Arnold & Porter

John B. Bellinger, III
+1 202.942.6599 Direct
John.Bellinger@arnoldporter.com

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Memorandum

To: Gil Avriel
Marlene Mazel

From: John B. Bellinger, III
Reeves Anderson
Kaitlin Konkel

Date: January 15, 2020

Re: Responses to Questions Dated January 9, 2020

Below please find preliminary responses to your questions dated January 9, 2020. Please let us know (1) which of these issues you would like us to analyze further and (2) which, if any, we should prioritize.

(1) Facebook made a motion to reschedule the scheduling conference and noted that the Hague service hasn't been completed as the Article 6 certificate was returned by Israel's Central Authority – but it is "forthcoming". What are the thoughts on the motion?

The motion itself simply asks the court to reschedule the initial case management conference due to a scheduling conflict. The court granted Facebook's motion on January 10 and reset the conference for February 13 at 1:30 p.m. in San Francisco. *See* ECF No. 17. The remainder of our analysis addresses the service issues discussed in the scheduling motion.

If the facts stated in plaintiffs' motion and supporting declaration are true—in particular, plaintiffs' assertion that the Administration of Courts (Israel's Central Authority) effected service via Article 5 of the Hague Convention on or around December 17, 2019—service would be complete even though the Article 6 certificate from Israel's Central Authority is "forthcoming." *See* The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Convention" or "Hague Service Convention"), arts. 5-6, Nov. 15, 1965, 20 U.S.T. 361. (It will be important to know whether the Administration of Courts actually did effect service on defendants.) Article 6 of the Hague Convention provides that "[t]he Central Authority of the State addressed . . . shall complete a certificate in the form of the model annexed to the present convention." If service is effected, the certificate "shall state that the document

has been served and shall include the method, the place and the date of service and the person to whom the document was delivered." *Id.*, art. 6. Alternatively, if service is refused for any reason, " the certificate shall set out the reasons which have prevented service." *Id.*

The official Handbook on the Hague Service Convention states that "the probative value of the Certificate in the requesting State [here, the U.S.] remains subject to that State's laws." Practical Handbook on the Operation of the Service Convention (2016 ed.) ¶ 216. Under U.S. law, the certificate constitutes *proof* of service under Federal Rule of Civil Procedure 4(l), but it is not a required component of service itself.

Rule 4(l) provides as follows:

(*l*) Proving Service.

> (1) *Affidavit Required*. Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.
>
> (2) *Service Outside the United States*. Service not within any judicial district of the United States must be proved as follows:
>
> > (A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or
> >
> > (B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.
>
> (3) *Validity of Service; Amending Proof*. Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

Fed. R. Civ. P. 4(l).

At least one U.S. court has held that "the return of a certificate, pursuant to Article 6," is not "essential to proper service." *Fox v. Regie Nationale des Usines Renault*, 103 F.R.D. 453, 455 (W.D. Tenn. 1984). Alternative "proof of service may include any evidence of delivery satisfactory to the Court." *Id.*; *see also Coombs v. Iorio*, No. CIV-06-060-SPS, 2008 WL 4104529, at *3 (Aug. 28, 2008) ("Consequently, the failure to provide proof of service by obtaining original certificates of service does not invalidate service of process in this case.").

Plaintiffs have not yet filed proof of service with the court, but the motion and supporting declaration suggest that they intend to rely on the Hague Article 5 process—principally, although they allude to other forms of service—to establish valid service here. The declaration states: "On December 31, 2019, Plaintiffs learned that Defendants had been properly served via the Hague Convention on December 17, 2019, and that a formal certificate of service from the Central Authority would be forthcoming." Decl., ECF No. 16-1, ¶ 2. The declaration further states that plaintiffs sent multiple "communications" to defendants via e-mail, physical mail, and hand service, each of which contained the summons and complaint. *Id.* ¶ 3. It is not clear from the motion and supporting declaration whether these "communications" were delivered in a manner that would constitute proper service on a defendant outside the United States. *See* Fed. R. Civ. P. 4(f).

Once service is effected, defendants have 21 days to respond. If plaintiffs intend to rely on the Hague process and move for default based on defendants' failure to respond to the suit within 21 days of December 17, 2019, it would be prudent for them to wait until they have received the Article 6 certificate. The fact that an Article 6 certificate is "forthcoming" does not necessarily mean that the Central Authority effected service, since a certificate may also be issued to "set out the reasons which have prevented service." *See* Hague Convention, art. 6. Waiting for receipt of the certificate would allow plaintiffs to confirm that Israel's Central Authority did, in fact, effect service under the Hague process on a date certain and that there are no issues that could affect its validity.[1] Because the certificate constitutes presumptive proof of service rather than a required step in the Hague process, plaintiffs may move for default at any time.

If, however, plaintiffs cannot otherwise prove service through the Hague Convention without the certificate, their ability to seek default is subject to the limitations set forth in Article 15 of the Convention. Article 15 provides two methods for establishing a default judgment in the absence of a certificate of service.

The first paragraph of Article 15 permits judgment if: "(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, *or* (b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, *and* that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend."

Alternatively, the second paragraph of Article 15 provides that a judge "may give judgment even if no certificate of service or delivery has been received, if": "(a) the

[1] Although securing the certificate before moving for default is a best practice, we have no reason to doubt plaintiffs' claim that they "learned that Defendants had been properly served via the Hague Convention on December 17, 2019" on December 31. Decl. ¶ 2.

document was transmitted by one of the methods provided for in this Convention, (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document, and (c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed."

The defendants might be able to resist a motion for default on the basis of Article 15 (potentially buying them up to six months), but we would want to assess this argument in greater detail before making a recommendation to that effect.

(a) If NSO decides to challenge service – what are their best grounds for doing so? How much additional time would they gain – for their motion, time for the Plaintiff to reply and for the court to rule? Is the decision of the court on service subject to appeal (from the magistrate to the federal court judge or in general).

Defendants may challenge service in two ways: a motion to dismiss for insufficient service and a motion to quash service.

