

United States District Court
Northern District of California

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In Re *Ex Parte* Application of
Path Network, Inc., and Tempest Hosting,
LLC,
Applicants.

Case No. [23-mc-80148-PHK](#)

**ORDER GRANTING IN PART AND
DENYING IN PART WITHOUT
PREJUDICE PATH NETWORK, INC.’S
AND TEMPEST HOSTING, LLC’S
APPLICATION TO SERVE
DISCOVERY ON DISCORD
PURSUANT TO 28 U.S.C. § 1782**

Re: Dkt. Nos. 1, 19, 20–22

Path Network, Inc. (“Path”) and Tempest Hosting, LLC (“Tempest”) (collectively “Applicants”) have filed an *ex parte* application authorizing service of a subpoena for documents on Discord, Inc. (“Discord”) pursuant to 28 U.S.C. § 1782. [Dkt. 1]. This application is made in connection with an action pending in the Superior Court of Justice in Ontario, Canada (“Canadian Court”). After considering the instant application, conducting a hearing, and considering supplemental briefing, Applicants’ request is **GRANTED-IN-PART** and **DENIED-IN-PART WITHOUT PREJUDICE**.

BACKGROUND

I. THE PARTIES AND UNDERLYING ALLEGATIONS

Path is an Arizona corporation providing data, hosting, and cyber services to subscribers. [Dkt. 1-2 at 2].¹ Path’s wholly owned subsidiary, Tempest, is an Arizona company providing virtual hosting services specializing in the leasing of services to customers. [Dkt. 1 at 4; Dkt. 1-2 at 2].

¹ For ease of reference, all page numbers cited to docket entries herein refer to the electronic page number in CM-ECF rather than the document’s internal page number.

1 Applicants aver that Curtis Michael Gervais (“Gervais”), a Canadian citizen, was a Path and
2 Tempest customer in June 2020, and as such he became acquainted with the CEO of Path. [Dkt. 1-
3 2 at 24]. Around approximately July 8, 2021, Path hired Gervais to work as an independent
4 contractor for Tempest. *Id.* at 25. His work for Tempest continued through various employment
5 roles until eventually Tempest promoted him to CEO in approximately February 2022. *Id.* at 25–
6 29. On or before June 2022, Gervais allegedly hacked into the internal network of an entity called
7 Game Server Kings (“GSK”), a competitor of Applicants. *Id.* at 36. The investigation into this
8 activity led Tempest to demote Gervais to COO and he eventually resigned on September 16, 2022.
9 *Id.* at 37–39, 45–46.

10 Prior to his work for Tempest, in November 2020, Gervais apparently started his own
11 company called Packet Rabbit, Inc. (“PR”), a Canadian corporation providing online virtual hosting
12 services that operates and leases services to customers for a monthly fee. *Id.* at 24–25. Gervais is
13 the sole director and officer of PR. *Id.*

14 Applicants allege that, as the relationship deteriorated between Tempest and Gervais,
15 Gervais began undertaking actions adverse to Applicants through a variety of means. *Id.* at 46.
16 Applicants allege that Gervais disclosed Applicants’ confidential information to GSK and third
17 parties, made defamatory comments concerning Applicants, and told third parties of his intentions
18 to harm Applicants. [Dkt. 1-3 at 29]. Applicants allege that Gervais conspired with Rene Roosen,
19 CEO and founder of GSK, to harm Applicants. [Dkt. 1-2 at 11 n.1]. Specifically, Applicants allege
20 that Gervais provided Roosen with confidential and/or false information about Applicants, which
21 Roosen used to convince third parties to terminate their user agreements with Applicants and instead
22 start doing business with GSK. *Id.* at 42–44, 46–47.

23 Germane to the instant dispute, Gervais and Roosen allegedly utilized Discord’s messaging
24 platform to communicate with each other and further the alleged plans to harm Applicants’ business.
25 *Id.* at 11 n.1. Furthermore, Gervais and Roosen allegedly utilized various usernames or aliases for
26 Discord accounts, such as “Archetype,” “1500,” “Renual,” and “cmg” as part of their efforts to
27 communicate their plans to harm Applicants. [Dkt. 1-1 at ¶¶ 4–5; Dkt. 1-2 at 53, 56–57].
28 Specifically, the “Archetype” user account allegedly used Discord to communicate with an

1 employee of Path to offer to ransom or sell back stolen copies of Applicants’ confidential source
 2 code and other confidential information for approximately \$800,000. [Dkt. 1-2 at 54–58]. Further,
 3 Applicants allege that Gervais used the alias or username “wdmg” for an account on an online forum
 4 called LowEndTalk. *Id.* at 53. Applicants similarly allege that Gervais used an email address
 5 deesnutiam@protonmail.com and submitted the username “Dees Nutiam” for a new user account
 6 on the Tempest platform after he had separated from the company. *Id.* at 52.

7 On January 5, 2023, Applicants acted on suspicions that Gervais acted to harm their business
 8 using the alias Archetype, resulting in both pre-litigation investigation and the filing of the
 9 underlying Canadian lawsuit germane to the instant dispute. *Id.* at 56.

10 **II. PRE-LITIGATION DISCOVERY AND UNDERLYING CLAIMS**

11 On December 21, 2022, Applicants allege they filed a Notice of Action, Motion Record, and
 12 Factum (a type of brief or memorandum of law under Canadian procedural rules, *see*
 13 <https://courtofappealbc.ca/civil-family-law/guidebook-for-appellants/write-your-argument>) in the
 14 Canadian Court seeking pre-litigation evidence preservation and a general injunction. [Dkt. 1-3 at
 15 2]. Applicants allege that on January 9, 2023, the Canadian Court held an *ex parte* hearing on
 16 Applicants’ filings and accepted *ex parte* briefing regarding issuing pre-litigation orders. *Id.* at 2–
 17 3. The Canadian Court granted Applicants’ request and issued a pre-litigation evidence preservation
 18 order; so-called “Anton Piller” Orders; a Stand and Deliver Order; and a general injunctive order.
 19 *Id.* (the “Canadian Court Orders”). Under Canadian law, and in general terms, an Anton Piller Order
 20 is a civil case order roughly analogous to an order granting permission for entry to land and
 21 inspection (*see* Fed. R. Civ. P. 34(a)(2)) under which a party is allowed the right to enter a location
 22 and seize evidence without advance notice to the party being searched, as part of an effort to reduce
 23 the risk of destruction of evidence. [Dkt. 1-2 at 2]. Under Canadian law, and in general terms, a
 24 Stand and Deliver Order requires individuals subject to the order to turn over off-site evidence and
 25 assets. *Id.*

26 Applicants allege that the Anton Piller Orders name certain individuals who were allowed
 27 to enter Gervais’s home including several lawyers for Applicants and a data forensics expert for the
 28 Applicants, specifically Tom Warren (“Warren”). [Dkt. 1-3 at 74]. Germane to the Section 1782

1 application at issue here, Warren submitted a declaration in support of Applicants here. [Dkt. 1-2].
2 The Anton Piller Orders require Gervais to “grant access and deliver up to the Authorized Persons”
3 certain evidence set forth in Schedule A to that order. [Dkt. 1-2 at 87]. Schedule A to the Anton
4 Piller Orders specifies that the evidence to be delivered includes “any and all communications,
5 whether in hard copy or electronic form, involving Gervais (including by any alias of Gervais
6 including but not limited to ‘cmg’ . . . ‘Archetype’[.]” and “any and all of the following information,
7 electronic data and/or code of the Plaintiffs as advertised for sale or ransom online pursuant to the
8 information of ‘Archetype’ (refer to . . . the Discord message attached as Schedule ‘B’ to this
9 Order)[.]” *Id.* at 90.

10 Following the execution of the Canadian Court Orders, the persons conducting the searches
11 for evidence delivered to their expert Warren three laptops, two cell phones, two iPads, and
12 numerous credit cards in PR’s name. [Dkt. 1-2 at 2]. Subsequently, Applicants allege Warren asked
13 Gervais to “provide access to his devices” and “various local and cloud-based applications / websites
14 within the scope of the Anton Piller Order.” *Id.* at 59. Applicants aver that “Gervais alleged that
15 he did not know the passwords to the applications / websites because all his log-in credentials were
16 stored on an encrypted password repository known as ‘LastPass.’” *Id.* Initially, Gervais provided
17 Warren with access to LastPass; however, Gervais allegedly later implemented security measures
18 to protect his computer from unauthorized access. *Compare* Dkt. 1-2 at 59, *with* Dkt. 1-2 at 62.
19 Applicants allege that Gervais created risks of evidence tampering of the data and messages in
20 Gervais’s online accounts because the LastPass program restricted access based on the device’s IP
21 address. [Dkt. 1-2 at 62]. Applicants allege that Warren noticed “Gervais was still able to access
22 his Discord account[.]” and when confronted about his ability to access that account, Gervais stated
23 “he could still use Discord because the session had not stopped.” *Id.* at 65. Applicants aver that
24 “Gervais[’s] information was false - that Mr. Warren had Gervais[’s] computer previously and the
25 Discord session was stopped when Mr. Warren shut down the laptop for [data collection].” *Id.*

26 On March 9, 2023, Applicants allegedly asserted several claims against Gervais and PR in
27 connection with their alleged unlawful conduct. *Id.* at 18–79. After filing the Canadian lawsuit, on
28 April 10, 2023, Applicants requested that Discord preserve all messaging data related to Gervais

1 and Roosen. [Dkt. 1-1 at ¶ 3]. The following day Discord responded that it would not preserve the
 2 requested data unless legally obligated to do so. *Id.* Subsequently, on May 22, 2023, Applicants
 3 filed the instant application seeking to serve Discord a subpoena pursuant to Section 1782 in support
 4 of the Canadian litigation. [Dkt. 1]. On August 17, 2023, the Court heard arguments on several
 5 issues associated with the instant application. [Dkt. 16]. Afterwards, the parties met and conferred
 6 in an effort to reach a resolution on several issues with the instant application. [Dkt. 17]. The Parties
 7 reached agreement on one issue. [Dkt. 20]. Additionally, the Parties supplemented their briefing
 8 regarding several remaining issues with the instant application. [Dkts. 20–22].

