

FILED  
U.S. DISTRICT COURT  
DISTRICT OF MARYLAND

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
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IN RE

) CLERK'S OFFICE  
) AT BALTIMORE

Application of the Federal Trade Commission  
for an Order Pursuant to 28 U.S.C. § 1782  
to Obtain Information from Aegis Mobile LLC  
on Behalf of the Competition Bureau, Canada,  
for Use by Foreign Proceedings.

BY ) \_\_\_\_\_ DEPUTY  
Misc. No. 13- 524

**APPLICATION FOR AN ORDER PURSUANT TO 28 U.S.C. § 1782**

The Federal Trade Commission ("FTC" or "Commission"), by and through its undersigned counsel, hereby applies for an ex parte order appointing an FTC attorney as a commissioner of the Court for purposes of obtaining documents and information from Aegis Mobile LLC ("Aegis"), a corporation domiciled in this district. The Commission seeks this order pursuant to 28 U.S.C. § 1782 and a request from the Competition Bureau of Canada (the "Competition Bureau"), an independent Canadian law enforcement agency, for assistance in a civil enforcement proceeding in that country. The FTC makes this application in accordance with Section 6(j) of the Federal Trade Commission Act, 15 U.S.C. § 46(j), which authorizes the FTC to assist—including specifically by applying for an order under 28 U.S.C. § 1782—a foreign law enforcement agency that is investigating, or engaging in enforcement proceedings against, possible violations of laws prohibiting fraudulent or deceptive commercial practices.

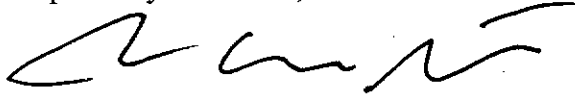
This application meets all of the statutory and discretionary requirements necessary to obtain an order under Section 1782, as detailed in the FTC's accompanying memorandum of law and supporting affidavit of Magalie Marie Plouffe, Senior

Competition Law Officer with the Fair Business Practices Branch of the Competition Bureau (attached as Exhibit 1 hereto), which is incorporated by reference herein.

WHEREFORE, based on the foregoing, the FTC respectfully requests that this Court grant this application and appoint FTC counsel as commissioners to conduct the discovery requested by the Canadian Competition Bureau.

A proposed Order is attached hereto.

Respectfully submitted,



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Dated: November 1, 2013

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**MEMORANDUM OF LAW IN SUPPORT OF  
APPLICATION FOR ORDER PURSUANT TO 28 U.S.C. § 1782**

The Federal Trade Commission ("FTC" or "Commission") applies to this Court for an ex parte order pursuant to 28 U.S.C. § 1782 appointing certain FTC attorneys as commissioners of the Court to facilitate the gathering of evidence in aid of a foreign judicial proceeding. The FTC makes this application on behalf of the Competition Bureau of Canada (the "Competition Bureau"), an independent law enforcement agency of the Canadian Government, which has requested the FTC's assistance in obtaining evidence from Aegis Mobile LLC, a U.S. corporation domiciled in this district, for use in its investigation of, and enforcement proceeding against, various Canadian wireless companies alleged to have deceptively advertised certain premium cellular services in violation of Canadian law.

**BACKGROUND**

In April 2012, the Competition Bureau launched an investigation into the marketing practices of various wireless companies, including, but not limited to, Rogers Communications Inc. ("Rogers"), Bell Canada ("Bell"), TELUS Corporation ("TELUS"), and the Canadian Wireless Telecommunications Association ("CWTA"). In September

2012, the Competition Bureau commenced an enforcement proceeding before the Ontario Superior Court of Justice against Rogers, Bell, TELUS, and the CWTA (collectively, the “Defendants”). See Affidavit of Magalie Marie Plouffe (Exhibit 1 to FTC’s Application) at ¶¶ 3-4, 7.

In its pleadings in the Ontario court, the Competition Bureau alleges that the Defendants have engaged in the deceptive marketing of premium digital services for mobile devices by: (1) making and permitting others to make false and misleading representations that consumers can acquire premium text messaging and digital content for free (the “Call-to-Action Representations”), when in fact customers are charged for the content; and (2) making false and misleading representations that consumers are safeguarded or protected from receiving and having to pay unauthorized charges for premium text messaging and digital content services (the “Safeguarding Representations”), when in fact Defendants facilitate such charges, keeping a share for themselves. *Id.* at ¶ 7 and Ex. B thereto.