A motion to dismiss would require defendants to simultaneously raise all of their grounds for dismissal, including dismissal on the basis of insufficient service, unless they secured the court's approval to brief the motion in stages. The process of resolving a motion to dismiss, including briefing by the parties and a ruling by the court, would likely take about 9-12 months. The actual timing could be longer or shorter, depending on factors such as the caseload of the assigned judge, whether the judge holds oral argument, and any unanticipated issues that arise in the course of the litigation. There is no guarantee that discovery would be stayed while the motion to dismiss is pending.

A motion to quash would focus solely on service. Such a motion would state that: (1) service is deficient; (2) as a result, defendants are not parties to the case; and (3) if the court disagrees, defendants will file a motion to dismiss once the court has denied the motion to quash. A motion to quash service would likely take 2-3 months to resolve, including briefing by the parties and a ruling by the court.

Substantively, defendants' arguments regarding the validity of service would be identical under either approach. A defendant challenging service must argue, in some form, that plaintiffs have not effected valid service under Federal Rule of Civil Procedure 4. Service under the Hague Convention is one recognized method of serving defendants outside the United States. *See* Fed. R. Civ. P. 4(f)(1). Practically, however, defendants likely would need stronger arguments to file a motion to quash, where the objection to service is the entire basis of the motion (as opposed to a subsidiary argument in a motion to dismiss). The most powerful basis for contesting service, of course, would be some

indication that Israel's Central Authority has not, in fact, effected service.[2] If, however, plaintiffs have evidence that Israel effected service via the Hague Convention, then an unsuccessful motion to quash could cause defendants to lose credibility with the Court.

If the court granted a motion to quash service in the form of an appealable final order, plaintiffs could appeal that decision to the U.S. Court of Appeals for the Ninth Circuit.[3] It is unlikely they would do so, however, since an appeal would take many months to resolve and defendants could use that time to prepare their case. Instead of appealing, plaintiffs could simply continue their efforts to serve defendants through alternative means under Federal Rule of Civil Procedure 4. For example, under Rule 4(f)(3), plaintiffs could seek permission from the court to serve the summons and complaint using an alternative method, such as service by e-mail or service on U.S. counsel, so long as that method provided actual notice of the suit to defendants. That approach would be more efficient than appealing a service order, especially if the court is amenable to allowing alternative service techniques under Rule 4(f)(3).

(b) Is it possible for NSO to request an extension of time to respond from the plaintiffs without waiving service issues? I know its up to Facebook but what is the regular practice in this regard.

Defendants could seek an extension of the 21-day response deadline in two ways: (1) by negotiating an agreed-upon deadline with Facebook and, if that fails, filing a motion for extension with the court, and (2) by agreeing to waive service under Federal Rule of Civil Procedure 4(d). Both approaches are common practice in the United States. The first option, securing an agreed-upon extension or extension from the court, would not require defendants to waive their potential service challenge unless the parties agreed to that restriction as a condition of the extension (i.e., an informal waiver). The second option, formal waiver, *would* bar defendants from raising an insufficient service argument, but it would offer a fixed deadline and likely the longest period of time to respond to the complaint.

First, defendants could negotiate an agreed-upon deadline with Facebook (for example, a fixed date to respond to the complaint in February or March). Facebook may seek certain concessions from defendants in exchange for consenting to the extension, such

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[2] To this end, we note that the Hague Handbook encourages a requested State "to communicate with the forwarding authority … [if] an obstacle arises which may significantly delay or even prevent execution of the request." Handbook, ¶ 197(d). Such a communication, which falls short of a final decision under Article 13, could be a basis for a motion to quash the purported service.

[3] In general, when a federal magistrate judge is assigned to a case for all purposes (rather than just discrete tasks like managing discovery), the parties may appeal directly to the court of appeals, without intermediate review by a federal district judge.

as defendants' agreement not to challenge the validity of service (i.e., an informal waiver). If defendants and Facebook cannot agree on a deadline, defendants could file a short, simple motion with the court, requesting that the court set a specific deadline for defendants' response. U.S. courts frequently grant extension requests of 30 to 60 days, particularly first requests where there is no indication that the party is seeking to delay or abusing the process. There is no guarantee that the court will grant the motion, however, and a denial could force defendants to brief and file the motion to dismiss on an extremely accelerated timeline.

Alternatively, defendants could agree to waive service under Federal Rule of Civil Procedure 4(d). Under Rule 4(d)(3), a defendant outside the United States who timely returns a waiver must respond within 90 days of the date the request for waiver was sent.

(c) Are there other grounds for requesting an extension beyond the traditional 60 day extension?

As noted, defendants have 21 days from the date of service to respond to plaintiffs' complaint. This timing differs from the 60-day period that applies to foreign sovereigns.

In addition to requesting an extension through the methods discussed in response to Question 1(b)—an agreement with Facebook, an opposed motion filed with the court, and waiver of service—one possible mechanism to delay defendants' obligation to respond is for Israel to seek a stay of proceedings. See the response to Question 1(f) for further discussion.

(d) How long do you anticipate the first phase of the case to be – filing of a motion to dismiss, time to reply and sur-reply and a decision?

As noted in response to Question 1(a), we anticipate that it would take 9-12 months for the parties to brief and the court to rule on a motion to dismiss. The actual timing could be longer or shorter, depending on factors that include the caseload of the assigned judge, whether the judge holds oral argument, and any unanticipated issues that arise in the course of the litigation.

(e) What kind of issues do you anticipate might arise if the court grants jurisdictional discovery? What are the general grounds for granting jurisdictional discovery in this matter? What types of jurisdictional discovery might be allowed in this case? Is a decision to grant jurisdictional discovery subject to interlocutory appeal? If so how long could the appeal process take?

Courts sometimes allow jurisdictional discovery to enable a plaintiff to better respond to the grounds for dismissal asserted in a defendant's motion to dismiss. For a discussion of potential grounds for dismissal of this case, see the response to Question 2.

Here, jurisdictional discovery is most likely to arise in connection with two grounds: lack of personal jurisdiction and derivative sovereign immunity.