9 **III. PROPOSED SUBPOENA**

10 Applicants submitted to the Court their proposed subpoena for documents directed to
 11 Discord, which is located in the geographic boundaries of the Northern District of California (as
 12 discussed further below). *See* Dkt. 1-5. With regard to logistics, the proposed subpoena requests
 13 that Discord produce documents in Los Angeles. *Id.* at 2. With regard to document categories
 14 sought, the proposed subpoena requests that Discord produce “documents, electronically stored
 15 information, or objects, and to permit inspection, copying, testing, or sampling of[:]”

16 (1) All passwords and account data associated with Curtis Gervais,
 17 including any aliases he used, such as cmg#8239;

18 (2) All passwords and account data associated with Rene Roosen,
 including any aliases he used, such as Renewal#7394;

19 (3) All passwords and account data associated with Archetype#8484;

20 (4) Roosen, Gervais and Archetype#8484’s login history for any and
 21 all Discord accounts, including but not limited to cmg#8239,
 Renewal#7394, and Archetype#8484; and

22 (5) Any and all messaging data associated with any of Roosen,
 23 Gervais, or Archetype#8484’s Discord account(s) including
 cmg#8239, Renewal#7394 and Archetype#8484.

24 *Id.* at 5. The subpoena names Curtis Gervais and Rene Roosen, as well as the three Discord account
 25 usernames, but provides no other identifying information for these individuals or accounts. *Id.*

26 Following oral argument and supplemental briefing, Applicants and Discord filed a joint
 27 stipulation. [Dkt. 20]. In the stipulation, Discord states it would not object to the production of the
 28

1 following documents, electronically stored information, or tangible things, which includes
2 documents, electronically stored information, or tangible things narrower than Applicants’ proposed
3 subpoena:

- 4 1) All account data, not including the contents of electronic
5 communications, associated with Curtis Gervais, including any
6 aliases he used, such as cmg#82391;
- 7 2) All account data, not including the contents of electronic
8 communications, associated with Rene Roosen, including any aliases
9 he used, such as Renewal#7394;
- 10 3) All account data, not including the contents of electronic
11 communications, associated with Archetype#8484;
- 12 4) Roosen, Gervais and Archetype#8484’s login history for any and
13 all Discord accounts, including but not limited to cmg#8239,
14 Renewal#7394, and Archetype#8484; and
- 15 5) Any and all headers of messaging data associated with any of
16 Roosen, Gervais, or Archetype#8484’s Discord account(s) including
17 cmg#8239, Renewal#7394 and Archetype#8484.

18 [Dkt. 20 at 2]. Discord further defined certain subpoena terms including:

- 19 “Account data” includes a user’s first and last name, email address,
20 birthdate, and any other non-content identifying information for a
21 specific user.
- 22 “Header” includes the name and email addresses of the sender,
23 recipient, and any copied or blind copied recipients in a particular
24 Discord message, and the time that message was sent and/or received.

25 *Id.* In other words, Discord represents that it would not object to searching for and producing
26 documents, electronically stored information, or tangible things sought as defined above. However,
27 Discord does object to searching for and producing any documents, electronically stored
28 information, or tangible things which fall outside the scope defined above but which would be within
the broader scope of Applicants’ initial subpoena as originally presented. *Id.*

DISCUSSION

I. JURISDICTION

As an initial matter, this Court has jurisdiction to hear and decide this matter because the Applicants and Discord have all consented to Magistrate Judge jurisdiction under 28 U.S.C.

1 § 636(c). *See CPC Pat. Techs. Pty Ltd. v. Apple, Inc.*, 34 F.4th 801, 808 (9th Cir. 2022); *Williams*
2 *v. King*, 875 F.3d 500, 500 (9th Cir. 2017) (requiring both the Section 1782 applicant and the party
3 from whom discovery is sought to consent to Magistrate Judge jurisdiction); Dkts. 3, 6 (Applicants
4 and Discord consenting to Magistrate Judge jurisdiction). Additionally, this Court exercises federal
5 question jurisdiction over the application for discovery pursuant to Section 1782. *In re Application*
6 *of Grupo Unidos Por El Canal S.A.*, No. 14-mc-80277-JST (DMR), 2015 WL 1815251, at *4 (N.D.
7 Cal. Apr. 21, 2015).

8 **II. APPLICABLE LEGAL STANDARDS**

9 Evaluating an application for leave to serve a subpoena under Section 1782 requires a two-
10 part analysis: (1) the statutory requirements and (2) the discretionary requirements. *Intel Corp. v.*
11 *Advanced Micro Devices, Inc.*, 542 U.S. 241, 264–65 (2004). First with regard to the statutory
12 requirements, Section 1782 authorizes district courts to permit discovery if: (A) the person from
13 whom the discovery is sought “resides or is found” in the district of the district court where the
14 application is made; (B) the discovery is “for use in a proceeding in a foreign or international
15 tribunal;” and (C) the application is made by a foreign or international tribunal or “any interested
16 person.” *Khrapunov v. Prosyankin*, 931 F.3d 922, 925 (9th Cir. 2019).

17 Second with regard to the discretionary factors, the Court considers the following
18 discretionary factors in determining whether to authorize discovery requested under Section 1782:
19 (A) whether the “person from whom discovery is sought is a participant in the foreign proceeding;”
20 (B) “the nature of the foreign tribunal, the character of the proceedings underway abroad, and the
21 receptivity of the foreign government or the court or agency abroad to U.S. federal court judicial
22 assistance;” (C) whether the request “conceals an attempt to circumvent foreign proof-gathering
23 restrictions or other policies of a foreign country or the United States;” and (D) whether the request
24 is “unduly intrusive or burdensome.” *Intel*, 542 U.S. at 264–65.

25 “A district court’s discretion is to be exercised in view of the twin aims of [Section] 1782:
26 providing efficient assistance to participants in international litigation, and encouraging foreign
27 countries by example to provide similar assistance to our courts.” *In re Nat’l Ct. Admin. of the*
28 *Republic of Korea*, No. 15-mc-80069-LB, 2015 WL 1064790, at *2 (N.D. Cal. Mar. 11, 2015).

1 Unless the district court orders otherwise, the discovery authorized by the court must be obtained in
2 accordance with the Federal Rules of Civil Procedure. *See* 28 U.S.C. § 1782(a); *In re Tokyo Dist.*
3 *Prosecutors Off., Tokyo, Japan*, 16 F.3d 1016, 1020 (9th Cir. 1994). The party seeking discovery
4 need not establish that the information sought would be discoverable under the foreign court’s law
5 or that the U.S. would permit the discovery in an analogous domestic proceeding. *See Intel*, 542
6 U.S. at 261–63.

7 **A. Statutory Factors**

8 **i. The Residency of the Discovery Target.**

9 Applicants must first demonstrate that the entity from which they seek discovery resides in
10 the geographic boundaries of the court to whom the application is addressed, here the Northern
11 District of California. *Khrapunov*, 931 F.3d at 925; *In re Republic of Ecuador*, No. 10-cv-80225,
12 2010 WL 3702427, at *2 (N.D. Cal. Sept. 15, 2010). A business entity’s residency for the purpose
13 of Section 1782 is “where the business is incorporated, is headquartered, or where it has a principal
14 place of business.” *In re Todo*, 2022 WL 4775893, at *2 (N.D. Cal. Sept. 30, 2022) (collecting
15 cases); *In re Med. Inc. Ass’n Takeuchi Dental Clinic*, 2022 WL 10177653, at *2 (N.D. Cal. Oct. 17,
16 2022) (Google met residency requirement under Section 1782(a) due to headquarters and principal
17 location in Mountain View).

18 Here, Applicants request discovery from Discord. [Dkt. 1-5]. Although Applicants cite the
19 statutory factors, their submissions have provided no factual evidence or material to establish
20 Discord’s residence. [Dkt. 1 at 8–9]. Rather, Applicants conclusorily state, without citation to
21 evidence or any documents in the record, that Discord is headquartered in the Northern District of
22 California. [Dkt. 1 at 9].

23 Nevertheless, the Court has the authority to take Judicial Notice of certain facts under the
24 proper circumstances. *See* Fed. R. Evid. 201(b)(2) (“The court may judicially notice a fact that is
25 not subject to reasonable dispute because it . . . can be accurately and readily determined from
26 sources whose accuracy cannot reasonably be questioned.”); *Minor v. FedEx Office & Print Servs.*,
27 78 F. Supp. 3d 1021, 1028 (N.D. Cal. 2015) (taking Judicial Notice of record of administrative
28 agencies and publicly accessible websites).

1 Publicly available records from the California Secretary of State and at least one website
2 indicate that Discord has its principal place of business in San Francisco, California, which is located
3 within the Northern District of California. See bizfile Online, Cal. Sec’y of State,
4 <https://bizfileonline.sos.ca.gov/search/business> (search for “Discord Inc” or file no. 3472899) (last
5 visited on Nov. 21, 2023) (Discord’s “principal address” is in San Francisco); *Discord Company*
6 *Information - Impressum*, <https://discord.com/company-information> (last visited on Nov. 21, 2023)
7 (same). The Court finds that these online materials are mutually corroborative and sufficiently
8 reliable, and that their accuracy cannot be reasonably questioned. Thus, the residency of Discord is
9 not subject to reasonable dispute, and the Court exercises its authority to take judicial notice of
10 Discord’s principal office under Rule 201.

