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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In Re Ex Parte Application of OmniArch
Capital Corporation, OmniArch
Management Corporation, OmniArch
Fixed Income Limited Partnership, and
OmniArch Fixed Income G.P. Ltd.,
Applicants, For an Order Pursuant to 28
U.S.C. § 1782 Granting Leave to Serve
Discovery in Aid of a Foreign Proceeding

Case No.: 16-cv-02991-CAB-AGS

**ORDER GRANTING EX PARTE
APPLICATION TO SUBPOENA
DOCUMENTS IN AID OF A
FOREIGN JUDICIAL PROCEEDING**

Some of the parties to a Canadian legal action who accused two American investment management companies of bilking them out of roughly \$40 million have returned to this Court seeking additional discovery assistance. Previously, this Court allowed applicants—a number of entities that can be functionally grouped together and referred to as OmniArch—to subpoena records from one of the American companies to produce transactional records bearing on this alleged fraud. Now OmniArch seeks this Court’s assistance in subpoenaing the deposition of the defendant firm’s principal and the records of two additional entities. OmniArch’s *ex parte* application is **GRANTED**.

DISCUSSION

When international courts or litigants request evidence from the United States, a U.S. district court may order a person residing or found in its district “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. . .” 28 U.S.C. § 1782(a). In order to issue a subpoena under

1 section 1782, a court must find that the foreign application meets three threshold statutory
2 requirements, and that the exercise of its discretion is proper based on the four
3 non-exhaustive factors set forth in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S.
4 241, 264-65 (2004).

5 **A. Statutory Authority**

6 A foreign request for judicial assistance under section 1782 must establish that:
7 (1) the person from whom discovery is sought “resides or is found” in the district; (2) the
8 requested discovery is “for use in a proceeding in a foreign or international tribunal”; and
9 (3) the request is made “by a foreign or international tribunal” or “any interested person.”
10 28 U.S.C. § 1782(a); *see also IPCom GMBH & Co. KG v. Apple Inc.*, 61 F.Supp.3d 919,
11 922 (N.D. Cal. 2014).

12 These threshold requirements are met here. First, the discovery is sought from
13 J. Thomas Epperson (for deposition) as well as Team Nation Investment Fund III, L.P.,
14 and San Diego Private Bank (for records), all of which reside in this district. Second, the
15 deposition would help explain the documents already provided, and the additional
16 documentary requests will help clear up the financial transactions that OmniArch claims
17 are part of the fraud. The Court of Queen’s Bench of Alberta, Canada, already ordered the
18 requested deposition and documents divulged, so they would clearly be of use in the
19 Canadian litigation. Finally, both the Canadian court, in its *ex parte* disclosure order, and
20 the plaintiff Canadian businesses, through the present application, have requested this
21 Court’s assistance. [Doc. 1; Doc. 1-7, at 6, ¶10.]

22 **B. Intel Discretionary Factors**

23 But “a district court is not required to grant a § 1782(a) discovery application simply
24 because it has the authority to do so.” *Intel*, 542 U.S. at 264 (citation omitted). In
25 exercising its discretion, a court must consider: (1) whether “the person from whom
26 discovery is sought is a participant in the foreign proceeding”; (2) “the nature of the foreign
27 tribunal, the character of the proceedings underway abroad, and the receptivity of the
28 foreign government or the court or agency abroad to U.S. federal-court judicial assistance”;

1 (3) “whether the § 1782(a) request conceals an attempt to circumvent foreign proof-
2 gathering restrictions or other policies of a foreign country or the United States”; and
3 (4) whether it is “unduly intrusive or burdensome.” *Id.* at 264-65 (citations omitted).

4 Each of the *Intel* factors weigh in favor of issuing the requested subpoenas.
5 Epperson, Team Nation, and San Diego Private Bank are not parties to the foreign
6 proceeding. *See Intel*, 542 U.S. at 264 (“[T]he need for § 1782(a) aid generally is not as
7 apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter
8 arising abroad.”). The foreign tribunal is a Canadian civil court with familiar legal
9 procedures and safeguards, proceeding in a fashion typical to American lawsuits. The
10 foreign court explicitly requested American judicial assistance. And the Canadian
11 government has long been receptive to such American judicial cooperation. *See, e.g., In*
12 *re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557, 563-64 (9th Cir.
13 2011) (discussing the mutual legal assistance treaty between Canada and the United States).
14 Since the application largely echoes the Canadian court’s disclosure order, it is plainly not
15 a camouflaged method for circumventing Canadian evidence-gathering restrictions or
16 similar policies. Finally, the subpoena should not unduly burden any of the responding
17 parties. The requested discovery mirrors the Canadian court’s order, goes to the heart of
18 the Canadian action, and is narrowly tailored to that proceeding’s ends.

19 **C. Ex Parte Proceedings**

20 The Ninth Circuit recognizes that § 1782 applications and letters rogatory “are
21 customarily received and appropriate action taken with respect thereto *ex parte*,” because
22 witnesses can later “exercise[] their due process rights by motions to quash the subpoenas.”
23 *In re Letters Rogatory from the Tokyo District, Tokyo, Japan*, 539 F.2d 1216, 1219 (9th Cir.
24 1976). Thus, this Court permits the application to proceed *ex parte*. But in case there are
25 factual or legal issues that are not apparent from the current *ex parte* record, the responding
26 parties will have 15 calendar days after service to contest the respective subpoenas.

1 **CONCLUSION**

2 For these reasons, the application is **GRANTED**. The applicants may cause service
3 of the proposed subpoenas on J. Thomas Epperson, Team Nation Investment Fund III, L.P.,
4 and San Diego Private Bank, except that the subpoenas' return date must be set at least
5 15 calendar days after service.

6 Dated: May 10, 2017

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9 Hon. Andrew G. Schopler
10 United States Magistrate Judge
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