery where the  
9 foreign tribunal or government expressly says it does not want the U.S. federal court’s assistance  
10 under § 1782. *See, e.g., Schmitz*, 376 F.3d at 84–85 (affirming the denial of discovery where the  
11 German government expressly objected to the information sought due to concerns that it would  
12 jeopardize an ongoing German criminal investigation, as well as German sovereign rights); *In re*  
13 *Ex Parte Appl. of Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1040–41 (N.D. Cal. 2016) (concluding  
14 that this *Intel* factor weighed heavily against discovery where the Korean Fair Trade Commission  
15 filed an amicus brief stating that it had no need or use for the requested discovery).

16 While Smile Create represents that Japanese courts have been receptive in other matters to  
17 assistance in discovery from the United States, the cases on which it relies do not actually support  
18 that proposition. *See* Dkt. No. 1 at 22. Neither case concerned Japanese courts’ receptivity to  
19 discovery of the personal identifying information of individuals posting anonymous online  
20 reviews. First, in *Marubeni Am. Corp. v. LBA Y.K.*, the Second Circuit merely observed that  
21 “there is no evidence in the record of what discovery would be available in, or is acceptable to, the  
22 Japanese District Court in Tokyo.” 335 F. App’x 95, 97–98 (2d Cir. 2009). Second, in *In re Ex*  
23 *Parte LG Elecs. Deutschland GmbH*, the discovery at issue concerned documents reflecting the  
24 transfer of intellectual property rights between private parties, not the personal identifying  
25 information of account holders. No. 12CV1197-LAB MDD, 2012 WL 1836283, at \*1 (S.D. Cal.  
26 May 21, 2012).

27 But Mr. Nakazawa, an attorney for Smile Create who is licensed to practice in Japan,  
28

1 asserts that he is aware of no restrictions or policies under Japanese law that would limit the  
 2 gathering of evidence that Smile Create seeks here. Dkt. No. 4 ¶ 30. Therefore, in the absence of  
 3 evidence that Japanese courts would object to Smile Create’s use of the information sought in the  
 4 subpoena, or that they more generally object to the judicial assistance of U.S. federal courts, the  
 5 Court concludes that this factor weighs in favor of authorizing service of the subpoena.

### 6 **3. Circumvention of Proof-Gathering Restrictions**

7 Under this factor, the Court considers whether Smile Create’s request for discovery  
 8 “conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a  
 9 foreign country or the United States.” *Intel*, 542 U.S. at 265. “A perception that an applicant has  
 10 side-stepped less-than-favorable discovery rules by resorting immediately to § 1782 can be a  
 11 factor in a court’s analysis.” *In re Varian Med. Sys.*, 2014 WL 1161568, at \*5 (quoting *In re*  
 12 *Cathode Ray Tube (CRT) Antitrust Litig.*, No. C07-5944-SC, 2013 WL 183944, at \*3 (N.D. Cal.  
 13 Jan. 17, 2013)). Courts have found that this factor weighs in favor of discovery where there is  
 14 “nothing to suggest that [the applicant] is attempting to circumvent foreign proof-gathering  
 15 restrictions.” *In re Google, Inc.*, No. 14-mc-80333-DMR, 2014 WL 7146994, at \*3 (N.D. Cal.,  
 16 Dec. 15, 2014); *see also In re Eurasian Natural Resources Corp. Ltd.*, No. 18-mc-80041-LB, 2018  
 17 WL 1557167, at \*3 (N.D. Cal., Mar. 30, 2018) (finding that the third *Intel* factor weighed in favor  
 18 of discovery where there was “no evidence” of an attempt to circumvent foreign proof-gathering  
 19 restrictions or policies).

20 As noted above, Mr. Nakazawa asserts that he is aware of no restrictions or policies under  
 21 Japanese law that would limit the gathering of evidence that Smile Create seeks here. Dkt. No. 4  
 22 ¶ 30. Smile Create also observes that evidence in Google’s possession is outside the reach of a  
 23 Japanese court’s jurisdiction. *Id.* ¶ 29. In the absence of contrary information regarding the  
 24 procedures acceptable to a Japanese court for identifying the Google account holders, the Court  
 25 concludes that this factor weighs in favor of authorizing service of the subpoena.

### 26 **4. Unduly Burdensome or Intrusive Discovery**

27 Under this factor, the Court considers whether the discovery is sought is “unduly intrusive  
 28 or burdensome.” *Intel*, 542 U.S. at 265.

1 Smile Create’s attorney, Mr. Nakazawa, contends that the Google account holders’  
2 identities are needed in order to bring a defamation lawsuit in Japan. Dkt. No. 4 ¶ 28. Smile  
3 Create’s proposed subpoena to Google seeks “all documents” identifying users of Google  
4 accounts from which reviews were posted, including all IP addresses, names, addresses, e-mail  
5 addresses, and e-mail address or telephone numbers for recovery or alternate purpose, and the  
6 name, address, and telephone number of each account holder. Dkt. No. 5 at 7–9. The subpoena  
7 seeks all such documents from the month and year of each posting to the present date. *Id.*

8 The application reflects that the earliest negative review was posted on June 19, 2019 and  
9 the latest was posted on November 23, 2020. Thus, the subpoena potentially encompasses nearly  
10 two years’ worth of identifying information for the account holder for the earliest posting and at  
11 least six months’ worth of identifying information for the account holder for the latest posting.  
12 The application does not explain why Smile Create requires identifying documents spanning  
13 months or years to identify each account holder.

14 There is no question that the proposed subpoena intrudes upon the privacy interests of  
15 Google account holders whose information Smile Create seeks, and the Court questions whether  
16 the procedures typically available for addressing and resolving challenges to a subpoena served  
17 pursuant to an ex parte application adequately protect the interests of the account holders here. As  
18 a practical matter, individuals in Japan may not be able to easily invoke the available U.S. judicial  
19 processes to object to the proposed subpoena, and it is not clear whether or to what extent Google  
20 may act to protect the privacy interests of its account holders.

21 Here, Smile Create may address the Court’s concerns about the breadth of the subpoena by  
22 narrowing the scope of documents requested for each account so that each request is limited to  
23 documents sufficient to identify (by name, telephone number, email address and mailing address)  
24 the person or persons who used or controlled each account on the date each negative review was  
25 posted. Alternatively, Smile Create may file an amended or supplemental application that  
26 explains why it requires the broader range of documents listed in its proposed subpoena.

27 The Court’s concerns about the account holders’ privacy interests can be addressed by  
28 adopting procedural protections to ensure that any objections an account holder may have to

United States District Court  
Northern District of California

1 disclosure of his or her information are addressed by the Court before disclosure is made.  
2 Specifically, if the Court authorizes service of a subpoena, it will require Google to give the  
3 account holder an opportunity to object and to notify the Court of any objections it receives from  
4 an account holder before Google discloses any objected-to documents to Smile Create.

5 **IV. CONCLUSION**

6 Smile Create’s application meets the statutory criteria for an order authorizing service of a  
7 modified subpoena. While some of the factors that inform the Court’s exercise of its discretion  
8 under *Intel* favor authorizing service of a modified subpoena, the last factor does not. For the  
9 reasons explained above, the Court denies Smile Create’s application without prejudice. Smile  
10 Create may file an amended proposed subpoena that narrows the documents requested, or it may  
11 file an amended or supplemental application in support of its original subpoena, by July 6, 2021.

12 **IT IS SO ORDERED.**

13 Dated: June 4, 2021

14  
15   
16 VIRGINIA K. DEMARCHI  
17 United States Magistrate Judge  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28