11 Accordingly, the Court finds that the first statutory requirement of residency is met because
12 Discord’s principal office is in San Francisco. See *In re Hattori*, No. 21-mc-80236-TSH, 2021 WL
13 4804375, at *3 (N.D. Cal. Oct. 14, 2021) (“Applicant’s request satisfies the statutory requirements
14 of [Section] 1782. First, Google can be found in this district because its principal office is located
15 in Mountain View, California.”).

16 **ii. Discovery Sought Is for Use in a Proceeding in a Foreign Tribunal.**

17 Next, Applicants must show the discovery sought is for use in a proceeding before a foreign
18 tribunal. *Khrapunov*, 931 F.3d at 925. To be “for use” in a foreign proceeding, the information
19 sought must be relevant. *Rainsy v. Facebook, Inc.*, 311 F. Supp. 3d 1101, 1110 (N.D. Cal. 2018).
20 “The party issuing the subpoena has the burden of demonstrating the relevance of the information
21 sought.” *Digital Shape Techs., Inc. v. Glassdoor, Inc.*, No. 16-mc-80150-JSC, 2016 WL 5930275,
22 at *3 (N.D. Cal. Oct. 12, 2016).

23 The Canadian lawsuit is certainly a foreign proceeding. Here, Applicants seek information
24 from Discord in connection with the complained-of activities allegedly committed by Gervais and
25 Roosen, specifically their alleged use of Discord accounts to communicate allegedly harmful
26 information about Applicants and their alleged attempt to ransom stolen proprietary source code.
27 [Dkt. 1-2 at 18–79]. These alleged unlawful activities and communications using Discord form the
28 basis of Applicants’ Canadian lawsuit as summarized above. *Id.* The discovery sought from

1 Discord includes information concerning the account logins and passwords for the accused Discord
2 user accounts (*i.e.*, Archetype, Renewal, and cmg), as well as login histories and the messages
3 themselves. [Dkt. 1-5]. The discovery is presumably sought in order to determine the connections
4 between Gervais and Roosen to these accounts. This connection would presumably be relevant to
5 the liability issues in the underlying Canadian litigation. If the discovery demonstrates such a
6 connection, then such discovery would impact liability, and if the discovery demonstrates that no
7 such connection exists (for example, if the user accounts were in fact owned and used by unrelated
8 third party actors), then the absence of any such discovery materials also would be relevant to
9 defenses in the Canadian litigation.

10 Further, as Applicants argue, the discovery sought is relevant to carrying out the Canadian
11 Court’s Anton Piller Orders. For example, as discussed above, the Anton Piller Order directed to
12 Gervais requires the delivery of evidence including “any and all communications, whether in hard
13 copy or electronic form, involving Gervais (including by any alias of Gervais including but not
14 limited to ‘cmg’ . . . ‘Archetype’ . . .)” and “any and all of the following information, electronic
15 data and/or code of the Plaintiffs as advertised for sale or ransom online pursuant to the information
16 of ‘Archetype’ (refer to . . . the Discord message attached as Schedule ‘B’ to this Order)[.]” [Dkt.
17 1-2 at 90]. The Canadian Court thus specifically ordered the production of evidence of Discord
18 messages from the user accounts identified by Applicants. *Id.*

19 Accordingly, the Court finds that the discovery sought from Discord is relevant, for the
20 purposes of Section 1782, to the Canadian lawsuit. The second statutory requirement under Section
21 1782 is satisfied.

22 **iii. Movants Are Interested Persons.**

23 Next under Section 1782, Applicants must show they are interested “persons.” *Khrapunov*,
24 931 F.3d at 925. An interested person under Section 1782 “plainly reaches beyond the universe of
25 persons designated ‘litigant,’” although there is “[n]o doubt [that] litigants are included among, and
26 may be the most common example[.]” *Intel*, 542 U.S. at 256.

27 Here, Applicants are party litigants in the Canadian lawsuit. *See* Dkt. 1-2 at 18–79. As
28 litigants in the foreign proceeding, Applicants are prototypical interested persons. *Intel*, 542 U.S.

1 at 256. Accordingly, the Court finds that the third and final statutory factor under Section 1782 is
2 satisfied.

3 In sum, because Applicants have satisfied all three statutory requirements, the Court
4 determines that, as a matter of statutory requirements, discovery relating to the foreign proceeding
5 is authorized under Section 1782. Because the Court has discretion to deny the application, even if
6 the statutory requirements are satisfied, the Court next analyzes the discretionary *Intel* factors. *Intel*,
7 542 U.S. at 256.

8 **B. The Court’s Discretion To Authorize The Requested Discovery**

9 As discussed above, the discretionary factors under Section 1782 are: (A) whether the
10 “person from whom discovery is sought is a participant in the foreign proceeding;” (B) “the nature
11 of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the
12 foreign government or the court or agency abroad to U.S. federal court judicial assistance;” (C)
13 whether the request “conceals an attempt to circumvent foreign proof-gathering restrictions or other
14 policies of a foreign country or the United States;” and (D) whether the request is “unduly intrusive
15 or burdensome.” *Id.* at 264–65. The Court analyzes each discretionary factor in turn.

16 **i. Whether the Person from Whom Discovery Is Sought Is a Party to the**
17 **Foreign Proceeding.**

18 The first discretionary factor is whether the discovery is appropriate where the target of
19 discovery is a party to the foreign litigation. *Id.* at 265 “A foreign tribunal has jurisdiction over
20 those appearing before it, and can itself order them to produce evidence.” *Id.* at 264. However,
21 “nonparticipants in the foreign proceeding may be outside the foreign tribunal’s jurisdictional reach;
22 hence, their evidence, available in the United States, may be unobtainable absent [Section] 1782
23 aid.” *Id.* As such, the first discretionary factor favors discovery sought from non-parties to the
24 foreign proceeding. *Cf. In re Varian Med. Sys. Int’l AG*, No. 16-mc-80048-MEJ, 2016 WL 1161568,
25 at *4 (finding that the first *Intel* factor weighs heavily against seeking discovery from participants
26 in foreign tribunals).

27 Here, Discord is not a party to the Canadian lawsuit and is only a third-party whose
28 messaging platform was allegedly used by Gervais and Roosen to harm Applicants. [Dkt. 1-2 at

1 18–79]. Accordingly, it appears the Canadian Court lacks authority or jurisdiction to compel
2 discovery from Discord. Further, efforts to secure voluntary disclosure were unavailing –
3 apparently, Discord refused to preserve messaging data absent court order. [Dkt. 1-1 at ¶ 3].
4 Applicants argue that “[i]f the Court does not grant the instant Application, Path and Tempest will
5 be unable to fully execute the Canadian Court’s Orders and engage in discovery essential to their
6 case[.]” [Dkt. 1 at 2]. The Court finds that this discretionary factor is satisfied, because Discord is
7 not a party to the foreign litigation and the requested discovery has been shown to be unavailable
8 otherwise. *Intel*, 542 U.S. 241.

9 **ii. The Nature of the Foreign Tribunal, the Character of the Proceedings**
10 **Underway Abroad, and the Receptivity of the Tribunal to U.S. Judicial**
11 **Assistance.**

12 The second *Intel* factor weighs in favor of discovery unless the foreign tribunal in question
13 has expressly made it clear that it would not accept the evidence. *In re Jt. Stock Co. Raiffeisenbank*,
14 2016 WL 6474224, at *5 (N.D. Cal. Nov. 2, 2016) (under this factor, “courts look for authoritative
15 proof that a foreign tribunal would reject evidence obtained with the aid of [Section] 1782.”). A
16 district court’s ability to order discovery under Section 1782 is not predicated on the discoverability
17 or admissibility of the evidence sought in that foreign tribunal. *See Intel*, 542 U.S. at 260. That is,
18 courts need not explore nor determine whether the information applicants seek is admissible in the
19 foreign jurisdiction. *See In re Seoul Dist. Criminal Court*, 555 F.2d 270, 723 (9th Cir. 1977).
20 Rather, in the absence of authoritative proof that a foreign tribunal would reject evidence obtained
21 with the aid of Section 1782, this discretionary factor tends to support authorizing the requested
22 discovery. *See, e.g., Palantir Techs., Inc. v. Abramowitz*, 415 F. Supp. 3d 907, 915 (N.D. Cal. 2019)
23 (citation omitted); *In re Med. Corp. H&S*, No. 19-mc-80058-VKD, 2019 WL 1230440, at *3 (N.D.
24 Cal. Mar. 15, 2019) (“In the absence of evidence that Japanese courts would object to MCHS’s
25 discovery of the information sought in the subpoena, or that they object more generally to the
26 judicial assistance of U.S. federal courts, the Court concludes that this factor weighs in favor of
27 authorizing service of the subpoena.”).

28 Here, the Canadian Court is the Superior Court of Justice in Ontario. This Court takes

1 Judicial Notice that, in the Canadian legal system “Superior courts are the highest level of courts in
2 a province or territory. They deal with the most serious criminal and civil cases and have the power
3 to review the decisions of the provincial and territorial courts.” *See* Government of Canada, *The*
4 *Judicial Structure – How the Courts are Organized* (Sept. 1, 2021),
5 <https://www.justice.gc.ca/eng/csj-sjc/just/07.html> (last visited Nov. 21, 2023) (information
6 published by the Canadian government). The Canadian Court is thus apparently analogous to a trial
7 court of general jurisdiction, and is not a specialized agency or limited jurisdiction tribunal. Further,
8 the proceeding abroad is a civil action by Applicants against Gervais and his co-defendants, and that
9 proceeding appears to be on a schedule which is intended to afford Applicants time to seek the
10 discovery herein. Accordingly, the Court concludes that the nature of the Canadian Court is such
11 that it is unlikely to object to judicial assistance from a U.S. District Court, and that the nature of
12 the proceedings abroad favors discretionary authorization of discovery here.