Personal jurisdiction: In order to establish that the court has specific personal jurisdiction over the claims, plaintiffs must satisfy the Ninth Circuit's three-part test: "(1) [t]he non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws"; "(2) the claim must be one which arises out of or relates to the defendant's forum-related activities"; and "(3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable." *Republic of Kazakhstan v. Ketebaev*, 2018 WL 2763308, at *5 (N.D. Cal. June 8, 2018) (quoting *Morrill v. Scott Financial Corp.*, 873 F.3d 1136, 1142 (9th Cir. 2017)). The complaint alleges the following regarding personal jurisdiction:

> 11. The Court has personal jurisdiction over Defendants because they obtained financing from California and directed and targeted their actions at California and its residents, WhatsApp and Facebook. The claims in this Complaint arise from Defendants' actions, including their unlawful access and use of WhatsApp computers, several of which are located in California.
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> 12. The Court also has personal jurisdiction over Defendants because Defendants agreed to WhatsApp's Terms of Service ("WhatsApp Terms") by accessing and using WhatsApp. In relevant part, the WhatsApp Terms required Defendants to submit to the personal jurisdiction of this Court.

Compl., ECF No. 1, ¶¶ 11-12.

Defendants may be able to argue that the court lacks personal jurisdiction over the case because, on its face, the complaint does not sufficiently allege that defendants intentionally routed their activities through plaintiffs' California servers or that their activities were otherwise sufficiently connected to California. If defendants raise this argument, plaintiffs might seek jurisdictional discovery on the basis that at least some of the information necessary to establish personal jurisdiction is within defendants' control. The requested jurisdictional discovery could include information that goes to both personal jurisdiction and the merits of the case, such as details about how defendants disseminate their products geographically and the level of control they exercise over their products' operation.

Derivative sovereign immunity: If defendants argue that the case should be dismissed because defendants are entitled to derivative sovereign immunity based on their relationship with one or more foreign governments, plaintiffs could seek jurisdictional discovery regarding the nature of those relationships.

One district court decision summarizes the standard for jurisdictional discovery in the Northern District of California as follows:

> [C]ourts are not required to determine jurisdiction on the papers alone. A district court has broad discretion to permit or deny jurisdictional discovery. Discovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary. The Ninth Circuit has reversed for abuse of discretion when further discovery might well have established a basis for personal jurisdiction. However, denial of jurisdictional discovery is not an abuse of discretion when it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction, or when the request is based on little more than a hunch that it might yield jurisdictionally relevant facts.

Gillespie v. Prestige Royal Liquors Corp., 183 F. Supp. 3d 996, 1001 (N.D. Cal. 2016) (citations, quotation marks, and footnotes omitted).

If the court granted plaintiffs' motion for jurisdictional discovery, defendants could appeal only if the district court agrees to certify the decision for interlocutory review. This is extremely unlikely to occur. Defendants would have to convince the district court that the order in question presented a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The rule governing jurisdictional discovery is largely uniform across the Ninth Circuit, and district courts have broad discretion in its application. As a result, a request for interlocutory certification is almost certain to fail.

If you would like, we can conduct additional research to determine how judges in the Northern District of California have resolved requests for jurisdictional discovery in similar cases. These decisions tend to be highly fact-specific, however, and it is difficult to predict the likelihood that the court will grant or deny jurisdictional discovery in this case.

(f) Are there any other procedural mechanisms or motions which could delay discovery in this matter?

We are researching whether defendants may be able to seek a stay of the case based on a request from Israel itself. In support of such a request, Israel's State Attorney or another high-level official could prepare a document stating that the case raises sensitive questions and that Israel needs more time to evaluate it. Defendants could then seek a stay for a defined period—for example, three or four months—with a promise to submit an

update to the court before that period expires. This approach is non-traditional, but there is some parallel precedent in cases involving U.S. government defendants, and courts have broad discretion to grant motions to stay.

(2) We would also be interested in receiving an analysis of the complaint, the strength of the arguments made– and whether there are strong grounds for dismissal, what these grounds are, and the likelihood of success of having the complaint dismissed on a motion to dismiss (and this dismissal being upheld on appeal). We would also appreciate a summary of any precedent (and copies of the court decisions) related to this case in which other courts have accepted and/or dismissed similar claims.

We have begun to analyze the claims in the complaint and potential grounds for dismissal listed below. We are happy to research these issues further at your request. We would note that conducting a comprehensive analysis of the claims and grounds for dismissal, including researching relevant precedents and evaluating the strength of each argument, would require an amount of work similar to the preparation of a motion to dismiss (likely hundreds of hours among the members of the case team).

One option is to begin work now but to focus on the potential grounds for dismissal that most implicate Israel's interests or require its involvement, such as the state secrets doctrine, derivative sovereign immunity, act of state doctrine, and joinder under Federal Rule of Civil Procedure 19.

Let us know how you would like to proceed.

Possible grounds for dismissal:

- Personal jurisdiction: As discussed in response to Question 1(e), defendants may be able to argue that the court lacks personal jurisdiction because plaintiffs have not alleged that defendants purposefully directed their activities at the relevant forum.

- Forum non conveniens: Under the doctrine of forum non conveniens, defendants could ask the court to dismiss the suit on the basis that Israel, not the United States, is the appropriate forum for plaintiffs' claims.

- State secrets doctrine: We are researching whether defendants may be able to assert that the case should be dismissed because it would require the disclosure of Israel's state secrets. This ground for dismissal would require supporting documentation from Israel, such as a declaration from the Minister of Defense.

- Derivative sovereign immunity: As discussed in response to Question 1(e), defendants may be able to argue that they are entitled to derivative sovereign immunity based on their relationship with one or more sovereigns. This argument would likely require supporting declarations from the relevant governments.

- Act of state doctrine: Defendants may be able to request dismissal under the act of state doctrine, which counsels that U.S. courts should not sit in judgment of a foreign government's acts.