Rogers, Bell, and TELUS sell digital content to their wireless customers developed by third-party content providers and aggregators. *Id.* at ¶ 4.a. During the Competition Bureau’s investigation of the deceptive advertising, the CWTA disclosed that it had contracted with Aegis Mobile LLC, a U.S. company based in Columbia, Maryland, to record and analyze the advertising used to promote this digital content. The contract required Aegis Mobile to assess compliance with industry standards and guidelines administered by the CWTA. *Id.* at ¶¶ 5-6. The CWTA asked Aegis Mobile to collect and analyze the very advertising that the Competition Bureau alleges is false and misleading in its Ontario proceeding. *Id.* at ¶ 12.

The FTC and the Competition Bureau often cooperate in investigations and have a long history of mutual enforcement assistance.<sup>1</sup> In aid of its investigation and the Ontario proceeding, the Competition Bureau on June 18, 2013, submitted a request to the FTC for assistance in obtaining relevant information from Aegis Mobile. Ex. 1 at ¶ 9. In its application, the Competition Bureau requests that the FTC seek documents and testimony from Aegis Mobile regarding (a) its monitoring and compliance activities for and on behalf of the Defendants, including specifically its capture of representations promoting the digital content at issue and the information it relied upon in performing this work; and (b) the marketing of this digital content in Canada, including comparisons with the marketing practices of other countries or comparisons to other telecommunications companies or associations. Ex. 1 at ¶ 10 and Ex. D thereto.

## **ARGUMENT**

### **I. THE FTC HAS STATUTORY AUTHORITY TO MAKE THIS APPLICATION ON BEHALF OF THE COMPETITION BUREAU.**

Under Section 6(j) of the Federal Trade Commission Act (“FTC Act”), the FTC may assist a foreign law enforcement agency that is “investigating, or engaging in enforcement proceedings against, possible violations of laws prohibiting fraudulent or deceptive commercial practices, or other practices that are substantially similar to practices prohibited by any provision of the laws administered by the Commission.” 15 U.S.C. § 46(j)(1). Specifically, Section 6(j) of the FTC Act provides that the FTC may,

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<sup>1</sup> In 1995, the United States and Canada entered in to a binding agreement to cooperate in competition and deceptive marketing practices cases. *See Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws* (Aug. 3 1995), reprinted in 4 Trade Reg. Rpt. (CCH) ¶ 13,503 (available at [http://www.ftc.gov/bc/international/docs/agree\\_canada.pdf](http://www.ftc.gov/bc/international/docs/agree_canada.pdf)).

when requested by a foreign agency “acting to investigate or pursue the enforcement of civil laws,” “seek and accept appointment by a United States district court of Commission attorneys to provide assistance to foreign and international tribunals and to litigants before such tribunals on behalf of a foreign law enforcement agency pursuant to section 1782 of Title 28.” 15 U.S.C. § 46(j)(2)(B).<sup>2</sup> Accordingly, the FTC is a proper applicant to seek this Court’s assistance on behalf of the Competition Bureau.

## II. JUDICIAL ASSISTANCE IS APPROPRIATE UNDER 28 U.S.C. § 1782.

Title 28, United States Code, § 1782 provides in pertinent part that:

[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal, or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

28 U.S.C. § 1782(a).

Section 1782 “is the product of congressional efforts . . . to provide federal-court assistance in gathering evidence for use in foreign tribunals.” *Intel Corp. v. Advanced*

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<sup>2</sup> Section 6(j) provides the Commission with two routes to provide such assistance. Under Section 6(j)(2)(A), the FTC may also “conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance, using all investigative powers authorized by the [FTC Act].” 15 U.S.C. § 46(j)(2)(A). The FTC initially took this route, serving an administrative civil investigative demand (“CID”) upon Aegis Mobile seeking documents requested by the Competition Bureau. *See* Ex. 1, ¶ 10 (attaching CID as Ex. D). Aegis Mobile petitioned the Commission to quash the CID. The Commission determined that, due to delays caused by the recent interruption in U.S. government operations, it would be more expeditious to seek this information by means of a proceeding under 28 U.S.C. § 1782. Accordingly, the Commission stayed the petition to quash, without ruling on its merits, while the FTC applies for an order under 28 U.S.C. § 1782. *See* Order Staying Petition to Quash Proceedings (Oct. 24, 2013), FTC No. 122 3247 (Exhibit 2 to FTC’s Application).

*Micro Devices, Inc.*, 542 U.S. 241, 247 (2004). It serves the “twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts.” *Al Fayed v. United States*, 210 F.3d 421, 424 (4th Cir. 2000) (quoting *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992)). The Court’s grant of the FTC’s application here would fulfill these twin aims.