13 Further, the record of proceedings from the Canadian litigation indicates that the Canadian
14 Court has taken steps and issued orders to seek, within its own jurisdiction, the type of discovery
15 and information sought here. As noted, the Anton Pillar Orders expressly order the production of
16 information and electronic files relating to the Discord messages and user accounts which are the
17 subjects of the instant request. [Dkt. 1-2 at 90]. In addition, the Canadian Court has extended the
18 Anton Pillar Order two separate times to allow Applicants to try to obtain cloud-related discovery.
19 *Id.* at 117–122. From the orders and steps taken by the Canadian Court, this Court concludes that
20 the Canadian Court would be receptive to information sought from Discord under Section 1782.
21 There is nothing in the record to imply, much less expressly indicate, that the Canadian Court would
22 reject any evidence produced by Discord in response to a properly issued subpoena under Section
23 1782. Accordingly, the Court finds that the third discretionary factor weighs in favor of discovery.

24 **iii. Circumvention of the Foreign Court’s Proof-Gathering Restrictions.**

25 The third *Intel* factor considers whether the request “conceals an attempt to circumvent
26 foreign proof-gathering restrictions or other policies of a foreign country or the United States.” *Intel*,
27 542 U.S. at 264–65. “A perception that an applicant has ‘side-stepped’ less-than-favorable
28 discovery rules by resorting immediately to [Section] 1782 can be a factor in a court’s analysis.” *In*

1 *re Cathode Ray Tube Antitrust Litig.*, No. 07-cv-5944-SC, 2013 WL 183944, at *3 (N.D. Cal. Jan.
2 17, 2013) (citing *In re Caratube Int'l Oil Co.*, 730 F. Supp. 2d 101, 107–08 (D.D.C. 2010)).
3 Additionally, the perception that an applicant has immediately resorted to Section 1782, bypassing
4 the foreign court’s proof-gathering, can weigh against discovery. *Id.* (citation omitted).

5 On the other hand, absence of evidence of attempted circumvention of the foreign tribunal’s
6 proof-gathering procedures weighs in favor of an application under Section 1782. *See, e.g., In re*
7 *Google, Inc.*, No. 14-mc-80333-DMR, 2014 WL 7146994, at *2 (N.D. Cal. Dec. 15, 2014); *In re*
8 *Eurasian Nat. Res. Corp. Ltd.*, No. 18-mc-80041-LB, 2018 WL 1557167, at *3 (N.D. Cal. Mar. 30,
9 2018); *In re Honda*, No. 21-mc-80167-VKD, 2021 WL 3173210, at *4 (N.D. Cal. July 27, 2021).

10 Here, the record of the proceedings in the Canadian lawsuit demonstrates that Applicants
11 pursued proof-gathering procedures in Canada extensively before filing the instant Application.
12 [Dkt. 1-2 at 18–79]. As summarized above, Applicants sought and were granted multiple Anton
13 Pillar Orders, executed on those Orders, followed up with Gervais on the passwords for accounts,
14 obtained extensions of the Anton Pillar Orders from the Canadian Court, and sought voluntary
15 cooperation from Discord. *Id.* Applicants demonstrated diligence in using the Canadian Court
16 system to try to obtain information about the Discord messages and accounts, both from Gervais
17 and from Discord. *Id.* Indeed, there is indication in the records provided that Gervais may have
18 taken steps to delay or hinder access to his Discord account by claiming lack of access to his
19 passwords stored in a LastPass account and by claiming lack of access to the email account linked
20 to this LastPass account. *Id.* at 62–63.

21 Accordingly, the Court concludes that Applicants’ discovery request here is not an improper
22 attempt to undermine the Canadian Court or its policies or proof-gathering restrictions. Therefore,
23 the Court finds that this discretionary factor weighs in favor of discovery.

24 **iv. Unduly Intrusive or Burdensome Discovery Requests.**

25 The final *Intel* factor addresses the intrusiveness and burden of the proposed discovery
26 requests. Discovery requests are unduly burdensome when they are “not narrowly tailored, request
27 confidential information and appear to be a ‘broad fishing expedition for irrelevant information.’”
28 *In re Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1043 (N.D. Cal. 2016). The “proper scope” of requests

1 under section 1782 is “generally determined by the Federal Rules of Civil Procedure.” *In re Varian*
2 *Med. Sys. Int’l AG*, 2016 WL 1161568 at *5. Thus, under this final discretionary factor, any “unduly
3 intrusive or burdensome requests may be rejected or trimmed.” *Intel*, 542 U.S. at 246.

4 While the Court finds that all the statutory and the other discretionary factors support
5 authorizing discovery, here the focus is on the proposed discovery and, as noted, whether the
6 proposed requests are impermissibly intrusive or burdensome using the discovery provisions of the
7 Federal Rules of Civil Procedure as guidelines, particularly Rule 45 governing subpoenas.

8 Here, the proposed subpoena fails to comply with the applicable legal standards. First, as
9 discussed above, Applicants’ proposed subpoena, as written, purports to require Discord,
10 headquartered in San Francisco, to produce documents in Los Angeles, California. [Dkt. 1-5].
11 Under Rule 45(c)(2), a subpoena may only command “production of documents, electronically
12 stored information, or tangible things at a place within 100 miles of where the person resides, is
13 employed, or regularly transacts business in person[.]” Applicants’ proposed subpoena thus violates
14 the 100-mile restriction on subpoenas *duces tecum*, because San Francisco is more than 100 miles
15 from Los Angeles, California. Compare bizfile Online, Cal. Sec’y of State,
16 <https://bizfileonline.sos.ca.gov/search/business> (search for “Discord Inc” or file no. 3472899) (last
17 visited Nov. 21, 2023) (Discord’s “principal address” is in San Francisco), with Dkt. 1-5 at 2.
18 Instructive on the importance of the geographical limitation in Rule 45(c) is the Ninth Circuit’s
19 recent opinion finding trial subpoenas improper where those subpoenas required witnesses to testify
20 remotely at trial because they were physically more than 100 miles from the location of the
21 proceeding. *In re Kirkland*, No. 22-70092, -- F.4th --, 2023 WL 4777937, at *6–10 (9th Cir. July
22 27, 2023) (granting writ of mandamus and ordering trial court to quash subpoenas). The Applicants’
23 proposed subpoena to Discord here is analogously improper for requiring production more than 100
24 miles from Discord’s headquarters. See *In re Portfolio Recovery Assocs., LLC Tel. Consumer Prot.*
25 *ACT Litig.*, No. 11MD2295 JAH (BGS), 2021 WL 5920086, at *3 (S.D. Cal. Dec. 15, 2021).

26 Second, Applicants’ proposed subpoena, particularly the descriptions of categories of
27 documents sought, does not satisfy the applicable legal standards. Discovery requests are intrusive
28 or burdensome where they are overbroad and “not narrowly tailored temporally, geographically or

1 in their subject matter.” *In re Qualcomm Inc.*, 162 F. Supp. 3d at 1044. Here, as discussed above,
2 the proposed subpoena refers to the names “Curtis Gervais” and “Rene Roosen” and asks for “all
3 passwords and account data associated with” each of them, asks for their “login history for any and
4 all Discord accounts,” and seeks “[a]ny and all messaging data associated with any of Roosen [or]
5 Gervais[.]” [Dkt. 1-5 at 5]. While the requests provide examples of Discord accounts (“such as
6 cmg#8329” or “such as Renewal#7394” or “Archetype#8484”), all the requests are expressly not
7 limited to those accounts and fail to provide Discord (the third-party which would be required to
8 understand and search for documents) any other information on who these persons are, what other
9 Discord accounts they may have, and what “any aliases” either of them used. *Id.*

10 Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, discovery must be
11 “proportional to the needs of the case, considering the importance of the issues at stake in the action,
12 the amount in controversy, the parties’ relative access to relevant information, the parties’ resources,
13 the importance of the discovery in resolving the issues, and whether the burden or expense of the
14 proposed discovery outweighs its likely benefit.” As discussed, the proposed subpoena seeks “[a]ll
15 . . . account data associated with” both Gervais and Roosen. [Dkt. 1-5 at 5]. This includes “any
16 aliases,” “login history for any and all Discord accounts,” and “[a]ny and all messaging data
17 associated with any of Roosen [or] Gervais.” *Id.* Given the lack of reasonable measures to identify
18 Gervais and Roosen with any particularity, the breadth of the proposed subpoena is not proportional
19 to the needs of the case. *See Winet v. Arthur J. Gallagher & Co.*, 2020 WL 6449230, at *2 (S.D.
20 Cal. Nov. 3, 2020) (request for production which sought “all documents” concerning, evidencing,
21 and reflecting sales is overbroad and not proportional to the needs of the case).

22 While Applicants may know who Gervais and Roosen are and how to identify them, that
23 information is notable by its absence from the proposed subpoena. The proposed subpoena has no
24 “definition” section and fails to provide any supplemental or explanatory information about Gervais
25 or Roosen. For example, the proposed subpoena lacks any personally identifying information about
26 these persons, such as their home or correspondence addresses, business addresses, business
27 affiliations, telephone or cellphone numbers, email addresses, or any other collateral data already in
28 Applicants’ possession to substantiate their identities. *See* Dkt. 1-5 at 2. It is evident from the

1 materials provided this Court from the Canadian lawsuit that Applicants possess, minimally, at least
2 some ancillary set of information that could facilitate a more precise identification of Gervais and
3 Roosen to avoid burdening Discord in its search for responsive documents.

