

1. An order from the U.S. District Court for the Northern District of California limiting a subpoena to Discord for electronically stored information (ESI) and declining to compel Discord to produce passwords and content for certain accounts, under 28 U.S.C. § 1782 and the Stored Communications Act (SCA).

In *In re Path Network, Inc.*, No. 23-MC-80148-PHK, 2023 WL 8115045 (N.D. Cal. Nov. 22, 2023), U.S. Magistrate Judge Peter H. Kang considered the standards applicable to a subpoena for information related to certain Discord accounts, including password information, under 28 U.S.C. § 1782 and the SCA.

This action concerned a subpoena for ESI served on Discord, Inc. for aid in a Canadian litigation. The subpoena was served by the Plaintiffs in the Canadian litigation, which were two companies that provide “data, hosting, and cyber services to subscribers.” *Id.* at *1. The Defendants in the Canadian action consisted of Michael Gervais, a former employee of Plaintiffs, and several of Gervais’ alleged co-conspirators. Plaintiffs alleged that Gervais disclosed their confidential information to third parties as his employment was ending, made defamatory statements about Plaintiffs, and acted with the other defendants to help terminate Plaintiffs’ relationships with their clients.

Plaintiffs alleged that Defendants communicated among themselves over the electronic messaging application Discord under various usernames and also communicated with Plaintiffs’ employees to make a ransom demand for return of confidential information. Plaintiffs sought and received from the Canadian courts an order requiring Defendants to grant access to Defendants’ Discord accounts. *Id.* at *2. Plaintiffs secured many of Defendants’ devices, but Plaintiffs claimed that the accounts contained on these devices were locked behind passwords and Defendants did not effectively provide those passwords. Plaintiffs subsequently requested that Discord “preserve all messaging data” related to Defendants. *Id.* at *3. Discord responded that it “would not preserve the requested data unless legally obligated to do so,” which prompted Plaintiffs’ subpoena application under 28 U.S.C. § 1782 (“Section 1782”) in the Northern District of California for discovery in aid of a foreign proceeding.

In the California proceeding, Plaintiffs sought access to Defendants’ account data, login history, passwords, and message contents on the Discord platform, across Defendants’ various Discord accounts. Discord agreed to provide account data and login history but resisted turning over passwords and message contents. Ultimately, Magistrate Judge Kang granted Plaintiffs’ application as modified to exclude passwords and the message contents and ordered Plaintiffs and Discord to submit a revised subpoena to the court for approval. *Id.* at *18. He also agreed to the parties’ stipulated protective order, finding that there was good cause to protect the private messages of third parties, especially of minors, because Discord “is a messaging platform which is popular with young people playing online video games” and so “information, messages, and documents involving minors may be implicated (whether inadvertently or because the subpoena is broadly drafted) by the discovery sought.”

Magistrate Judge Kang began by analyzing Plaintiffs’ request under the requirements of Section 1782. *Id.* at *4. He noted that there were three statutory factors and four discretionary factors that required consideration. He held that the three statutory requirements were all satisfied. First, “the person from whom the discovery is sought ‘resides or is found’ in the district of the district court

where the application is made” because Discord was headquartered in San Francisco, California. Second, “the discovery is ‘for use in a proceeding in a foreign or international tribunal’” because the discovery sought was in aid of a Canadian proceeding. Third, “the application is made by a foreign or international tribunal or ‘any interested person’” because Plaintiffs were interested parties in the underlying Canadian litigation. *Id.* at *4-6.

Magistrate Judge Kang also noted four discretionary factors that the court “considers ... in determining whether to authorize discovery requested” under the Supreme Court’s opinion in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004): (A) whether the discovery target is a “participant” in the foreign proceeding, “(B) ‘the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal court judicial assistance,’” “(C) whether the request ‘conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States,’” and “(D) whether the request is ‘unduly intrusive or burdensome.’” *Id.* at *4 (quoting *Intel*, 542 U.S. at 264-65).