To facilitate the gathering of U.S. evidence for use in a foreign judicial proceeding, a district court may appoint a commissioner empowered to take the necessary steps to collect the information sought, including by issuing subpoenas. 28 U.S.C. § 1782(a). Typically, when a foreign request for judicial assistance is made through a U.S. government agency, the district court appoints as commissioner one of the government attorneys submitting the request. *See, e.g., In re Request from Canada*, 155 F. Supp. 2d 515, 517 (M.D.N.C. 2001) (appointing an Assistant United States Attorney); *In re Letter of Request from District of Rhein-Necker-Kreis, Amtsgericht Sinsheim, Germany*, 2010 WL 1655823, at \*2 (S.D. Fla. April 23, 2010) (same); *In re Wilhelm*, 470 F. Supp. 2d 409, 411 (S.D.N.Y. 2007) (same).

Such applications are properly made and acted upon ex parte because persons with objections to the requests will likely have notice of any discovery orders issued. Recipients of subpoenas issued pursuant to Section 1782 may raise objections by appropriate motions to the district court in response to any subpoena served by the court-appointed commissioner. *Gushlak v. Gushlak*, 486 Fed. Appx. 215, 217 (2d Cir. 2012); *In re Republic of Ecuador*, 2010 WL 3702427, at \* 2 (N.D. Cal. 2010) (citing cases).

**III. THE FTC'S APPLICATION ON BEHALF OF CANADA SATISFIES THE STANDARDS FOR AN ORDER PURSUANT TO 28 U.S.C. § 1782.**

The FTC's application for judicial assistance in obtaining evidence from Aegis Mobile in aid of the Competition Bureau's investigation and enforcement proceeding in Ontario Superior Court fully comports with the standards for obtaining documents and testimony under 28 U.S.C. § 1782. That section requires only that (1) the request be made by an interested party, (2) for use in a proceeding in a foreign tribunal, and (3) the party from whom discovery is sought reside or be found in the district of the district court ruling on the application for assistance. 28 U.S.C. § 1782; *In re Chevron Corp.*, 753 F. Supp. 2d 536, 539 (D. Md. 2010). Each of the statutory requirements is satisfied here: (1) the Competition Bureau, on whose behalf the FTC seeks this discovery, unquestionably is an interested party; (2) the information is sought in aid of a Canadian judicial proceeding;<sup>3</sup> and (3) Aegis Mobile, the party from whom the information is sought, is located in this district.

In *Intel Corp. v. Advanced Micro Devices, Inc.*, the Supreme Court identified four additional discretionary factors that a district court *may* consider in determining whether to grant a request under Section 1782. Specifically, the district court may consider whether (1) "the person from whom information is sought is a participant in the foreign proceeding;" (2) the foreign tribunal is receptive to U.S. court assistance; (3) the

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<sup>3</sup> Section 1782 does not limit the provision of judicial assistance to instances when a foreign adjudicative proceedings is "pending" or "imminent," but requires only that the information be sought for use in a foreign adjudicative proceedings that is "within reasonable contemplation." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258-59 (2004) (citing legislative history that statute gives district courts "discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries"). The present request easily satisfies this requirement: The Competition Bureau seeks information for use in its pending judicial proceeding and its ongoing inquiry into whether further enforcement action is warranted. *See* Ex. 1 at ¶ 15.



request is an attempt to “circumvent foreign proof gathering restrictions;” and (4) the request for information is “unduly intrusive or burdensome.” 542 U.S. 241, 264-65 (2004); accord *Chevron Corp.*, 753 F. Supp. 2d at 539. These discretionary factors likewise support the FTC’s application.

First, Aegis Mobile is not a party to the Ontario proceeding and, upon information and belief, has no presence in Canada. The Competition Bureau therefore cannot avail itself of the authority of the Ontario court to obtain the needed information from Aegis Mobile without assistance from the United States. *See* Ex. 1, ¶¶ 13.

Second, the Ontario courts have historically been receptive to requests for this judicial assistance from the United States. Indeed, they have previously permitted parties in proceedings there to seek evidence under 28 U.S.C. §1782, having found that use of this procedure to obtain evidence does not violate the rules and procedure of Ontario courts and promotes judicial efficiency. *Id.* at ¶¶ 16-17 and Ex. F thereto. And the Ontario court here has already ruled that the Defendants’ Call-to-Action Representations (which Aegis Mobile collected and analyzed pursuant to its contract with the CWTA) are the proper subject of discovery. *Id.* at ¶ 8 and Ex. C thereto.