4 Furthermore, this Court takes Judicial Notice that Discord’s registration panel appears to
5 require the following information to create a user account: an email address; a username; a
6 password; and a date of birth. *See Create an Account*, <https://discord.com/register> (last visited Aug.
7 9, 2023). If Applicants have email addresses and/or birth dates for Gervais and Roosen, that
8 information would appear to be helpful in reducing the burden on Discord in its attempts to comply
9 with a subpoena (indeed, Applicants’ application recites multiple email addresses which Applicants
10 believe Gervais has used, and yet inexplicably fails to include those in the subpoena).

11 Additionally, it is unknown how many other persons among Discord’s worldwide customer
12 base have the same or similar names as Gervais and Roosen. Similarly, it is unknown how many
13 other users have user account names that are the same as or closely similar to “Archetype,”
14 “Renual,” or “cmg.” As drafted, the proposed subpoena would potentially implicate searching for
15 and perhaps even producing information from innocent third parties unrelated to the Canadian
16 lawsuit. The risk of misidentification of innocent parties and the disclosure of their personal
17 messages or other information is thus exacerbated by the lack of definitional or narrowing
18 information about Gervais and Roosen in the proposed subpoena. Thus, the proposed subpoena is
19 not only unduly burdensome but also unduly intrusive, particularly with regard to the universe of
20 innocent third parties whose information and data may be swept up by an overbroadly worded
21 subpoena and resulting search.

22 As a consequence, the breadth of the subpoena as drafted risks compelling Discord to embark
23 on a potentially complex task of discerning the specific “Curtis Gervais” or “Rene Roosen”
24 contemplated by the subpoena in order to filter out any false hits or misidentified persons. Thus,
25 the subpoena as drafted risks imposing further undue burden on Discord both in its search for
26 responsive documents and in its attempts to reasonably filter out the truly irrelevant misidentified
27 information from the information on the specific Messrs. Gervais and Roosen actually of interest.

28 Accordingly, the Court finds that application of this final *Intel* discretionary factor militates

1 against approval of the proposed subpoena as presented to the Court. However, the Court finds that
2 Applicants' failure to satisfy this discretionary factor does not require a negative finding on the
3 threshold issue of whether any discovery should be authorized in the first instance; rather this factor
4 requires the Court to find that the proposed discovery, in its present form, should be modified
5 because, as literally drafted, the proposed subpoena to Discord is overbroad, not narrowly tailored,
6 unduly intrusive, and burdensome under the applicable legal standards. Therefore, the Court
7 **GRANTS-IN-PART** Applicants' application for leave to serve a document subpoena on Discord,
8 and **GRANTS** Applicants leave to submit a revised subpoena as discussed further herein after
9 appropriate meet and confer with Discord.

10 **III. THE STORED COMMUNICATIONS ACT**

11 Even if Applicants satisfy the Section 1782 requirements, the Court may not grant the
12 application if granting the application would cause a violation of the Stored Communications Act
13 ("SCA"). *Xie v. Lai*, 2019 WL 7020340, at *5 (N.D. Cal. Dec. 20, 2019) ("It is well-established
14 that civil subpoenas, including those issued pursuant to [Section] 1782, are subject to the
15 prohibitions of the Stored Communications Act."). On August 17, 2023, the Parties briefly
16 presented arguments on the applicability of the SCA as the initial application did not contain any
17 arguments on the applicability of the SCA. *See* Dkt. 1. At the Court's request, the Parties submitted
18 supplemental briefing on (A) whether passwords are afforded protections pursuant to the SCA and
19 (B) whether Gervais has impliedly consented to the disclosure of his communications such that
20 Discord may produce the communications pursuant to the issuance of the subpoena. [Dkts. 20–22].

21 The Court finds these arguments are fit for determination without a hearing pursuant to this
22 Court's Civil Local Rule 7-1(b). For the reasons explained below, the Court finds passwords are
23 afforded protection under the SCA and Gervais did not explicitly or implicitly consent to the release
24 of the contents of his communications.

25 **A. Whether Passwords are Afforded Protection Under the SCA.**

26 The SCA "prohibits electronic communication service providers from 'knowingly
27 divulg[ing] to any person or entity the contents of a communication while in electronic storage by
28 that service.'" *Obodai v. Indeed, Inc.*, No. 13-mc-80027-EMC, 2013 WL 1191267, at *2 (N.D. Cal.

1 Mar. 21, 2013) (citing 18 U.S.C. § 2702(a)(1); *Optiver Australia Pty. Ltd. & Anor. v. Tibra Trading*
 2 *Pty. Ltd. & Ors.*, No. 12-cv-80242-EJD (PSG), 2013 WL 256771 (N.D. Cal. Jan. 23, 2013)). The
 3 SCA incorporates the definition of “contents” from the Wiretap Act. *In re Zynga Priv. Litig.*, 750
 4 F.3d 1098, 1105–06 (9th Cir. 2014) (citing 18 U.S.C. § 2711(1); 18 U.S.C. § 2510(8)). The SCA
 5 defines “contents” as “any information concerning the substance, purport, or meaning of [a]
 6 communication.” *Id.* The *Zynga* Court held the words “substance, purport, or meaning” carry their
 7 dictionary definitions which indicate that “Congress intended the word ‘contents’ to mean a person’s
 8 intended message to another.” *Id.* (the *Zynga* Court defines: “substance” as “the characteristic and
 9 essential part;” “purport” as “meaning conveyed, professed or implied;” and “meaning” as “the thing
 10 one intends to convey . . . by language[.]”) (citing *Webster’s Third New International Dictionary*
 11 1399, 1847, 2279 (1981))).

12 The issue of discovery of electronic communications can implicate Fourth Amendment
 13 concerns. S. REP. 99-541, 2–3, 1986 U.S.C.C.A.N. 3555, 3556–57. “The SCA was enacted
 14 because the advent of the Internet presented a host of potential privacy breaches that the Fourth
 15 Amendment does not address.” *Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013) (citation
 16 omitted). However, often times the “existing statutory framework is ill-suited to address modern
 17 forms of communication[.]” *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 874 (9th Cir. 2001).
 18 “Courts have struggled to analyze problems involving modern technology within the confines of
 19 this statutory framework, often with unsatisfying results.” *Id.* (citations omitted).

20 Applicants argue passwords are not afforded protection under the SCA because passwords
 21 should not be considered “content.” [Dkt. 21 at 5]. Discord argues passwords are implicitly
 22 included within the SCA’s prohibitions because passwords implicate communications. [Dkt. 21 at
 23 7; Dkt. 22 at 6–7]. In other words, Discord argues that passwords are “content “ under the SCA
 24 because they are “information concerning the substance, purport, or meaning” of a communication.
 25 For the reasons explained herein, the Court find passwords are content under SCA.

26 The Court is faced with an issue of first impression regarding the bounds of the scope of the
 27 meaning of the word “content” in the SCA. While the SCA defines “contents” as “any information
 28 concerning the substance, purport, or meaning of [a] communication,” and the *Zynga* Court held the

1 “Congress intended the word ‘contents’ to mean a person’s intended message to another” no court
2 has apparently determined the scope of the phrase “information concerning” within the statute.
3 *Zynga*, 750 F.3d at 1105–06; 18 U.S.C. § 2711(1); 18 U.S.C. § 2510(8).

4 To determine the scope of what is considered “content” under the SCA, the Court must first
5 determine Congress’s intended meaning of the words “information concerning.” *See Zynga*, 750
6 F.3d at 1105–06. “In ascertaining the plain meaning of the statute, the court must look to the
7 particular statutory language at issue, as well as the language and design of the statute as a whole.”
8 *Id.* at 1105 (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). “We start with the
9 plain language of the statutes.” *Zynga*, 750 F.3d at 1105 (citing *Gwaltney of Smithfield, Ltd. v.*
10 *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987)). Because the term “information concerning”
11 is not further defined within the statute, the Court considers the ordinary meaning of this term,
12 including its dictionary definition. *Zynga*, 750 F.3d at 1105 (citing *Wilderness Soc’y v. U.S. Fish &*
13 *Wildlife Serv.*, 353 F.3d 1051, 1061 (9th Cir. 2003) (en banc), *amended by* 360 F.3d 1374 (9th Cir.
14 2004) (en banc)). The Electronic Communications Privacy Act, which is related to both the Wiretap
15 Act and the SCA, was promulgated in 1986. *Zynga*, 750 F.3d at 1106; *In re Yahoo Mail Litig.*, 7 F.
16 Supp. 3d 1016, 1026 (N.D. Cal. 2014) (discussing how the Wiretap Act and SCA are titles of the
17 Electronic Communications Privacy Act). The *Zynga* Court utilized the 1981 edition of *Webster’s*
18 *Third New International Dictionary* when defining “substance, purport, or meaning” because the
19 dictionary was “in wide circulation during the relevant time frame.” *Zynga*, 750 F.3d at 1106. The
20 1981 edition of *Webster’s* defines: (1) “information” as “the communication or reception of
21 knowledge or intelligence,” *Webster’s Third New International Dictionary* 1160 (1981), and (2)
22 “concerning” as “relating to,” *id.* at 470. These definitions indicate that Congress intended “content”
23 to be broad because “content of a communication” necessarily encompasses “the communication or
24 reception of knowledge or intelligence.” In other words, the definition of “content” is not narrow;
25 rather, the definition broadly includes “the communication or reception of knowledge or
26 intelligence” that is “relating to” “a person’s intended message to another (i.e., the ‘essential part’
27 of the communication, the ‘meaning conveyed,’ and the ‘thing one intends to convey’).” *Webster’s*
28 *Third New International Dictionary* 470, 1160 (1981); *Zynga*, 750 F.3d at 1106.