Magistrate Judge Kang held that the proposed discovery satisfied the first three discretionary factors. He held that the first factor was satisfied because Discord was not a party to the foreign proceeding such that the Canadian court could order Discord to comply, necessitating the subpoena in the California action. *Id.* at *6-7. He held that the second factor was satisfied because the Canadian courts had sought the kinds of discovery at issue in the subpoena. *Id.* at *7. He held that the third factor was satisfied because “the record of the proceedings in the Canadian lawsuit demonstrates that [Plaintiffs] pursued proof-gathering procedures in Canada extensively before filing the instant Application.”

However, Magistrate Judge Kang held that the fourth discretionary factor, “whether the request is ‘unduly intrusive or burdensome,’” counseled against disclosing passwords and personal information associated with Defendants. *Id.* at *4, 7. He found that the subpoena provided too little information to Discord to identify accounts or information associated with Defendants other than the accounts explicitly mentioned in the subpoena. *Id.* at *9. This was especially true because the subpoena mentioned the individuals by name and username only, but, other than those individuals, “it is unknown how many other persons among Discord’s worldwide customer base have the same or similar names” or usernames. *Id.* at *10. He thus found that the suggested subpoena as written would be overly burdensome and consequently was overbroad such that it was disproportionate to the needs of the case.

Magistrate Judge Kang therefore granted in part the application for leave to serve a subpoena and ordered Plaintiffs and Discord to meet and confer and produce a subpoena compliant with the court’s findings. *Id.* at *10, 18. But he noted that “[e]ven if [Plaintiffs] satisfy the Section 1782 requirements, the Court may not grant the application if granting the application would cause a violation of the Stored Communications Act.”

The SCA “prohibits electronic communication service providers from knowingly divulging to any person or entity the contents of a communication while in electronic storage by that service” unless that person or entity consented to that disclosure. *Id.* at *11 (internal quotation and alteration omitted). Magistrate Judge Kang found that Defendants’ account passwords were appropriately

designated communication “contents” under the SCA and that Defendants had not consented to the disclosures at issue. *Id.* at *11-16.

Magistrate Judge Kang first turned to the issue of what comprised the “contents” of a communication under the SCA. *Id.* at *11. The SCA defines “content” as “any information concerning the substance, purport, or meaning of [a] communication.” Discord argued that passwords were “information concerning” the communications at issue. Magistrate Judge Kang agreed, noting that this was a question of first impression and considering the text of the applicable provisions of the SCA, its language and design, and its legislative history. *Id.* at *12. He noted that passwords were themselves information and “broadly ‘relate to’” the contents of the communications, and this information “controls a user’s access to the content or services that require the user to prove their identity” as the author of the contents of a message. Thus, Magistrate Judge Kang reasoned, the password communicates to the recipient of a communication that the communicator has at least “completed the process of authentication,” which itself was information concerning the communication. He further reasoned that any other rule would allow litigants to “circumvent the very purpose of the SCA,” as most stored electronic information is locked behind passwords, so individuals seeking information barred from disclosure under the SCA could “simply request[] that a service provider disclose the password for a user account” containing those communications, “ultimately vitiating the protections of the SCA.” *Id.* at *13. In Plaintiffs’ case, “[t]he only conceivable use for the passwords here is for [Plaintiffs] to access the requested accounts (such as ‘Archetype’) and view the contents of all electronically stored communications in those requested accounts.” *Id.* at *15.

Magistrate Judge Kang then moved to the consent prong of the analysis. *Id.* at *16. He noted that the SCA would not prohibit the disclosure of this information if the target consented. He held that Defendants had not consented, either explicitly or impliedly, to the disclosure of the content at issue. *Id.* at *15-16. Although Plaintiffs argued that Defendants’ relinquishment of their personal devices in the Canadian litigation constituted implied consent, Magistrate Judge Kang agreed that Defendants did so pursuant to Canadian court orders in which their objections were preserved, which did not itself constitute implied consent. *Id.* at *16. Magistrate Judge Kang also found that Plaintiffs’ declaration documented numerous efforts to thwart compliance with the subpoena, which belied that it was consented to. Considering the disclosure restrictions under Section 1782 and the SCA, Magistrate Judge Kang held that the subpoena should be modified and thus ordered Plaintiffs and Discord to meet and confer to produce a subpoena compliant with the court’s findings. *Id.* at *18.