- Joinder under Federal Rule of Civil Procedure 19: Defendants may have an argument that (1) Israel or another sovereign is an indispensable party that must be joined under Rule 19 and (2) the case must be dismissed because Israel or the other sovereigns cannot be joined.

- Failure to state a claim: Defendants may be able to argue that plaintiffs have failed to plead sufficient facts to establish their claims under the Computer Fraud and Abuse Act and California state law.

(3) What is your analysis as to whether it is in the defendants best interest to stay with the Magistrate Judge or request an alternate federal judge.

Because both sides must consent to the assignment of the case to a magistrate judge rather than a federal district judge, defendants can unilaterally secure reassignment to a federal district judge. Plaintiffs have already consented to the magistrate judge's assignment. *See* ECF No. 14.

The case is currently assigned to Jacqueline Scott Corley, an experienced magistrate judge with a reputation for being reasonable and not overly political (in the sense of having strong pro-plaintiff or pro-defendant leanings). According to the court's website, Magistrate Judge Corley has approximately 20 years of experience with the U.S. District Court for the Northern District of California, first as a career law clerk to a federal district judge (from 1998-2009) and then as a federal magistrate judge (from 2011-present). *See* Biography of Magistrate Judge Jacqueline Scott Corley, https://www.cand.uscourts.gov/judges/corley-jacqueline-scott-jsc/ (last accessed Jan. 15, 2020). She also served as a federal law clerk in the District of Massachusetts, a law firm associate in Boston, and a law firm partner in San Francisco (from 2009-2011, the two-year period between her service as a career clerk and her tenure as a magistrate judge). *Id.*

If defendants object to the assignment of Magistrate Judge Corley, the case will be reassigned to a federal district judge in the Northern District of California. Because the parties cannot control which federal district judge will receive the case, there is some risk

of reassignment to a judge who is less even-handed, more unpredictable, or less likely to be sympathetic to defendants' interests than Magistrate Judge Corley. Large companies often choose to have their cases heard by federal district judges, but Facebook diverged from that practice here, consenting instead to proceed before the magistrate judge. One possible explanation is that Facebook is a frequent litigant in the Northern District of California and may have wished to avoid reassignment to a judge who has previously ruled against the company. Alternatively, Facebook might simply have regarded Magistrate Judge Corley as a good draw and declined to take its chances with reassignment.

At your request, we are happy to do further research to evaluate potential strategic considerations, such as analyzing relevant opinions by Judge Corley and recent decisions involving Facebook by federal district judges in the Northern District of California. Ultimately, however, reassignment will involve unknowns, and the calculation may come down to defendants' view of whether the potential benefits of reassignment outweigh the known information about Judge Corley.

(4) In addition, we would be interested in your initial analysis with regard to whether you can identify issues which would raise concerns with regard to the interests of the State of Israel and/or as we discussed issues in which discovery (or the continuation of the proceedings) may also raise problems for Facebook/Whatsapp.

This question is difficult to answer without knowing more about the relationship between Israel and the defendants. In general, the scope of civil discovery in the United States is very broad: plaintiffs "may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence," *Greer v. Elec. Arts, Inc.*, No. 10-cv-3601, 2012 WL 299671, at *1 (N.D. Cal. Feb. 1, 2012) (Corley, M.J.) (quoting Fed. R. Civ. P. 26(b)(1), and "[d]istrict courts have broad discretion in determining whether evidence is relevant for discovery purposes," *id.* Here, due to the nature of the allegations, plaintiffs' discovery requests could encompass wide-ranging information about NSO's products, practices, customers, and operations inside and outside of Israel.

Regarding potential problems for Facebook, we are in the process of reviewing public sources to identify possible issues.

(5) Are there any agreements that we (or attorneys acting on our behalf) can sign with NSO, in order to maintain the confidentiality of our communications regarding the case from being compelled during discovery in this matter.

The common interest doctrine allows parties to share confidential information, through their counsel, without waiving the attorney-client privilege and attorney work product protections, provided that certain criteria are met. Although common interest agreements need not be written, a written agreement is more likely to be recognized by the court. It also allows the parties to set forth the scope of the common interest and provide for eventualities, such as one party's withdrawal from the agreement.

Notably, courts have held that communications that pre-date the relevant understanding or agreement are not protected. As a result, it may be important for any written agreement between Israel and the defendants to make clear that the parties' understanding regarding their shared interest in a common legal enterprise began at an earlier date.

The following practices may increase the chances that a court will find the common interest doctrine to apply:

- Entering into a written common interest agreement.

- Limiting communications until the written agreement is finalized.

- Communicating through attorneys only. Some courts have refused to apply the common interest doctrine to communications that do not involve attorneys, on the basis that the doctrine is an exception to waiver of the attorney-client privilege, rather than a standalone protection.

- Including a caption such as "COMMON INTEREST PRIVILEGE" in written communications.

U.S. courts have varied somewhat in defining the boundaries of the common interest doctrine. We are continuing to research these issues and will provide more detailed analysis and recommendations.

(6) What background information do you have about the Coolely law firm, and the attorneys representing the plaintiffs in this matter.

The Cooley law firm is an international law firm of approximately 1,000 attorneys, with offices across the United States, Europe, and Asia. It has represented Facebook in defense-side matters for a number of years. In terms of capabilities and composition, the

firm is more similar to other large defense-side firms than to the smaller plaintiffs'-side firms and non-governmental organizations that often bring lawsuits styled as "human rights" suits.

Based on public sources, the Cooley lawyers listed in the complaint are experienced attorneys who specialize or have significant experience in tech, cyber, privacy, and national security issues. *See* Profile of Travis LeBlanc, https://www.cooley.com/people/travis-leblanc (last accessed Jan. 15, 2020); Profile of Dan Grooms, https://www.cooley.com/people/daniel-grooms (last accessed Jan. 15, 2020); and Profile of Joseph Mornin, https://www.cooley.com/people/joseph-mornin (last accessed Jan. 15, 2020). According to the Cooley website, lead attorney Travis LeBlanc is vice chair of Cooley's cyber/data/privacy practice, and he has been recognized as a top cyber lawyer through various appointments and honors, including unanimous confirmation by the U.S. Senate to the Privacy and Civil Liberties Oversight Board in 2019. *See* Profile of Travis LeBlanc.