1 The broad scope of “content” is further illuminated by the “language and design of the statute
2 as a whole,” *K Mart Corp.*, 486 U.S. at 291. The use of the word “any” modifying “information
3 concerning” highlights Congress’s intent to have a broad definition of “content.” *Republic of Iraq*
4 *v. Beatty*, 556 U.S. 848, 856 (2009) (interpreting the word “any” to have an “expansive meaning”
5 when analyzing the phrase “any other provision of law” “giving us no warrant to limit the class of
6 [things referenced].”); *accord Am. C.L. Union Immigrants’ Rts. Project v. United States Immigr. &*
7 *Customs Enf’t*, 58 F.4th 643, 657 (2d Cir. 2023) (quoting *Cohen v. JP Morgan Chase & Co.*, 498
8 F.3d 111, 117 (2d Cir. 2007) (“[T]he statutory use of the word ‘any’ has long signaled ‘Congress’s
9 intent to sweep broadly to reach all varieties of the item referenced.’”); *Webster’s Third New*
10 *International Dictionary* 97 (1981) (defining “any” as “one, some, or all indiscriminately of
11 whatever quantity[.]”). The context of the definition of “content” thus indicates that there exists an
12 indiscriminate number of classes or varieties of “information” that constitute “content” so long as
13 that “information” “concerns” or “relates to” a “person’s intended message to another.” *Zynga*, 750
14 F.3d at 1105–06.

15 The legislative history agrees with a broad interpretation of “content.” S. REP. 99-541, 2–
16 3, 1986 U.S.C.C.A.N. 3555, 3556–57. Congress explained that the purpose of enacting the SCA
17 was to protect individuals on the shortcomings of the Fourth Amendment. *Id.* Specifically,
18 Congress enacted the SCA due to the “tremendous advances in telecommunications and computer
19 technologies” with the “comparable technological advances in surveillance devices and techniques.”
20 *Id.* The SCA was further meant to help “Americans [who] have lost the ability to lock away a great
21 deal of personal and business information.” *Id.*

22 With this analysis of the scope of the term “content” under the SCA in mind, the Court now
23 turns to determine if passwords are afforded protection under the SCA under that understanding of
24 the definition of the term “content.” Passwords are undoubtedly a form of “information.” And
25 passwords broadly “relate to” (or are “concerning”) the “substance, purport, or meaning of [a]
26 communication” even if passwords are not themselves the content of a communication. Passwords
27 further relate to a person’s intended message to another; while a password is not the content of the
28 intended message, a password controls a user’s access to the content or services that require the user

1 to prove their identity. As a matter of technological access to an electronic message, a password
2 thus “relates to” the intended message because without a password, the author cannot access their
3 account to draft and send the message (and the user cannot access their account to receive and read
4 the message). When a person uses a password to access their account to draft and send a message,
5 that author inherently communicates to the recipient at least one piece of information that is essential
6 to complete the communication process: namely, that the author has completed the process of
7 authentication. The password is information or knowledge which is intended to convey a person’s
8 claim of identity not just to the messaging system but also implicitly to the recipient. As such,
9 within the context of electronic communication systems, passwords are a critical element because
10 they convey an “essential part” of the communication with respect to access and security protocols.
11 The dispute at issue here demonstrates the inherency of communicating about passwords when using
12 a messaging platform such as Discord: when the user of the “Archetype” sent messages demanding
13 ransom for the stolen source code, those messages conveyed to the recipients that the author is or
14 was an authentic or authorized user of the “Archetype” account who used and had access to the
15 password for that account. That password for that account thus is information concerning that
16 communication, even if the password is not itself written out in the content directly.

17 This holding is consistent with the context and purpose of the SCA. The SCA was
18 promulgated to protect the content of a communication maintained within an “electronic storage.”
19 18 U.S.C. § 2702. If this Court were to hold that passwords are not afforded SCA protections, such
20 a ruling would otherwise create a perverse incentive which circumvents the protections of afforded
21 by SCA. Contents of an electronic communication are stored as files within an electronic memory
22 or storage device, which files are accessible because the person uses their password to access the
23 account. There is no question that the contents of a communication stored within an electronic
24 storage device are normally not accessible absent user consent. However, an opposing party in
25 litigation could request production of a user’s and thereafter circumvent necessary user consent,
26 under the assertion that they are not subject to protections of the SCA. With this password in hand,
27 a litigant (or their ediscovery consultants) would have unfettered access to all communications
28 within the account holder’s electronic storage, without regard to relevance, privilege, or other

1 appropriate bounds of permissible discovery. In other words, litigants could circumvent the very
2 purpose of the SCA by simply requesting that a service provider disclose the password for a user
3 account, ultimately vitiating the protections of the SCA.

4 This holding is consistent with the Ninth Circuit’s interpretation of the SCA. *Theofel*, 359
5 F.3d at 1072. The *Theofel* Court explained:

6 Like the tort of trespass, the Stored Communications Act protects
7 individuals’ privacy and proprietary interests. The Act reflects
8 Congress’s judgment that users have a legitimate interest in the
9 confidentiality of communications in electronic storage at a
10 communications facility. Just as trespass protects those who rent
space from a commercial storage facility to hold sensitive documents,
[citation], the Act protects users whose electronic communications
are in electronic storage with an ISP or other electronic
communications facility.

11 *Id.* at 1072–73 (citing *Prosser and Keeton on the Law of Torts* § 13, at 78 (W. Page Keeton ed., 5th
12 ed. 1984)). The *Theofel* Court thus explained that the SCA should be examined under the common
13 law tort of trespass. *Theofel*, 359 F.3d at 1073. The *Theofel* Court further noted that “Congress
14 surely did not intend to exempt” a hacker’s use of a stolen password when breaking into a mail
15 server by considering the use of a stolen password an “authorized” access of the mail server. *Id.*
16 The Court looked to the “essential nature of the invasion.” *Id.* In this analytical context, Congress
17 surely did not intent to create a law forbidding (by analogy) a bank from turning over the money in
18 its vault but in the same stroke of its pen allowing the bank to turn over the vault key. Protecting
19 passwords relates to the “essential nature of the invasion” here by protecting access to the contents
20 of a communication within electronic storage. Accordingly, protecting passwords under the SCA
21 promotes and relates to “the specific interests that the tort of trespass seeks to protect.” *Id.* (citing
22 *Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1352 (7th Cir. 1995); *Lewis v. United States*,
23 385 U.S. 206, 211 (1966); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 517–18 (4th
24 Cir. 1999)). Thus, finding that passwords are “information” subject to the protections of the SCA
25 protects individuals’ privacy and proprietary interests in their electronic communications, and
26 furthers the legitimate interests that users have in the confidentiality of communications in electronic
27 storage at a communications facility. *Theofel*, 359 F.3d at 1072.

28 In arguing passwords are not afforded protections under the SCA, Applicants primarily rely

1 on the holding of *In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1083–84 (N.D. Cal. 2015), which
2 found passwords are not considered “content” in the context of a motion to dismiss for claims of
3 violations of the Wiretap Act. [Dkt. 21 at 5]. However, *Carrier* is distinguishable and inapplicable
4 to the instant application for a number of reasons explained below.

5 First, *Carrier*’s holding is limited to the Wiretap Act. *Carrier*, 78 F. Supp. 3d at 1083–84.
6 Cases which rely on *Carrier* likewise limit and apply their holdings to only the Wiretap Act. *See*
7 *Brodsky v. Apple Inc.*, No. 19-cv-00712-LHK, 2019 WL 4141936 (N.D. Cal. Aug. 30, 2019);
8 *Brodsky v. Apple Inc.*, 445 F. Supp. 3d 110 (N.D. Cal. 2020); *Biesenbach v. Does 1-3*, No. 21-cv-
9 08091-DMR, 2022 WL 204358 (N.D. Cal. Jan. 24, 2022). While this Court acknowledges the
10 Wiretap Act and the SCA utilize the same definition of “content,” this does not automatically
11 indicate the definition is the same. “[A] statutory term may mean different things in different
12 places[.]” as “the presumption of consistent usage readily yields to context[.]” *King v. Burwell*, 576
13 U.S. 473, 493 n.3 (2015) (citing *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 320 (2014)).

14 Second, the context in which *Carrier* made its holding is materially different from the instant
15 case. The *Carrier* opinion relied on the Ninth Circuit’s *Zynga* opinion. *Carrier*, 78 F. Supp. 3d at
16 1083. In turn, *Zynga* cited with approval the First Circuit’s decision in *Gilday v. Dubois*, 124 F.3d
17 277 (1st Cir. 1997). *Zynga*, 750 F.3d at 1106. In *Gilday*, a prisoner-plaintiff brought suit against a
18 prison-defendant for alleged Wiretap Act violations stemming from the prison’s telephone
19 monitoring system and “detailing” system. *Gilday*, 124 F.3d at 281. The “detailing” system
20 recorded the prisoners’ dialed numbers, call duration, and PIN. *Id.* at 281, 296 n.27. The PIN was
21 assigned to the specific prisoner and used to facilitate the phone call. *Id.* The Plaintiff relied on the
22 prison’s interception of the PIN for the alleged Wiretap Act violation. *Id.* The First Circuit
23 disagreed and found no Wiretap Act violation because the “detailing” procedure did not intercept
24 content and “simply capture[d] electronic signals relating to the PIN of the caller, the number called,
25 and the date, time and length of the call.” *Id.* at 296 n.27.

