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2 UNITED STATES DISTRICT COURT  
3 NORTHERN DISTRICT OF CALIFORNIA

4 Case No. 21-mc-80254-SVK

5 In re:  
6 MEDICAL INCORPORATED  
7 ASSOCIATION SMILE CREATE,  
8 Applicant.

**ORDER ON *EX PARTE* APPLICATION  
FOR ORDER PURSUANT TO 28 U.S.C.  
§ 1782 TO PERMIT DISCOVERY FOR  
USE IN FOREIGN PROCEEDING**

Re: Dkt. No. 1

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11 Before the Court is the *ex parte* application of Medical Incorporation Smile Create  
12 (“Applicant”) for an order pursuant to 28 U.S.C. § 1782 authorizing service of a subpoena for  
13 documents on Google LLC (“Google”). Dkt. 1. Applicant operates an orthodontic clinic under  
14 the name Jingumae Orthodontic Clinic in Tokyo, Japan. Dkt. 1-1 (Declaration of Yuichi  
15 Funakoshi) ¶ 4. Applicant requests permission to subpoena information relating to the Google  
16 accounts of users who posted negative reviews and ratings on Applicant’s Google Maps page.  
17 Dkt. 1 at 2. Applicant alleges that these statements are actionable as reputational torts under  
18 Japanese law. *Id.*; Funakoshi Decl. ¶¶ 4-5.

19 The Court **GRANTS** Applicant’s section 1782 application for the reasons and on the  
20 conditions discussed below.

21 **I. BACKGROUND**

22 Between August and October 2021, Google users posted one- or two-star reviews and  
23 “offensive statements” on the Google Maps page associated with Applicant. Dkt. 1 at 2;  
24 Funakoshi Decl. ¶ 4 and Exs. 1-3; Dkt. 1-2 (Reynolds Decl.) at Exs. A-F. Applicant asserts that it  
25 intends to bring a lawsuit in Japan against the people who control the Google accounts that posted  
26 these reviews of Applicant as soon as their identities are ascertained. *Id.* ¶ 6. As a result,  
27 Applicant seeks discovery of the account users’ identities by subpoena to Google.  
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1           **II.     LEGAL STANDARD**

2           A district court may order the production of documents or testimony for use in a foreign  
3 legal proceeding under 28 U.S.C. § 1782 as long as the disclosure would not violate a legal  
4 privilege. 28 U.S.C. § 1782(a); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 249  
5 (2004). An applicant may invoke the statute where (1) the discovery is sought from a person  
6 residing in the district of the court to which the application is made; (2) the discovery is for use in  
7 a proceeding before a foreign tribunal; and (3) the applicant is a foreign or international tribunal or  
8 an “interested person.” 28 U.S.C. § 1782(a).

9           A district court is not required to grant an application that meets the statutory criteria, but  
10 instead retains discretion to determine what discovery, if any, should be permitted. *Intel*, 542 U.S.  
11 at 264. Several factors guide the Court’s decision on a section 1782(a) request:

- 12           (1) whether “the person from whom discovery is sought is a participant in the foreign  
13 proceeding;”  
14           (2) “the nature of the foreign tribunal, the character of the proceedings underway abroad,  
15 and the receptivity of the foreign government or the court or agency abroad to U.S.  
16 federal-court judicial assistance;”  
17           (3) whether the request “conceals an attempt to circumvent foreign proof-gathering  
18 restrictions or other policies of a foreign country or the United States;” and  
19           (4) whether the discovery requested is “unduly intrusive or burdensome.”

20 *Id.* at 264–65. The party seeking discovery need not establish that the information sought would  
21 be discoverable under the governing law in the foreign proceeding or that United States law would  
22 allow discovery in an analogous domestic proceeding. *Id.* at 247, 261–63.

23           A district court’s discretion is guided by the twin aims of section 1782: providing efficient  
24 assistance to participants in international litigation and encouraging foreign countries by example  
25 to provide similar assistance to our courts. *Schmitz v. Bernstein Liebhard & Lifshitz LLP*, 376  
26 F.3d 79, 84 (2d Cir. 2004).

27           Applications made under 28 U.S.C. § 1782 are typically considered on an *ex parte* basis,  
28 since “parties will be given adequate notice of any discovery taken pursuant to the request and will

1 then have the opportunity to move to quash the discovery or to participate in it.” *IPCom GmbH &*  
 2 *Co. KG v. Apple, Inc.*, 61 F. Supp. 3d 919, 922 (N.D. Cal. 2014) (quoting *In re Republic of*  
 3 *Ecuador*, No. C-10-80225 MISC CRB (EMC), 2010 WL 3702427, at \*2 (N.D. Cal. Sept. 15,  
 4 2010)) (internal quotation marks omitted). “Consequently, orders granting § 1782 applications  
 5 typically only provide that discovery is ‘authorized,’ and thus the opposing party may still raise  
 6 objections and exercise its due process rights by challenging the discovery after it is issued via a  
 7 motion to quash, which mitigates concerns regarding any unfairness of granting the application *ex*  
 8 *parte.*” *In re Ex Parte Application Varian Med. Sys. Int’l AG, Applicant*, No. 16-mc-80048-MEJ,  
 9 2016 WL 1161568, at \*2 (N.D. Cal. Mar. 24, 2016).