If you would like, we are happy to compile more detailed information about the attorneys above, the Cooley law firm in general, and Cooley's prior representations of Facebook, either now or at a later stage in the case. For current purposes, we think the significant points are that: (1) Cooley regularly represents Facebook; (2) Cooley is a large international firm, rather than a small plaintiffs'-side firm or a non-governmental organization; and (3) the attorneys working on the case appear to be experienced and well-established in the relevant subject matter. Let us know of any additional information that would be helpful at this stage.

(7) Are you aware of any claim in which an article 13 objection pursuant to the Hague Convention from a foreign state actually barred the case from moving forward altogether? Is there any precedent relating to the meaning of the failure to file an article 6 certificate in accordance with the Convention?

On these points, we offer two preliminary observations. First, the Hague Handbook affirms that an Article 13 decision rests in the sole discretion of the requested State: "The Convention makes clear that it is for the *requested State* to determine whether compliance with the request would infringe its sovereignty or security. In this regard, the authorities of the requested State have a broad discretion. Accordingly, the authorities of the requesting State should avoid reviewing a decision by the authorities of the requested State to refuse compliance with a request for service pursuance to Article 13(1). To do so would undermine the purpose of the Convention by rendering Article 13 a dead letter." Handbook, ¶ 228. We are not aware of any instance in which a U.S. court has reviewed the substantive validity of an Article 13 objection. You may want to consider, however, whether an Israeli court would entertain such a request. That said, in light of the availability of alternative means of service under Rule 4(f)(3), we do not think that an Article 13 objection would actually bar the case from moving forward. It would be more accurate to

describe the objection as a procedural roadblock and a signal to the court and to the plaintiffs of the challenges and sensitivities of this action.

Second, we are aware of at least two cases in which U.S. courts have held that the absence of an Article 6 certificate does not render service under the Hague Convention insufficient, and we will look into these issues further. In *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 301 (2d Cir. 2005), the U.S. Court of Appeals for the Second Circuit held that a police report was an "adequate substitute" for an Article 6 certificate because the plaintiff "attempted in good faith to comply with the Hague Convention," "it was certainly not [the plaintiff's] fault that the French authorities did not return a formal Certificate," and "the material information [in the police report] was the same [as the information in an Article 6 certificate]; only the format differed." *Id.* at 301-02. Likewise, in *Fox v. Regie Nationale des Usines Renault*, 103 F.R.D. 453, 455 (W.D. Tenn. 1984), a U.S. district court interpreted the Hague Convention in conjunction with Federal Rule of Civil Procedure 4 to reject the defendant's argument that "the return of a certificate, pursuant to Article 6, is essential to proper service, and since none was returned in this case, service was not perfected." The court explained that "[t]here is no indication from the language of the Hague Convention that it was intended to supersede th[e] general and flexible scheme [set forth in Rule 4], particularly where no injustice or prejudice is likely to result to the party located abroad, or to the interests of the affected signatory country." *Id.*

As discussed in Response to Question 1, Article 15 of the Hague Convention sets forth the methods by which a plaintiff may establish default in accordance with the Hague Convention in the absence of a certificate of service.

JOSEPH N. AKROTIRIANAKIS (Bar No. 197971)
jakro@kslaw.com
AARON S. CRAIG (Bar No. 204741)
acraig@kslaw.com
KING & SPALDING LLP
633 West Fifth Street, Suite 1700
Los Angeles, CA 90071
Telephone: (213) 443-4355
Facsimile: (213) 443-4310

Attorneys for Defendants NSO GROUP TECHNOLOGIES LIMITED and Q CYBER TECHNOLOGIES LIMITED

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

WHATSAPP INC., a Delaware corporation, and FACEBOOK, INC., a Delaware corporation,

Plaintiffs,

v.

NSO GROUP TECHNOLOGIES LIMITED and Q CYBER TECHNOLOGIES LIMITED,

Defendants.

Case No. 4:19-cv-07123-PJH

DECLARATION OF JOSEPH N. AKROTIRIANAKIS IN SUPPORT OF DEFENDANTS NSO GROUP TECHNOLOGIES LIMITED AND Q CYBER TECHNOLOGIES LIMITED'S ADMINISTRATIVE MOTION TO FILE UNDER SEAL

Judge: Hon. Phyllis J. Hamilton

I, Joseph N. Akrotirianakis, declare as follows:

1. I am a member of the California State Bar and the bar of this court and a partner in the law firm of King & Spalding LLP, counsel of record to Defendants NSO Group Technologies Limited and Q Cyber Technologies Limited (collectively, the "Defendants"). I have personal knowledge of the facts set forth herein, except as otherwise stated.

2. The Complaint was filed October 29, 2019. (Dkt. No. 1.) Defendants were served March 12, 2020, and on April 2, 2020, Defendants moved to dismiss the complaint. (Dkt. No. 45.) The parties' conducted the Rule 26(f) conference on May 6, 2020. (*See* Dkt. No. 76.) Thereafter, on June 2, 2020, Plaintiffs served Requests for Production of Documents, to which Defendants timely responded on July 6, 2020. On June 16, 2020, Defendants moved to stay discovery pending resolution of Defendants' motion to dismiss. (Dkt. No. 95.) On July 16, 2020, the Court ruled on Defendants' motion to dismiss the complaint and denied as moot Defendants' motion to stay discovery. (Dkt. No. 111.)

3. Defendants seek to file under seal certain documents (the "Sealed Documents") which are submitted to the Court for its consideration in connection with the Initial Case Management Conference. As described in the Sealed Documents, including paragraph 3-10 and 12 of this Declaration and paragraph 6 of the accompanying Declaration of Chaim Gelfand, actions by the Government of Israel will have direct implications for Defendants' ability to proceed with discovery and are likely to affect other proceedings in this case. The Sealed Documents contain highly sensitive, traditionally nonpublic government information that the Honorable Tzachi Uziel, Chief Justice of the Magistrate Court in Tel Aviv-Jaffa,[1] has ordered be kept confidential upon a request submitted by the Government of Israel. Accordingly, consistent with principles of international comity, Defendants now seek leave of this Court to file unredacted copies of the Sealed Documents under seal and ask that they be ~~so~~ maintained under seal.

[1] In the Israeli judiciary system, the Magistrate Court is the basic trial court, akin to the United States District Court. Appeals from judgments of the Magistrate Court are heard in the District Court, which also has limited original jurisdiction. There are six districts, and six District Courts, in Israel. Israel's court of last resort is the Supreme Court, which like the United States Supreme Court, has discretionary appellate and limited original jurisdiction.

1 4. On July 19, 2020, the Government of Israel filed in the Magistrate Court of Tel
2 Aviv–Jaffa a request titled "Request for the Issuance of a Search Warrant on the Premises, to Seize
3 Computers (Including Computers of the Companies) and Access to the Computer Materials."
4 (Gelfand Decl. Exh. B ("Request") at __.) The Request was presented *ex parte* by Dr. Haim
5 Vismonski, Director of the Cyber Department of the Israeli State Attorney's Office, and Moran
6 Eshol, an attorney in the Cyber Department of the State Attorney's Office. As set forth in the
7 accompanying Declaration of Chaim Gelfand, the Request and the resulting Order were neither
8 announced in advance to, nor expected by, Defendants. (Gelfand Decl. ¶ __.) The Request sought
9 a warrant to search Defendants' business premises and seize "[a]ny document or object" held by
10 Defendants. The Request was made "for the purpose of preventing the disclosure of information
11 that is within [Defendants'] ownership, or is held by [Defendants], by [Defendants'] employees,
12 or by those who act on [Defendants'] behalf, which is likely to cause 'grave national security-
13 foreign relations' damage to the State of Israel." (Gelfand Decl. Exh. __ at __.) Through the
14 Request, the Government of Israel sought to prohibit Defendants from making "any change,
15 deletion or transfer to an external person or entity" with respect to "all of the documents and
16 computer materials which are under the ownership of" Defendants. (Gelfand Decl. Exh. __ at __.)
17 5. As the Request indicates on its face, the seizure was not sought for purposes of a
18 criminal investigation or any other investigatory matter. (Gelfand Decl. Exh. B at __.) The Israeli
19 government sought the warrant to seize information from the Defendants for the purpose of
20 preventing the disclosure of information that would be "likely to cause 'grave national security-
21 foreign relations' damage to the State of Israel." (Gelfand Decl. Exh. B at __.)
22 6. On July 19, 2020, Chief Justice Uziel issued an Order granting the Request.
23 (Gelfand Decl. ("Order") Exh. D at __.) Chief Justice Uziel found the issuance of the seizure
24 warrant was necessary "to prevent serious diplomatic and security damage" to Israel. (Gelfand
25 Decl. Exh. D at 1.) Chief Justice Uziel's Order prohibits Defendants from "making any changes,
26 deletion or transfer to any external party that is not an employee of one of the [Defendants], with
27 regard to any document or computer matters that are owned by the [Defendants] or in their
28 possession, their employees or anyone on their behalf, that could possibly be found to be related

Commented [A1]: Please review a copy of the accompanying Gelfand declaration and of all attached exhibits

Commented [A2]: John – you suggested to following sentence marked in green:
" Defendants were not aware of the Government's request until the Government later informed Defendants about it"

The updated version that was sent to us suggests something similar that was added by NSO:
As set forth in the accompanying Declaration of Chaim Gelfand, the Request and the resulting Order were neither announced in advance to, nor expected by, Defendants.

p.s – any mark up in green – is us adding your comments to this draft.

Commented [A3]: The correct translation of the phrase used in all the Hebrew documents is:
"grave damage to the State of Israel's national security and foreign relations"

Any reference to said phrase and / or interest of the State of Israel which are at the basis of the Order should match the correct translation.

Commented [A4]: See above comment regarding correct translation of this phrase

Commented [A5]: Perhaps determined af

Commented [A6]: The Order includes additional actions, including a warrant to search the Premises and access to the Computer Materials and not only the issuance of a "seizure warrant". Therefore, the language should be amended to describe the full scope of the order granted by the Court, and then all references should state as "the Order" as defined at the outset of paragraph 6. [and in the accompanying declaration]

Commented [A7]: The correct term should be "Foreign Relations". Please change in all other places as well.

Commented [A8]: See above comment regarding correct translation of this phrase. Moreover, the term "diplomatic" is not an accurate description for the interests of the State of Israel.

to the issues of the [Defendants]." (Gelfand Decl. Exh. D at 1.) The Order also authorizes the State of Israel to search Defendants' premises and seize "[a]ny document or item that may contain data or content that may possibly cause serious diplomatic-security damage, including computers (which includes cellular phones), organizational computers, magnetic media, and computer items of an 'organization' . . . that is located on the premises." (Gelfand Decl. Exh. D at 1-2.) And the Order also authorizes "continuous penetration and re-penetration" of "computer materials and anything that embodies computer materials" and "computer material[] that the seized computer has authorization to access, in any place that such computer materials are located." (Gelfand Decl. Exh. D at 3.)

7. Since obtaining the Order, as set forth in the Gelfand Declaration, the Government of Israel has removed from Defendants' premises a significant portion of the physical documents previously in Defendants' possession, custody, and control and has begun seizing Defendants' electronically-stored information (ESI). (Gelfand Declaration ¶¶ __-__.)

