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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

IN RE EX PARTE  
APPLICATION OF JAMES F.  
RIGBY, JR., CHAPTER 7  
TRUSTEE OF THE ESTATE OF  
MICHAEL R. MASTRO

Applicant.

CASE NO. 13cv0271-MMA (MDD)  
ORDER GRANTING *EX PARTE*  
APPLICATION FOR ORDER  
PURSUANT TO 28 U.S.C. § 1782

[ECF. No. 1]

On February 1, 2013, James R. Rigby, Jr., the Chapter 7 Trustee of the Estate of Michael R. Mastro, (“Applicant” or “Trustee”) filed an Ex Parte Application for an Order Pursuant to 28 U.S.C. § 1782 Granting Leave to Obtain Discovery from Michael K. Mastro for Use in Foreign Proceedings. (ECF No. 1). The Applicant seeks permission to subpoena Mr. Mastro for deposition regarding a dispute pending in France.

According to the Application, Michael K. Mastro is the son of Michael R. Mastro. An involuntary bankruptcy petition was filed regarding Michael R. Mastro’s business in 2009. In 2011, the Honorable Marc Berreca of the United States Bankruptcy Court for the Western District of Washington found that Michael R. Mastro and his wife had

1 made false and fraudulent representations and fraudulently transferred  
2 assets. Judge Barreco ordered the arrest of Michael R. Mastro and his  
3 wife in July 2011. They were arrested in France on October 24, 2012. A  
4 federal indictment charging them with bankruptcy fraud and money  
5 laundering was entered on October 25, 2012.

6 The Application further reports that in November 2012, the  
7 Trustee obtained an order from the district court in Annecy, France,  
8 authorizing the bailiff of that court to take possession of and inventory  
9 all of the documents and property found at the home of Michael R.  
10 Mastro and his wife in France. In December 2012, Michael R. Mastro,  
11 his wife, and Michael K. Mastro filed a petition in the French court  
12 seeking, among other things, return of certain personal property.

13 Michael K. Mastro resides in the Southern District of California.

#### 14 **I. LEGAL STANDARD**

15 A district court may grant an application pursuant to 28 U.S.C. §  
16 1782 where: (1) the person from whom the discovery is sought resides or  
17 is found in the district of the district court to which the application is  
18 made; (2) the discovery is for use in a proceeding before a foreign  
19 tribunal; and, (3) the application is made by a foreign or internal  
20 tribunal or any interested person. *See, e.g., Lazaridis v. International*  
21 *Centre for Missing and Exploited Children*, 760 F.Supp.2d 109, 112  
22 (D.D.C. 2011).

23 Even if these requirements are met, a district court retains the  
24 discretion to deny the request. *Intel Corp. v. Advanced Micro Devices,*  
25 *Inc.*, 542 U.S. 241, 264 (2004); *In re Premises Located at 840 140th*  
26 *Avenue., N.E., Bellevue, Wash.*, 634 F.3d 557, 563 (9th Cir. 2011). The  
27 Supreme Court, in *Intel*, identified several factors that a court should  
28 consider in ruling on a request under § 1782:

1 “(1) whether the material sought is within the foreign  
2 tribunal's jurisdictional reach and thus accessible absent  
3 Section 1782 aid;

4 (2) the nature of the foreign tribunal, the character of the  
5 proceedings underway abroad, and the receptivity of the  
6 foreign government or the court or agency abroad to U.S.  
7 federal-court jurisdictional assistance;

8 (3) whether the Section 1782 request conceals an attempt to  
9 circumvent foreign proof-gathering restrictions or other  
10 policies of a foreign country or the United States; and,

11 (4) whether the subpoena contains unduly intrusive or  
12 burdensome requests.”

13 542 U.S. at 264-65.

## 14 II. DISCUSSION

### 15 A. Authority to Issue Subpoena

16 Having reviewed the application, the Court finds that the statutory  
17 requirements have been satisfied. Mr. Mastro resides in the Southern  
18 District of California, there is a pending proceeding in a French court  
19 and the Trustee is an “interested party” as he is a party to the litigation  
20 in France.