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

### 14 **III. DISCUSSION**

#### 15 **A. Statutory Requirements**

16 The application satisfies the statutory requirements of section 1782(a). First, the subpoena  
 17 seeks discovery from Google, which is located in this District. Funakoshi Decl. ¶ 8. Second,  
 18 Applicant requests this discovery for use in a civil action that it intends to file in Japan once it  
 19 learns the identity of the Google account users responsible for the relevant postings. *Id.* ¶ 6. This  
 20 proceeding before a foreign tribunal appears to be within reasonable contemplation. *See Intel*, 542  
 21 U.S. at 259 (adjudicative proceedings need not be pending or imminent, so long as they are within  
 22 reasonable contemplation). Third, Applicant, as the putative plaintiff in the contemplated civil  
 23 action, is an interested person within the meaning of the statute.

#### 24 **B. Intel Factors**

25 Although the application satisfies the statutory requirements, the Court must also  
 26 determine whether judicial assistance is appropriate by considering the *Intel* factors.

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

28 The first factor considers whether the person from whom discovery is sought is a party to

1 the foreign proceeding. *Intel*, 542 U.S. at 247. However, “the key issue is whether the material is  
2 obtainable through the foreign proceeding.” *In re Varian Med. Sys.*, 2016 WL 1161568, at \*3  
3 (internal quotation marks and citation omitted).

4 According to the application, Google will not be a party to the civil action Applicant plans  
5 to bring in Japan. Funakoshi Decl. ¶ 8. The documents Applicant seeks by subpoena are located  
6 in the United States, and Applicant contends that the evidence is thus outside the reach of a  
7 Japanese court’s jurisdiction. *See id.* Under these circumstances, the Court finds that there is a  
8 need for assistance pursuant to section 1782, so this factor weighs in favor of permitting discovery

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

10 This factor requires the Court to consider “the nature of the foreign tribunal, the character  
11 of the proceedings underway abroad, and the receptivity of the foreign government or the court or  
12 agency abroad to U.S. federal-court judicial assistance.” *Intel*, 542 U.S. at 264. “This factor  
13 focuses on whether the foreign tribunal is willing to consider the information sought.” *In re*  
14 *Varian Med. Sys.*, 2016 WL 1161568, at \*4. “[I]f there is reliable evidence that the foreign  
15 tribunal would not make any use of the requested material, it may be irresponsible for the district  
16 court to order discovery, especially where it involves substantial costs to the parties involved.” *Id.*  
17 (quoting *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 241 (D. Mass. 2008)). Courts have  
18 denied requests for discovery where the foreign tribunal or government expressly states it does not  
19 want the assistance of a United States federal court under section 1782. *See, e.g., Schmitz*, 376  
20 F.3d at 84-85 (affirming denial of section 1782 request where German government expressly  
21 objected to the information sought due to concerns it would jeopardize an ongoing German  
22 criminal investigation, as well as German sovereign rights); *In re Ex Parte App. Of Qualcomm*  
23 *Inc.*, 162 F. Supp. 3d 1029, 1040-41 (N.D. Cal. 2016) (concluding that this *Intel* factor weighed  
24 heavily against discovery where Korean Fair Trade Commission filed an amicus brief stating it  
25 had no need or use for requested discovery).

26 Here, Applicant represents that Japanese courts have been receptive in other matters to  
27 assistance in discovery from the United States. Dkt. 1 at 5. In the absence of evidence that  
28 Japanese courts would object to Applicant’s discovery of the information sought in the subpoena,

1 or that Japanese courts object more generally to the judicial assistance of U.S. federal courts, the  
2 Court finds that this factor weighs in favor of authorizing service of the subpoena.

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

4 This Court must next consider whether Applicant’s request for discovery “conceals an  
5 attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or  
6 the United States.” *Intel*, 542 U.S. at 265. “A perception that an applicant has side-stepped less-  
7 than-favorable discovery rules by resorting immediately to § 1782 can be a factor in a court’s  
8 analysis.” *In re Varian Med. Sys.*, 2014 WL 1161568, at \*5 (citation omitted). Courts have found  
9 that this factor weighs in favor of discovery where there is “nothing to suggest that [the applicant]  
10 is attempting to circumvent foreign proof-gathering restrictions.” *In re Google, Inc.*, No. 14-mc-  
11 80333-DMR, 2014 WL 7146994, at \*3 (N.D. Cal. Dec. 15, 2014); *see also In re Eurasian Natural*  
12 *Resources Corp. Ltd.*, No. 18-mc-80041-LB, 2018 WL 1557167, at \*3 (N.D. Cal. Mar. 30, 2018).