The third discretionary factor aims to protect against abuse of Section 1782 as a vehicle to end-run foreign proof-gathering restrictions or other policies of a foreign country of the United States. *See Intel*, 524 U.S. at 265.<sup>4</sup> Absent a showing of bad faith on the part of a Section 1782 applicant, which cannot be shown here, courts generally do

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<sup>4</sup> Litigants are not required to seek discovery through the process available in a foreign tribunal prior to seeking it from a district court pursuant to 28 U.S.C. § 1782. *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1098 (2d Cir. 1995). Moreover, Section 1782 contains no requirement that evidence sought from a federal court is actually discoverable under the law governing the foreign proceeding. *Chevron Corp.*, 753 F. Supp. 2d at 540.

not weigh this factor in considering whether to grant an application for judicial assistance in aid of a foreign proceeding. See *In re Application of Gemeinshcaftspraxis Dr. Med. Schottdorf*, 2006 WL 3844464, at \*7 (S.D.N.Y. Dec. 29, 2006); cf. *In re ex parte Lee-Shim*, 2013 WL 5568713, at \*2 (N.D. Cal. October 9, 2013).<sup>5</sup> As the accompanying affidavit of Magalie Marie Plouffe makes clear, the Competition Bureau has not sought to avoid any restrictions on proof gathering that may be applicable in the Canadian proceedings, and nothing suggests that the Ontario court would deny any effort by the Competition Bureau to obtain this highly probative information sought from Aegis Mobile. To the contrary, under Canadian law, the Competition Bureau would likely be able to obtain the documents and testimony it seeks from Aegis Mobile, were the company located in Canada. *Id.* at ¶ 14. And Ontario courts previously have permitted parties to seek evidence pursuant to 28 U.S.C. § 1782, on the grounds that it is consistent with the rules and procedures of Ontario courts and also promotes judicial efficiency. *Id.* at ¶ 16-17 and Ex. F thereto. Accordingly, the third discretionary factor, to the extent the Court weighs it at all, favors granting this application.

Lastly, although responding to any form of process imposes some burden on the producing party, the discovery sought here from Aegis Mobile is plainly not unduly burdensome or intrusive. Rather, it is narrowly tailored to the services that Aegis Mobile contracted to perform for the CWTA and merely seeks information related to the work that Aegis Mobile performed in the ordinary course of business. Accordingly, Aegis should both possess the requested information and be able to provide it easily in response

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<sup>5</sup> Although Aegis has objected to use of the FTC's administrative CID to obtain documents (*see* note 3, *supra*), we have no reason to believe that Aegis Mobile's objection would extend to the FTC's use of the mechanism permitted by Section 1782.

to requests for documents and testimony issued by a court-appointed commissioner.

Thus, the fourth discretionary factor likewise supports granting this application.

**CONCLUSION**

Accordingly, pursuant to 28 U.S.C. § 1782, the FTC respectfully requests that this Court grant the instant application for an order appointing an attorney of the FTC as Commissioner in this matter, with authority to issue appropriate subpoenas for documents and testimony relevant to the foreign request for assistance.

Respectfully submitted,



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**[PROPOSED] ORDER**

Upon application of the Federal Trade Commission ("FTC" or "Commission") for judicial assistance on behalf of the Competition Bureau, Canada ("Competition Bureau") to obtain information from Aegis Mobile LLC, a corporation found in this District, for use in a judicial proceeding in Ontario, Canada, and it appearing that the requirements of 28 U.S.C. § 1782 have been satisfied,

IT IS HEREBY ORDERED, pursuant to the authority conferred by 28 U.S.C. § 1782 and the Court's inherent authority, that Laureen Kapin, FTC Counsel for International Consumer Protection, and Stephanie Rosenthal, attorney in the FTC's Division of Financial Practices, are hereby appointed as Commissioners of the Court and are hereby directed to take such steps as are necessary to collect the evidence requested by the Competition Bureau as follows:

1. the Commissioners may issue commissioner's subpoenas to be served on persons (natural and artificial) within the jurisdiction of this Court ordering them or their representatives to appear and testify and produce documents;

2. the Commissioners shall provide notice with respect to the collection of this information to those persons identified in the requests as parties to whom notice should be given (and no notice to any other party shall be required);

3. the Commissioners, in collecting the information requested, may be accompanied by persons whose presence or participation is authorized by the Commissioner, including, without limitation, representatives of the Competition Bureau who, as authorized by the Commissioners, may direct questions to any witness;

4. the Commissioners may seek such further orders of this Court as may be necessary to execute this request for information;

5. the Commissioners shall submit the evidence collected to the FTC for transmission to the Competition Bureau.

IT IS SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE