Date : 10/1/2020 7:18:08 AM
From : "Omer Mucznik"
To : "Vered Shpilman"
Subject : RE: NSO Litigation -- Call with King & Spalding

אין בעיה – עשינו עכשיו שיחת עדכונים על כל ההגשות והתאריכים ממש מפורטת

From: Vered Shpilman <VeredSh@justice.gov.il>
Sent: Thursday, October 1, 2020 10:01 AM
To: Omer Mucznik <OmerMu@justice.gov.il>
Cc: Avital Berger <AvitalBer@justice.gov.il>; Esther Mendelsohn <EstherMe@justice.gov.il>
Subject: FW: NSO Litigation -- Call with King & Spalding

היי עומר,
לפי המייל של ג'ון אמורה להיות הגשה בהליך הערעור ממש בימים הקרובים.
אבקש שתעקבי אחר הדוקט של הערעור. כמו כן, היתה אמורה להיות היום הגשה בהליך במחוזי – נוכח ההתפתחויות אני לא בטוחה שזה יקרה, אבל אנא עקבי לראות אם אכן זה קורה.
חשוב לשים לב מדי יום אם יש איזושהי הגשה בשני הדוקטים ולהסב את תשומת ליבנו.
לשאלות – ניתן לפנות לאסתרוש

תודה

From: Bellinger III, John B. <John.Bellinger@arnoldporter.com>
Sent: Thursday, October 1, 2020 4:56 AM
To: Marlene Mazel <MarleneM@justice.gov.il>
Cc: Itai Apter <ItaiA@justice.gov.il>; Vered Shpilman <VeredSh@justice.gov.il>; shani-v@mail.gov.il; FW-RamR <rraviv@mod.gov.il>; FW-GilA <gila@pmo.gov.il>; INBAR_LINHARD@mod.gov.il; Anderson, Reeves <Reeves.Anderson@arnoldporter.com>; Roy Schondorf <RoySc@justice.gov.il>
Subject: RE: NSO Litigation -- Call with King & Spalding

Marlene, Roy, Ram, Vered, et al:

Reeves and I spoke to King & Spalding today, with the following results:

1. Rod Rosenstein started by stating that Israel's filing may well have helped Judge Hamilton to reach her decision, and he thanked Israel for it.

2. K&S agrees that Judge Hamilton's order appears to stay all discovery, even though K&S only requested a stay of discovery from NSO. They think Facebook will not continue to ask third parties for discovery, so as not to anger Judge Hamilton. K&S will alert other third parties (including FP) to her order.

3. K&S is not sure what Facebook will do next. FB may ask Judge Hamilton for reconsideration, which K&S expects she will deny.

4. K&S filed Judge Hamilton's order with Ninth Circuit today, alerting them to the fact that Judge Hamilton believes the Ninth Circuit may have jurisdiction to hear the case. K&S expects the Ninth Circuit to decide the motion to dismiss the appeal quickly, perhaps within the next few days to a week.

5. K&S raised (we did not raise) that if the Ninth Circuit denies the motion to dismiss the appeal and agrees to hear the appeal, that would be good time for Israel to contact Jennifer Newstead to urge/discuss settlement. They raised (and we agree) that Jennifer may be much more receptive nine months after we last spoke and when Facebook faces another 18 months before a decision from the Ninth Circuit. They also noted that Jennifer has fired Cooley as lead counsel and that she may potentially be unhappy with Cooley both for encouraging her to file the lawsuit (if that is what happened) and to file the motion to disqualify K&S (which was denied). [I would note that K&S's sentiments about Cooley may reflect their own irritation with Cooley, but it is certainly possible that Jennifer may feel that Cooley mishandled the case, and that she may possibly want a resolution.]

6. K&S also raised (we did not raise) the possibility of Israel's contacting DoJ to urge DoJ to press Facebook to drop the case. Rod Rosenstein said he has no indication that senior DoJ or FBI officials are aware of the NSO case, but he thinks senior DoJ officials might be receptive to a request from Israel. K&S reminded us that the press had reported earlier this year that the FBI is investigating NSO for hacking into What'sApp, although NSO has no evidence that this is true. They also said that if Biden wins the election, Facebook might urge a Biden DoJ to take action against NSO.

7. K&S also urged Israel to file a brief supporting NSO in the Ninth Circuit. We said that we would relay this to you but we will not need to make a decision on this for some time.

John

John Bellinger III
Partner

Arnold & Porter
601 Massachusetts Ave., NW
Washington | District of Columbia 20001-3743
T: +1 202.942.6599
John.Bellinger@arnoldporter.com | www.arnoldporter.com

From: Marlene Mazel <MarleneM@justice.gov.il>
Sent: Wednesday, September 30, 2020 10:05 AM
To: Bellinger III, John B. <John.Bellinger@arnoldporter.com>
Cc: zzz.External.ItaiA@justice.gov.il <ItaiA@justice.gov.il>; zzz.External.VeredSh@justice.gov.il <VeredSh@justice.gov.il>; zzz.External.shani-v@mail.gov.il <shani-v@mail.gov.il>; zzz.External.rraviv@mod.gov.il <rraviv@mod.gov.il>; FW-GilA <gila@pmo.gov.il>; zzz.External.INBAR_LINHARD@mod.gov.il <INBAR_LINHARD@mod.gov.il>; Anderson, Reeves <Reeves.Anderson@arnoldporter.com>
Subject: RE: NSO Litigation -- 1800 call

External E-mail

Dear John,

Sounds good. We will dial in.

Marlene

From: Bellinger III, John B. <John.Bellinger@arnoldporter.com>
Sent: Wednesday, September 30, 2020 4:30 PM
To: Marlene Mazel <MarleneM@justice.gov.il>; Anderson, Reeves <Reeves.Anderson@arnoldporter.com>
Cc: Itai Apter <ItaiA@justice.gov.il>; Vered Shpilman <VeredSh@justice.gov.il>; shani-v@mail.gov.il; FW-RamR <rraviv@mod.gov.il>; FW-GilA <gila@pmo.gov.il>; INBAR_LINHARD@mod.gov.il
Subject: RE: NSO Litigation -- 1800 call

Marlene:

We can do 1800 your time. Here are dial-ins:

US toll-free 1-866-802-1366
International: 617-786-4670
Israel toll-free 1809344378

Code: 244-73-163

_____
John Bellinger III
Partner

Arnold & Porter
601 Massachusetts Ave., NW
Washington | District of Columbia 20001-3743
T: +1 202.942.6599
John.Bellinger@arnoldporter.com | www.arnoldporter.com

From: Marlene Mazel <MarleneM@justice.gov.il>
Sent: Wednesday, September 30, 2020 7:02 AM
To: Bellinger III, John B. <John.Bellinger@arnoldporter.com>; Anderson, Reeves <Reeves.Anderson@arnoldporter.com>
Cc: zzz.External.ItaiA@justice.gov.il <ItaiA@justice.gov.il>; zzz.External.VeredSh@justice.gov.il <VeredSh@justice.gov.il>; zzz.External.shani-v@mail.gov.il <shani-v@mail.gov.il>; zzz.External.rraviv@mod.gov.il <rraviv@mod.gov.il>; FW-GilA <gila@pmo.gov.il>; zzz.External.INBAR_LINHARD@mod.gov.il <INBAR_LINHARD@mod.gov.il>
Subject: FW: NSO Litigation -- Judge Hamilton Orders Stay of Discovery

External E-mail

Hi John,

It seems the email below did not reach you - so I am sending again. Please let us know about your and Reeves' availability for the conference call later today. We have some specific questions related the decision of the Court, and strategy with regard to the appeal.

Warm regards,
Marlene

From: Marlene Mazel <MarleneM@justice.gov.il>
Sent: Wednesday, September 30, 2020 7:57 AM
To: Don, Avishai <Avishai.Don@arnoldporter.com>

Cc: xIsrael NSO <xIsraelNSO@arnoldporter.com>
Subject: Re: NSO Litigation -- Judge Hamilton Orders Stay of Discovery

Hi Avishai,

What fantastic news! We are so pleased with this development and with the excellent decision on immunity.

We would like to schedule a call to discuss this with John and the team - what is your availability between 18:00 and 20:00 Israel time?

Roy, Marlene, Vered and the team

> On 30 Sep 2020, at 6:44, Don, Avishai <Avishai.Don@arnoldporter.com> wrote:
>
> Hello all,
>
> On Tuesday evening, in a major victory for NSO, Judge Hamilton issued an order that: (1) granted NSO's motion to stay discovery pending appeal; (2) denied Facebook's motion to compel discovery; and (3) granted the parties' motions to file under seal. In addition, on Monday, Facebook filed a reply in support of its motion to dismiss NSO's appeal. We have provided summaries of both documents below. Please let us know if you have any additional questions.
>
> Thanks,
>
> Avishai
>
> **[1] Judge Hamilton's Order**
> As noted above, Judge Hamilton granted NSO's motion to stay pending appeal, denied (without prejudice) Facebook's motion to compel discovery, and granted the parties' motions to file materials under seal. Judge Hamilton clarified at the end of her order that NSO's motion to dismiss Facebook's claim for injunctive relief--as well as "*all other litigation*"--will be stayed "pending resolution of [NSO's] appeal." Order at 15 (emphasis added). We read Judge Hamilton's order as staying *all* discovery in this case--including third-party discovery--until the Ninth Circuit resolves NSO's appeal.
>
> *Granting NSO's Motion to Stay*
> - Judge Hamilton framed the issue before her as whether NSO's appeal "divests the [district] court of jurisdiction over pretrial discovery and any pretrial proceedings." Order at 3. Judge Hamilton noted that an appeal divests a district court of jurisdiction over matters "involved in the appeal," and that NSO claims that its immunity defenses constitute "immunity from suit" -- which would make "the aspects of the case involved in the appeal . . . quite broad." Order at 2-3.

Facebook, by contrast, claims that NSO's immunity defenses constitute "immunity from liability" rather than "immunity from suit."

- Judge Hamilton then discussed the two types of immunity that NSO seeks to invoke--foreign official immunity and derivative foreign sovereign immunity--and concluded that it is plausible that the Ninth Circuit will conclude that either form of immunity is "immunity from suit" rather than merely "immunity from liability." *See* Order at 5-10.

    - With respect to foreign official immunity, Judge Hamilton noted that the Ninth Circuit in *Dogan v. Barak* (albeit in dicta) stated that foreign official immunity constituted immunity from suit. Order at 6. Judge Hamilton then cited other cases with similar language, including the Fourth Circuit's decision in *Yousuf v. Samantar*, the Second Circuit's decision in *Matar v. Dichter*, and the Central District of California's decision in *Mireskandri v. Mayne*, which the Ninth Circuit affirmed. Order at 7-8.

    - With respect to derivative foreign sovereign immunity, Judge Hamilton noted that the case law is far from clear, and ultimately concluded that this "lack of clarity illustrates the hazard of opining on an issue that the Ninth Circuit has not adopted." Order at 10. That said, however, she found that it is certainly "plausible" for the Ninth Circuit to conclude that NSO's derivative sovereign immunity defense would constitute immunity from suit, because such immunity would "derive[] from a foreign sovereign and not the federal government." Order at 10.

- Judge Hamilton then addressed--and rejected--Facebook's contention that discovery should proceed even though NSO has a "plausible contention that, if [it] prevail[s] on appeal, [it is] immune from suit." Order at 11. Citing dicta from the Supreme Court's decision in *Harlow v. Fitzgerald*, Judge Hamilton determined that "imposing discovery on officials is to be avoided" even in cases simply involving immunity from *liability*. Order at 11-12. Judge Hamilton also rejected Facebook's contention that the court had yet to make the necessary factual findings for NSO to assert its immunity defenses, explaining that "the court's prior order did, in fact, consider evidence outside the pleadings in arriving at its determinations." Order at 13. Judge Hamilton asserted that the Ninth Circuit could similarly likely "determine the initial questions of subject matter jurisdiction based on the declarations submitted in support of [NSO's] motion to dismiss." *Id*.