8. On July 19, 2020, the Deputy Attorney General for International Law, Dr. Roy Schondorf, and the Director of the Cyber Department of the Israeli State Attorney's Office Dr. Vismonski called Defendants' Israeli counsel, Adv. Roy Blecher, and requested an immediate meeting with Defendants' Chief Executive Officer, Shalev Hulio; Defendants' General Counsel, Shmuel Sunray; and Adv. Blecher. Dr. Schondorf and Dr. Vismonski notified Adv. Blecher (and through him, Defendants) for the first time of the existence of the Order and stated that further information would be provided at the meeting. At the meeting held a few hours later, Dr. Vismonski served the Order on Defendants' Israeli counsel and also delivered to Messrs. Hulio, Sunray, and Blecher a copy of a letter. (Gelfand Decl. Exh. F ("Vismonski Letter").) In the Vismonski Letter~~, Deputy State Attorney~~Dr. Vismonski informed Defendants of the seizure warrant and explained, as is indicated in the letter, that "[t]he purpose of the Courts' Order is to prevent disclosure of information, which is likely to cause grave damage to the State of Israel's national security and foreign relations." (Gelfand Decl. Exh. F ¶ 3.) ~~Deputy State Attorney~~ Dr.Vismonski warned Defendants that according to the Order they are "forbidden to make any disposition of all of the documents and computer materials which are owned or held by the

Commented [A9]: Foreign relations – also to be applied to all other references to "diplomatic"

Commented [A10]: See above comment regarding correct translation of this phrase

Commented [A11]: This is the description in the Order:

"computer (and included in this a cellular telephone), including a computer that is being used by a company, magnetic media and computer material belonging to a 'company' … which is located on the premises."

Commented [A12]: Moran - Is this information subject to disclosure? Check accuracy as well of the statement. Consider: "The GOI is in the process of executing the Order of the Court."

Commented [A13]: ורד – רק צריכה לוודא מול חיים שאכן זה המצב בשלב זה מבחינת ביצוע הצו. כשחיים יחזור אליי אעדכן אותך וניתן יהיה למחוק הערה זו

Commented [A14]: The correct title was added

Commented [A15]: Referencing the meeting specifically might open the door to discovery about the meeting. We suggest to re-draft to say that on July 19, 2020 NSO was informed of the issuance of the Order of the Court that day via a letter of…and a copy of the Order was hand-delivered and served on ..
John – we also feel it is unnecessary to mention Roy's name in this request.

Commented [A16]: Haim/Roy - discuss

Formatted: Highlight

Commented [A17]: See above comment regarding the reference to the Order

Commented [A18]: See a suggested change. The Defendants are forbidden not because of Dr. Vismonski's warning - they are forbidden by the Order

companies, by their employees or by those who act on their behalf," including a prohibition on "making any change, deletion or transfer of these materials to any external person or entity that is not currently employed in one of the companies." (Gelfand Decl. Exh. F ¶ 2.) ~~Deputy State Attorney~~ The Director of the Cyber Department of the Israeli State Attorney's Office, Dr. Vismonski also informed Defendants that they are prohibited from disclosing "any information whatsoever with regard to the Order, including information with regard to the very existence of the Order forbidding publication, to the hands of any person or entity," with a few specific exceptions. (Gelfand Decl. Exh. F ¶ 4.)

9. At the time Defendants received the Vismonski Letter, a Non-Disclosure Order ~~gag order~~ barred Defendants from disclosing the existence of the Order to this Court or Plaintiffs. (Gelfand Decl. Exh. F ¶ 4.) Defendants subsequently sought permission from the Israeli State Attorney's office to disclose the Order, and on July 22, 2020, Defendants and the Israeli State Attorney's office jointly requested that Chief Justice Uziel issue an order lifting the non-disclosure ~~gag~~ order for the limited purpose of allowing disclosure of the Request, the Order, and the Vismonski Letter to this Court and to Plaintiffs' counsel. Dr. Vismonski conditioned ~~his~~ the State of Israel's consent to the joint request to the partial lifting of the non-disclosure ~~gag~~ order on Defendants' written promise to use best efforts to request that this Court (the United States District Court for the Northern District of California) order that the Sealed Documents and information related to them not be disseminated further and remain under seal. Chief Justice Uziel granted the joint request, authorizing Defendants to submit the Sealed Documents to this Court and to Plaintiffs' counsel.[2] Although Chief Justice Uziel's order granting a limited lifting of the non-disclosure~~gag~~ order itself remains subject to the same non-disclosure order~~gag order~~, Defendants are presently seeking permission to share that further order of Chief Justice Uziel with the Court and Plaintiffs.

[2] Chief Justice Uziel's further order also permits Defendants to seek an order allowing disclosure of the Sealed Documents to certain specified members of Plaintiffs' senior corporate leadership.

Commented [A19]: The correct title was added

Commented [A20]: In order to clarify that the prohibition on disclosure was ordered by the Court, and not by Dr. Vismonski – a reference to the Non-Disclosure Order should be added beforehand

Commented [A21]:

Commented [A22]: The consent was not Dr. Vismonski's personally – it was the State of Israel's

Commented [A23]: John – FYI the updated version changed the sentence so it now reads: and remain under seal.
You suggested in the previous version:
"and would not be made publicbe kept secret."

Commented [A24]: Footnote 3: Defendants' or Plaintiffs' senior leadership?

10. Defendants seek to file paragraphs 3-10 and 12 of this Declaration under seal and, to the extent necessary in the future, permission to file under seal additional matters that make reference to the content of this Declaration, paragraph 6 and Exhibits A-F of the accompanying Gelfand Declaration, or the sealed proceedings before the Tel Aviv–Jaffa Magistrate Court. Exhibits A through F of the Gelfand Declaration comprise:

A. The Israeli government's "Request for the Issuance of a Search Warrant on the Premises, to Seize Computers (Including Computers of the Companies) and Access to the Computer Materials," dated July 19, 2020 (Hebrew);

B. English translation of Exhibit A. (Gelfand Decl. ¶ __.)

C. The Tel Aviv–Jaffa Magistrate Court's "Decision - Search Warrant on the Premises, Seizure and Access to Computer Materials," dated July 19, 2020 (Hebrew);

D. English translation of Exhibit C. (Gelfand Decl. ¶ __.)

E. Dr. Haim Vismonski's letter to Adv. Roy Blecher, dated July 19, 2020, which provides information about the search and seizure warrant to Defendants (Hebrew).