### 21 B. Discretionary Factors

#### 22 1. Jurisdictional Reach of Foreign Tribunal

23 The Supreme Court, in *Intel*, stated that,

24 when the person from whom discovery is sought is a  
25 participant in the foreign proceeding ..., the need for § 1782(a)  
26 aid generally is not as apparent as it ordinarily is when  
27 evidence is sought from a nonparticipant in the matter  
28 arising abroad. A foreign tribunal has jurisdiction over those  
appearing before it, and can itself order them to produce  
evidence. In contrast, nonparticipants in the foreign  
proceeding may be outside the foreign tribunal's  
jurisdictional reach; hence, their evidence, available in the  
United States, may be unobtainable absent § 1782(a)  
aid.

542 U.S. at 264.

Mr. Mastro is a party to the French lawsuit so this factor may  
weigh against granting the application. The Trustee asserts, however,

1 that French civil procedure does not include a discovery process  
2 adequate to the task. (ECF No. 1 at 6). Specifically, the Trustee asserts  
3 that French procedure requires that the party seeking discovery needs to  
4 identify the precise document sought for production. (*Id.*). The  
5 application does not address the availability of depositions in French  
6 civil procedure. Although § 1782 does not have an “exhaustion”  
7 requirement, the Court is permitted, in deciding how to exercise its  
8 discretion, to consider whether the applicant has availed itself of  
9 discovery procedures in the foreign forum. *See In re Degitechnic*, 2007  
10 WL 1367697 at \*4 (W.D.Wash. 2007). Here, there is a lack of clarity on  
11 the issue of whether the jurisdictional reach of the French court extends  
12 to depositions. Due to the lack of clarity, the Court finds that this factor  
13 weighs against granting this application.

## 14 **2. Nature and Receptivity of Foreign Tribunal**

15 The Trustee has made a sufficient showing that the French courts  
16 would be receptive to the introduction of evidence obtained pursuant to  
17 § 1782. Consequently, this Court views this factor as favoring the  
18 Applicant.

## 19 **3. Attempt to Circumvent Foreign Proof-Gathering** 20 **Restrictions and Policies**

21 Applicant claims to be “unaware of any restrictions on proof-  
22 gathering that would prohibit obtaining the discovery it seeks through  
23 Section 1782.” (ECF No. 1 at 8). As discussed above, however, the  
24 Trustee has not addressed the availability of party depositions in the  
25 French proceeding. So, while there is no evidence that the Trustee is  
26 seeking to circumvent restrictions that may exist in the host court, this  
27 factor does not help to convince the Court to exercise its discretion in  
28 favor of the Applicant.

1           **4. Undue Intrusion or Burden**

2           It does not appear that requiring Mr. Mastro to be deposed  
3 regarding the petition he filed in France would constitute and undue  
4 intrusion or burden upon him. To the contrary, if French procedure  
5 allows for depositions, Mr. Mastro might be required to travel there to be  
6 deposed. The instant arrangement is far more convenient for him and  
7 for the Trustee.

8           **C. Final Analysis**

9           The Court finds that applying the *Intel* factors does not clearly  
10 suggest how the Court should exercise its discretion in this case. But,  
11 considering that our courts generally favor discovery, the Court will  
12 authorize the issuance of the requested deposition subpoena. A copy of  
13 this Order must be served with the subpoena.

14   **III. CONCLUSION**

15           The application is **GRANTED**. Applicant may serve Michael K.  
16 Mastro with a deposition subpoena. A copy of this Order must be served  
17 with the subpoena. Nothing herein prevents Mr. Mastro from asserting  
18 any rights he may have to challenge the subpoena after it is served. Any  
19 such challenge must be filed as a motion to quash in this docket.

20   **IT IS SO ORDERED.**

21           DATED: February 19, 2013

22     
23   Hon. Mitchell D. Dembin  
24   U.S. Magistrate Judge