26 In *Carrier*, the Court held that “the PIN number in *Gilday* served the same function as
27 traditional username and password” because the PIN was meant for authentication purposes of
28 accessing the phone system. *Carrier*, 78 F. Supp. 3d at 1084. *Carrier* further reasoned that “[j]ust

1 as interception of the PIN number in [*Gilday*] was found to not implicate ‘content’ information,
2 neither does interception of a user name or password. While such credentials may be a prerequisite
3 to engaging in communications (i.e., entering a user name and password in order to access one’s
4 email), the credentials themselves do not reveal the substance, purport, or meaning of any
5 communication.” *Id.*

6 The context is clear that *Carrier*’s limited holding does not extend to liability under the SCA.
7 The Wiretap Act imposes liability based on the *interception* of the contents of a communication
8 while *in transit*. *Yahoo Mail Litig.*, 7 F. Supp. 3d at 1026 (“Title I of the ECPA amended the federal
9 Wiretap Act to impose liability for the interception of certain electronic communications while they
10 are in transit.”). The Wiretap Act is meant to protect individuals from their communications being
11 intercepted while in transit. The Wiretap Act protects real-time or near-real-time electronic
12 communications that are in the process of being sent, delivered, or received. The key aspect of
13 transient communication subject to Wiretap Act protection is its ephemeral nature; such
14 communication exists only briefly in a human-accessible form as it travels from sender to recipient.
15 The Wiretap Act is designed to protect these in-transit communications, acknowledging that
16 individuals have a reasonable expectation of privacy in their conversations as they occur.

17 By contrast, the SCA imposes liability on service providers’ *knowingly divulging* the
18 contents of a communication in *an electronic storage*. Compare 18 U.S.C. § 2511 with 18 U.S.C.
19 § 2702. Under the SCA, liability is thus imposed when the content of a communication, stored in
20 an electronic storage, is knowingly divulged. 18 U.S.C. § 2702. The content of a communication
21 subject to protections of the SCA are by definition not transient or ephemeral; because the SCA
22 deals with storage, the content of a communication can later be accessed, potentially for an indefinite
23 period. As such, these stored communications can be repeatedly and more readily accessed unlike
24 transient communications under the Wiretap Act.

25 Finally, *Gilday* is materially different from the instant case. In *Gilday*, the prison did not
26 obtain the content of a communication by intercepting prisoners’ PIN. *Gilday*, 124 F.3d at 281, 296
27 n.27. Indeed, the contents of the communication in *Gilday* were the words spoken into or heard by
28 the phone; the phone conversation was completely separate from the PIN. *Id.* Because the other

1 party to the phone call need never be told that the prisoner must use a PIN to access the phone line,
2 there is no inherent communication concerning the PIN in a phone call (again, unlike stored
3 electronic communications, which inherently reveal information about the account user). Unlike
4 under the SCA, in *Gilday* there existed no informational nexus or relation between the PIN and the
5 phone conversation.

6 This issue exemplifies the second problem applying *Carrier*'s holding to the SCA. The
7 Wiretap Act's factual patterns are materially distinct from SCA fact patterns. In *Gilday*, the PIN
8 functioned more as a username rather than a password. *Gilday*, 124 F.3d at 281, 296 n.27 (the call
9 detailing system "captures electronic signals relating to the PIN of the caller, the number called, and
10 the date, time and length of the call"). The PIN was a prisoners' specific identification number that
11 allowed them access to the telephone. *Id.* The information yielded from the interception of the PIN
12 would be the identification of the specific individual who was tied to that number, nothing more.
13 Additionally, given the ephemeral nature of phone calls, there was no risk that the contents of the
14 communication could be later accessed after the interception of the PIN.

15 If an electronic communication service provider discloses a users' username and password
16 to a third party, the electronic communication service provider would know they are ultimately
17 disclosing the contents of the communication because that third party could then access the full
18 contents of the stored communication using the username and password. Functionally, by disclosing
19 a password as requested here, Discord would divulge information which it knows will allow third
20 parties to access the contents of all communications in the listed user accounts. The only
21 conceivable use for the passwords here is for Applicants to access the requested accounts (such as
22 "Archetype") and view the contents of all electronically stored communications in those requested
23 accounts. Indeed, as the discussion of the Anton Pillar Order proceedings above indicate,
24 Applicants' consultant Warren asked for and use the usernames and passwords of Gervais's
25 accounts to access the information therein.

26 Accordingly, this Court find that passwords are afforded protections under the SCA.
27 However, this does not end the dispute. The Court next address whether Gervais consented to the
28 disclosure of the content of his communications.

B. Whether Gervais Consented.

The SCA allows a provider of covered services to “divulge the contents of a communication” to “an addressee or intended recipient of such communication,” or “with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.” *Zynga*, 750 F.3d at 1104 (quoting 18 U.S.C. § 2702). The SCA does not define “lawful consent” or describe how it may be established. *In re JSC Com. Bank Privatbank*, No. 21-mc-80216-VKD, 2021 WL 4355334, at *5 (N.D. Cal. Sept. 24, 2021). However, “exceptions to the SCA are to be construed narrowly.” *Suraju v. Yahoo!, Inc.*, No. 22-mc-80072-SK, 2022 WL 3365086, at *4 (N.D. Cal. July 13, 2022), *appeal dismissed*, No. 22-16231, 2022 WL 18671555 (9th Cir. Dec. 14, 2022) (citing *Suzlon Energy Ltd. V. Microsoft Corp.*, 671 F.3d 726, 730 (9th Cir. 2011)).

“Courts have cautioned that implied consent applies only in a narrow set of cases.” *Calhoun v. Google LLC*, 526 F. Supp. 3d 605, 623 (N.D. Cal. 2021) (quoting *In re Google, Inc.*, 2013 WL 5423918, at *12 (N.D. Cal. Sept. 26, 2013). “[W]hile consent may *permit* production by a provider, it may not *require* such a production.” *In re Facebook, Inc.*, 923 F. Supp. 2d 1204, 1206 (N.D. Cal. 2012) (citing *United States v. Rodgers*, 461 U.S. 677, 706 (1983) (“The word ‘may,’ when used in a statute, usually implies some degree of discretion.”) (emphasis in original)). The party seeking the benefit of the exception has the burden to prove consent. *Calhoun*, 526 F. Supp. 3d at 620 (quoting *Matera v. Google Inc.*, No. 15-cv-04062-LHK, 2016 WL 5339806, at *17 (N.D. Cal. Sept. 23, 2016)).

The Northern District of California has found consent may be explicit or implied, but requires the consent be actual. *Calhoun*, 526 F. Supp. 3d at 620 (quoting *In re Google*, 2013 WL 5423918, at *12). “Thus, ‘a reviewing court must inquire into the dimensions of the consent and then ascertain whether the interception exceeded those boundaries.’” *Calhoun*, 526 F. Supp. 3d at 623 (quoting *In re Pharmatrak, Inc.*, 329 F.3d 9, 19 (1st Cir. 2003)).

Both Parties agree Gervais did not explicitly consent to Discord knowingly “divulge the contents of a communication.” *See* Dkt 21. The Parties disagree on whether Gervais implicitly consented to the disclosure of the content of his communications. *See id.* Applicants cite

1 circumstantial evidence that purportedly shows Gervais’s consent. Specifically, Applicants rely on
2 the fact that Gervais was on notice that his Discord communications were ordered to be collected
3 by the Canadian Court; Gervais consented to the search of his devices which would provide access
4 to his Discord communications in the Canadian Litigation; and Gervais actively participated in the
5 collection of his data in the Canadian Litigation. *Id.* at 6.

6 Discord argues that any judicial decree stemming from the Canadian Litigation is
7 inapplicable because the judicial decree does not indicate Gervais actually consented; rather, the
8 judicial decree is an order from the court for which Gervais may still preserve objections and may
9 not consent to. Additionally, Discord argues Applicants’ support for Gervais’s consent is flawed
10 because the support comes from Mr. Warren’s affidavit, a secondhand account, rather than Gervais
11 himself. Further, Discord argues Gervais’s actions indicate he does not consent. For example,
12 Discord argues Mr. Warren’s affidavit details “various instances of delay tactics, lack of
13 cooperation, and outright obstruction.” [Dkt. 21 at 9 (citing Dkt. 1-2 at 3 (“Gervais ... ha[s] not
14 rendered the ‘necessary assistance’ required” under the Anton Piller order such that Warren “ha[s]
15 been frustrated by Gervais in [Warren’s] efforts to preserve data”), 5 (expressing concern that
16 Gervais would delete or alter information though he allowed the search), 8 (Gervais failing to
17 respond to Warren’s attempts to access password repository and that “Gervais had booby-trapped
18 his own . . . account”), 11 (finding Gervais’s explanations “not credible” in part because Gervais
19 continued to access Discord), 12 (Gervais used a hotkey in Warren’s presence to delete email
20 account data), 12–13 (recounting Gervais’s misrepresentations concerning his access to Discord.)].

21 The Court finds that Gervais’s actions, as presented on the current record, fail to show that
22 he did implicitly consent to Discord disclosing the contents of his communications. First, the mere
23 fact Gervais is on notice of his obligation under the Canadian Orders does not indicate his consent
24 to the disclosure of the contents of his communications. Indeed, the fact that he was ordered by the
25 Canadian court to allow searches and inspections of his electronic devices indicates he opposed such
26 disclosures and would not allow them voluntarily (otherwise, there would be no need for an order
27 from the Canadian court).