- In short, Judge Hamilton concluded, "if the Ninth Circuit determines that this court erred in finding defendants could not assert foreign official immunity or derivative sovereign immunity, then they would have been immune from all of plaintiffs' claims from the outset. Permitting this case to proceed through discovery, in the meantime, would undermine the fundamental privilege of immunity from suit." Order at 14.

The Parties' Motions to File Under Seal

- Judge Hamilton granted the parties' motions to seal on the grounds that: (1) neither party opposes the motions; (2) "the court agrees" that "the documents to be sealed contain highly sensitive, non-public information"; and (3) "the material to be sealed in the briefs is narrowly tailored." We interpret Judge Hamilton's language to mean not only that the information will remain under seal for the time being, but that Judge Hamilton has seen the information and agrees that it is "highly sensitive" and "non-public."

[2] Facebook's Reply in Support of Its Motion to Dismiss NSO's Appeal

On Monday, Facebook filed a reply in support of its motion to dismiss NSO's appeal. As a reminder, Facebook's motion to dismiss does not concern the *merits* of NSO's immunity defense, but rather whether the Ninth Circuit has *jurisdiction* to address NSO's immunity defense at this stage of the litigation (*i.e.*, whether the district court's order denying NSO's motion to dismiss on immunity grounds is immediately appealable under the collateral order doctrine). Facebook continues to argue that NSO's claimed immunity defense is not immediately appealable because it is a "defense from liability" rather than a "defense from suit." Facebook's brief does not refer to (or appear to depend on) any confidential information, and there is no mention of the GOI.

Facebook's reply includes the following legal arguments:

- NSO cannot invoke the "core form" of foreign sovereign immunity that applies to states, because NSO is a private corporation. Rather, NSO can assert only either conduct-based foreign-official immunity or derivative foreign-sovereign immunity. Reply 2-4.

- Denial of conduct-based foreign-official immunity is not immediately appealable, because it is an "immunity from liability" rather than an "immunity from suit." Facebook relies heavily on the D.C. Circuit's decision in *Lewis v. Mutond* to support this proposition, and seeks to minimize the Ninth Circuit's decision in *Dogan v. Barak*, which appears to stand for the opposite proposition. The other authorities that NSO cites "are non-binding and unpersuasive." Reply 4-8.

- Denial of derivative foreign-sovereign immunity is not immediately appealable "because it too is a defense to liability" rather than an immunity from suit. Facebook explains that this is so because: (1) derivative foreign-sovereign immunity does not "rest[] upon an explicit statutory or constitutional guarantee that trial will not occur" (citing the Supreme Court's decision in *Midland Asphalt v. United States*); and (2) the domestic contractor defense, upon which the "derivative foreign-sovereign immunity" defense is expressly modeled, is not subject to immediate appellate review. Reply 8-13.

Facebook's motion to dismiss the appeal is now fully briefed. As Kaitlin noted earlier, the Ninth Circuit can now either (1) decide Facebook's motion before the case proceeds to the merits, or (2) hold Facebook's motion in abeyance until it decides the case on the merits. The current schedule for merits briefing is as follows:

- **Wednesday, October 21, 2020:** NSO's opening brief due
- **Friday, November 20, 2020:** Facebook's answering brief due
- **21 days from the date of service of the answering brief:** Facebook's reply brief due

Avishai Don
Associate

Arnold & Porter
250 West 55th Street | New York, New York 10019-9710
T: +1 212.836.8012
Avishai.Don@arnoldporter.com | www.arnoldporter.com

<2020-09-29 Order Granting NSO's Motion to Stay.pdf.awsec>
<2020-09-28 Facebook's Reply in Support of Motion to Dismiss Appeal.pdf.awsec>