13 Applicant supports the application with the declaration of Yuichi Funakoshi, an attorney  
14 licensed to practice law in Japan. Funakoshi Decl. ¶ 1. Mr. Funakoshi states that he is aware of  
15 no restrictions or policies under Japanese law that would limit the gathering of the evidence  
16 Applicant seeks here. *Id.* ¶ 9. In the absence of contrary information regarding the procedures  
17 acceptable to a Japanese court for identifying the Google account-users, the Court concludes that  
18 this factor also weighs in favor of discovery.

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

20 Under the final factor, the Court considers whether the discovery sought is “unduly  
21 intrusive or burdensome.” *Intel*, 542 U.S. at 265. Request Nos. 1-4 in Applicant’s proposed  
22 subpoena to Google seek the following categories of documents with regard to the three Google  
23 accounts at issue (defined in the proposed subpoena, collectively, as “ALL ACCOUNTS”):

- 24 1. ALL DOCUMENTS identifying the users of ALL ACCOUNTS from the date the  
25 Google Accounts were created to the present, including all names, addresses (including  
26 postal codes), e-mail addresses (including email addresses used for recovery or other  
27 purposes), and telephone numbers.
- 28 2. ALL DOCUMENTS showing all names and addresses (including postal codes) of  
credit card holders registered on ALL ACCOUNTS.

1 3. ALL DOCUMENTS showing access log (including dates, times, IP addresses, and  
2 access type) of ALL ACCOUNTS from the date the foregoing accounts were created to  
the present, including access log for each login (namely, login history).

3 4. ALL DOCUMENTS showing access log (including dates, times, IP addresses, and  
4 access type) of ALL ACCOUNTS at the time each of the SUBJECT REVIEWS were  
posted.

5 Dkt. 1-5.

6 Applicant does not state whether the information it seeks is confidential to the account  
7 user(s) at issue, but the Court assumes that it is. The Court finds under the circumstances of this  
8 case that Applicant has attempted to narrowly tailor the subpoena to seek only sufficient  
9 information to identify the users of the two accounts at issue. Applicant has demonstrated why the  
10 access logs are relevant and necessary, as well as why the access logs close in time to when the  
11 reviews were posted would not be sufficient. Dkt. 1 at 6-7; Funakoshi Decl. ¶¶ 7; Dkt. 1-3 (Togi  
12 Decl.) ¶¶ 6-8. Also, the subpoena appropriately does not seek the content of any communications  
13 associated with the accounts at issue. *See, e.g., Optiver Australia Pty. Ltd. v. Tibra Trading Pty.*  
14 *Ltd.*, Case No. C 12-80242 EJD (PSG), 2013 WL 256771, at \*2-3 (Jan. 23, 2013) (discussing  
15 prohibitions of the Stored Communications Act, 18 U.S.C. § 2701 *et seq.*). Further, the subpoena  
16 seeks only the names and addresses of the person(s) whose credit card is associated with the  
17 Google accounts and does not seek disclosure of credit card numbers or any other sensitive  
18 information. *See In re Med. Corp. H&S*, No. 19-MC-80058-VKD, 2019 WL 1230440, at \*4  
19 (N.D. Cal. Mar. 15, 2019) (limiting a subpoena for account-user credit card information to the card  
20 holder's name and address).

21 Accordingly, subject to the requirements discussed below, the Court will permit Applicant  
22 to serve the proposed subpoena on Google.

#### 23 **IV. CONCLUSION**

24 The application meets the statutory criteria for an order authorizing service of the proposed  
25 subpoena. In addition, the factors that inform the Court's exercise of its discretion under *Intel*  
26 favor authorizing service of the subpoena proposed by Applicant.

27 Accordingly, the Court authorizes service of the proposed subpoena on Google. This order  
28 does not foreclose a motion to quash or modify the subpoena by Google following service or by

United States District Court  
Northern District of California

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the Google account user(s) whose identifying information is sought, and the Court orders Applicant to comply with the following requirements to ensure all interested persons have an opportunity to contest the subpoena if they wish:

1. At the time of service of the subpoena, Applicant must also serve a copy of this order on Google.
2. Within 10 calendar days of service of the subpoena and this order, Google shall notify each of the account users that their identifying information is sought by Applicant and shall serve a copy of this order on each such account user.
3. Google and/or each account user whose identifying information is sought may, within 21 days from the date of the notice, file a motion in this Court contesting the subpoena (including a motion to quash or modify the subpoena).
4. If any party contests the subpoena, Google shall preserve, but not disclose, the information sought by the subpoena pending resolution of that contest.
5. Any information Applicant obtains pursuant to the subpoena may be used only for purposes of the anticipated action in Japan, and Applicant may not release such information or use it for any other purpose, absent a Court order authorizing such release or use.

**SO ORDERED.**

Dated: January 11, 2022

  
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SUSAN VAN KEULEN  
United States Magistrate Judge