28 Secondly, a Court order to produce the communication subject to a judicial decree stemming

1 from the Canadian Litigation does not amount to Gervais consenting to Discord disclosing the
2 content of the communication. Instructive is the Ninth Circuit’s analysis in *Suzlon*, 671 F.3d at 731,
3 where the court explained that compliance with foreign civil litigation rules does not amount to
4 implied consent. In that case, the party seeking a finding of implied consent, *Suzlon*, argued that
5 “under Australian civil litigation rules, a litigant is obligated to list and disclose documents that
6 would include the emails at issue,” but the Ninth Circuit indicated this obligation does not amount
7 to implied consent. *Id.* Rather, the Court stated the Australian civil litigation rules required “Sridhar
8 himself . . . be responsible for disclosing [the content of the communications,]” not the non-party
9 Microsoft, Corp. *Id.*

10 Furthermore, Gervais’s actions detailed in Mr. Warren’s affidavit indicate that he does not
11 implicitly consent to the production of the contents of his communications. The “various instances
12 of delay tactics, lack of cooperation, and outright obstruction[.]” highlighted by Discord indicate
13 Gervais would not consent to the production of the content of the communications on Discord. *See*
14 Dkt. 21 at 9 (citing Dkt. 1-2 at 3 (“Gervais . . . ha[s] not rendered the ‘necessary assistance’ required”
15 under the Anton Piller order such that Warren “ha[s] been frustrated by Gervais in [Warren’s] efforts
16 to preserve data”), 5 (expressing concern that Gervais would delete or alter information though he
17 allowed the search), 8 (Gervais failing to respond to Warren’s attempts to access password
18 repository and that “Gervais had booby-trapped his own . . . account”), 11 (finding Gervais’s
19 explanations “not credible” in part because Gervais continued to access Discord), 12 (Gervais used
20 a hotkey in Warren’s presence to delete email account data) 12–13 (recounting Gervais’s
21 misrepresentations concerning his access to Discord)). While such tactics by Gervais may be
22 improper under Canadian law (and presumably will be addressed by the Canadian Court), for
23 purposes of the implied consent analysis here, those actions support a conclusion that Applicants
24 failed to satisfy their burden of showing that Gervais implicitly consented to disclosure of his
25 communications. Therefore, in light of the above analysis, the Court finds that Gervais has not
26 consented either expressly or impliedly to the disclosure of the contents of his communications,
27 including in particular the passwords to his accounts.

28

1 **IV. APPOINTMENT OF SECTION 1782 COMMISSIONER**

2 The Court next addresses Applicants’ ancillary request to appoint Mr. Warren as
3 “Commissioner” for the purpose of issuing the subpoena and receiving the documents and materials
4 in response thereto. [Dkt. 1 at 14]. Whether to appoint a Commissioner, and determining the
5 qualifications of any potential Commissioner, is a multi-factor analysis. *See United States v. Google*
6 *LLC*, -- F.Supp.3d --, 2023 WL 5725518 (N.D. Cal. Sept. 5, 2023). However, in subsequent
7 briefing, Applicants and Discord have stipulated that a “commissioner does not need to be appointed
8 in this matter.” [Dkt. 20 at 2]. Therefore, Applicants’ initial request for appointment of a
9 Commissioner is **DENIED** as moot.

10 **V. PROTECTIVE ORDER**

11 Courts have discretion to issue a protective order for “good cause” in order to “protect a
12 party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]” Fed.
13 R. Civ. P. 26(c). To establish “good cause,” there must be a demonstration of specific prejudice or
14 harm that would result from the absence of a protective order. *Phillips ex rel. Ests. of Byrd v.*
15 *General Motors Corp.*, 307 F.3d 1206, 1210–11 (9th Cir. 2002). “[B]road allegations of harm,
16 unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test [for
17 good cause].” *Beckman Indus. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992).

18 Here, good cause exists to protect the privacy and rights of the persons whose information,
19 messages, and documents may be produced by Discord in response to an appropriate subpoena. As
20 noted, the proposed subpoena is broadly drafted, and therefore documents, messages, and
21 information produced in response to the requested subpoena may not lead to Gervais and Roosen.
22 Accordingly, it is necessary to protect the rights of any potential and innocent third parties. *See,*
23 *e.g., Strike 3 Holdings, LLC v. Doe*, No. 23-cv-01985-AMO, 2023 WL 3483288, at *2 (N.D. Cal.
24 May 15, 2023). The Court takes Judicial Notice of the fact Discord is a messaging platform which
25 allows minor children to utilize the service. *See Discord’s Terms of Service*, (Feb. 24, 2023),
26 <https://discord.com/terms#2> (last visited Aug. 14, 2023) (Section 2 indicating individuals must be
27 thirteen years or older to utilize Discord’s service.). Indeed, it appears that Discord is a messaging
28 platform which is popular with young people playing online video games. *See* Kellen Browning, 5

1 *Ways Young People Are Using Discord*, New York Times (Dec. 29, 2021),
2 <https://www.nytimes.com/2021/12/29/business/discord-users-gen-z.html> (last visited Aug. 15,
3 2023) (“Discord, the online messaging platform, has long been popular with gamers. . . . The site
4 is particularly popular with young adults, teenagers and almost-teenagers.”). Because information,
5 messages, and documents involving minors may be implicated (whether inadvertently or because
6 the subpoena is broadly drafted) by the discovery sought, the Court finds that specific potential harm
7 to minors should be addressed, as well as the annoyance, embarrassment, and undue burden suffered
8 by any innocent third parties (whether minors or not) should their private messages be publicly
9 produced by Discord with no confidentiality or other protections.

10 After reviewing Applicants’ and Discord’s stipulated protective order, [Dkt. 19], the Court
11 finds that good cause exists to **GRANT** the stipulated protective order to handle the confidential
12 treatment of confidential documents, information, messages, or data produced by Discord in
13 response to an appropriately framed subpoena.

14 **VI. MISCELLANEOUS**

15 Following oral argument and subsequent supplemental briefing, two issues remain regarding
16 the issuance of the subpoena. [Dkt. 20]. First, whether a litigation hold should be implemented
17 pausing any of Discord’s routine deletion procedures, notwithstanding Discord’s preservation of all
18 responsive accounts. *Id.*

19 Discord stated it “has preserved all accounts it *could identify based on the information*
20 *provided by Applicants, to the extent any exist.*” [Dkt. 21 at 10]. Discord avers it created a
21 “snapshot” of the accounts, and thereby preserved any information in those accounts. *Id.* Applicants
22 imply, without explanation, Discord created one “snapshot” subject to the information Applicants
23 gave Discord on August 17, 2023, and Discord will create another “snapshot” at the time of
24 production. [Dkt. 22 at 8 n.4].

25 Applicants explain their concern that, “[i]f Gervais or Roosen engaged in further
26 communications, create new aliases, or otherwise, between August 17, 2023 and the time of
27 production, and Discord’s routine deletion procedures are not halted, evidence of those
28 communications and aliases could be lost forever.” *Id.*

1 Discord’s only obligation is to preserve accounts that it is able to identify based on the
2 information that it has been provided by Applicants. Other than speculation, Discord has failed to
3 show what new aliases or accounts Gervais or Roosen would utilize because (as noted above)
4 Applicants provided Discord with no identifiable information for Gervais and Roosen other than
5 their names. Applicants’ failure to provide insufficient information associated with potential other
6 accounts Gervais and Roosen may be using is not a sufficient basis to require Discord to halt all
7 routine deletion procedures for an unknown number of other accounts, particularly where Discord
8 has taken reasonable steps to preserve data in the accounts which were adequately identified.

9 Accordingly, the Court **GRANTS-IN-PART** Applicant’s request for a litigation hold.
10 Discord is **ORDERED** to preserve the data and communications in all accounts relating to Gervais
11 and Roosen which Discord previously identified based on the information provided by Applicants,
12 to the extent any exist, until the production of the information subject to the subpoena. Further,
13 Discord is **ORDERED** to exempt the preserved accounts from deletion policies or other routine
14 retention policies.

15 The final remaining issue is whether Discord can be prevented from notifying Gervais of the
16 instant subpoena. Applicants seek “a brief non-disclosure order preventing Discord from disclosing
17 the collection of Gervais’s communications[.]” [Dkt. 21 at 3]. Applicants acknowledge “non-
18 disclosure orders, in the context of a civil subpoena, have not been addressed in the Ninth Circuit”
19 nor in this Court. *Id.* (citing 18 U.S.C. § 2703). Applicants base their argument for the non-
20 disclosure order on the risk of spoliation by Gervais. However, this risk is at best speculative and
21 is mitigated because Discord has already taken snapshots of the accounts, and Discord going forward
22 is required to abide by this Court’s **ORDER** to preserve all accounts it could identify based on the
23 information provided by Applicants, to the extent any exist, until the production of the information
24 subject to the subpoena. As such, Applicants’ request is **DENIED WITHOUT PREJUDICE** as
25 moot.

CONCLUSION

In view of the foregoing, the Court **GRANTS-IN-PART** Applicant’s application and grants leave for Applicants to serve an appropriate subpoena for documents on Discord but **DENIES-IN-PART WITHOUT PREJUDICE** the application to the extent that the proposed subpoena submitted to the Court requires modification for the reasons stated herein, including with regard to the Court’s finding that passwords are subject to the protections of the SCA here. The Parties are hereby **ORDERED** to meet and confer promptly to prepare a mutually agreeable subpoena for documents which is consistent with the Court’s rulings herein. If Applicants and Discord are able to reach agreement, they shall submit a Stipulation with Proposed Revised Subpoena to the Court within **thirty (30) days** of entry of this Order. If Applicants and Discord are unable to reach agreement on a revised subpoena, within **thirty (30) days** of entry of this Order they shall each file a brief no longer than three pages explaining their positions on areas of disagreement and attaching their respective proposed revised subpoenas.

The Court **DENIES AS MOOT** Applicants’ request for appointment of a Commissioner. [Dkt. 1 at 14].


The Court further hereby **GRANTS** Applicants’ and Discord’s stipulated protective order. [Dkt. 19].

The Court **GRANTS-IN-PART** Applicants’ request for a litigation hold as discussed above. [Dkt. 20].

The Court **DENIES WITHOUT PREJUDICE** Applicants’ request for a brief nondisclosure order with regard to Gervais. [Dkt. 21].

IT IS SO ORDERED.

Dated: November 22, 2023


PETER H. KANG
United States Magistrate Judge

United States District Court
Northern District of California