F. English translation of Exhibit E. (Gelfand Decl. ¶ __.)

11. [Insert description of correspondence with opposing counsel (following protective order) and any explanation of why a stipulation to a sealing order could or could not be obtained.]

12. Good cause exists to seal each of the above-listed documents because the Sealed Documents come from Israeli courts and Israeli officials, and they are therefore entitled to deference, consistent with international comity.

a. *First*, the Sealed Documents relate to Israel's efforts to protect its national security and foreign relations interests and come directly from an Israeli judicial officer and the Israeli executive branch. As such, the Sealed Documents contain traditionally nonpublic government information for which there is no constitutional right of access. *See*, *e.g.*, *N.Y. Times Co. v. Dep't of Justice*, 806 F.3d 682, 688 (2d Cir. 2015) ("As a general rule, there is no constitutional right of access to traditionally nonpublic government information.") The fact that

Commented [A25]: We do not know which translation you mean, but is important to note it is an unofficial translation and not a translation issued by the court

Commented [A26]: See above comment regarding the reference to the Order

these documents were issued by Israeli officials and courts and governmental agencies and contain highly sensitive, nonpublic government information of a foreign government "alone counsels in favor of finding that there is no presumptive public right of access" to these documents. *Omari v. Ras Al Khaimah Free Trade Zone Authority*, 16 Civ. 3895, 2017 WL 3896399, at *14 (S.D.N.Y. Aug. 18, 2017) (sealing a white paper commissioned by a ruler of a political subdivision of foreign nation because it contained "highly sensitive, traditionally nonpublic government information, in this case of a foreign government"); *see also In re Terrorist Attacks on September 11, 2001*, No. 03-MDL-01570 (GBD)(SN), 2019 WL 3296959, at *5 (S.D.N.Y. July 22, 2019) (sealing multiple documents and finding that the documents contained "traditionally nonpublic information" because the documents involved senior foreign officials, were designated as sensitive at the time of creation, and detailed information about the nation's response to certain investigations).

b. *Second*, international comity counsels that the Sealed Documents be kept confidential because Israel itself has ordered the documents be kept confidential in order to protect its national security interests. The Supreme Court has described the doctrine of international comity as "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 543 n. 27, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987). Information sealed by a foreign court should remain sealed in other courts "[i]n the interests of judicial comity." *United States v. Sater*, 98-CR-1101 (ILG), 2019 WL 3288289, at *4 (E.D.N.Y. July 22, 2019). This is particularly true where, as here, the documents sought to be sealed "are not publicly accessible [and] disclosure of the [documents] here, would harm the integrity of those respective judicial systems." *Compal Elecs., Inc. v. Apple Inc.*, No. 317CV00108GPCMDD, 2017 WL 11423604, at *3 (S.D. Cal. Sept. 5, 2017) (sealing documents because of a "concern for comity"); *see also Accent Delight Int'l Ltd. v. Sotheby's*, No. 18-CV-9011 (JMF), 2019 WL 2602862, at *9 (S.D.N.Y. Jun. 25, 2019) (holding that, under principles of comity, where a foreign court has taken under advisement whether to keep a document sealed, the District Court would permit the foreign court to "rule on the issue in the first instance" rather than decide whether to unseal a duplicative document on its own docket). Because Israel has ordered

Commented [A27]: And foreign relations

the Sealed Documents be kept confidential in the interests of national security and foreign relations, international comity supports honoring that requirement and keeping the documents confidential.

c. *Third*, because Israel has prohibited Defendants from publicly disclosing the Sealed Documents, protection of the documents is warranted. *See Strauss v. Credit Lyonnais, S.A.*, Nos. 06-cv-702 and 07-cv-914, 2011 WL 4736359, at *5 (E.D.N.Y. Oct. 6, 2011) (sealing a non-party's banking records because, among other things, French law prohibited the documents' disclosure).

13. Accordingly, good cause (and, if necessary, a compelling reason) exists to seal each of the above-listed documents, and Defendants respectfully request that the Court grant the accompanying Administrative Motion to File Under Seal and order the Sealed Documents be kept under seal.

14. The Declarant has carefully sought sealing of only those parts of this Declaration as are necessary to comply with other court orders binding on Defendants, as described above, and, on behalf of Defendants, respectfully submits that the good cause and compelling reasons standards are met with respect to the sealing of paragraphs 3-9 and 11, above, and paragraph 6 and the Exhibits to the accompanying Gelfand Declaration. If the Court disagrees, the Declarant respectfully requests that the unredacted version of this Declaration and the Exhibits to the Gelfand Declaration be stricken from the record and not reflected in the docket of this action and that any copies thereof be destroyed.

I declare under the penalty of perjury and the laws of the United States that the foregoing is true and correct this __th day of July 2020, at Altadena, California.

____

JOSEPH N. AKROTIRIANAKIS

Commented [A28]: This is too much disclosure as this paragraph will not be under seal. We suggest to change to "under the circumstances described above" and not to mention "other court orders"

Commented [A29]: Due to the changes added, should be changed to match request to seal paragraphs (3-10, 12). That's what the request states in paragraph 3: (3-10, 12)

Commented [A30]: What information would be reflected on the Docket?

<u>בבית משפט השלום בתל-אביב-יפו</u> צ"ח **41333-07-20**
בפני כבוד הנשיא צחי עוזיאל

<u>המבקשת</u>: **מדינת ישראל**
באמצעות מחלקת הסייבר בפרקליטות המדינה
רח' שאול המלך 39 תל-אביב, מיקוד 64924
טלפון :073-33924455, פקס : 02-6468009

- נ ג ד -

<u>המשיבות</u>: **1. קבוצת אן. אס. או טכנולוגיות בע"מ**
(NSO Group Technologies LTD)
ח"פ 514395409
מרחוב גלגלי הפלדה 22, הרצליה, מיקוד 4672222

2. קיו סייבר טכנולוגיות בע"מ
(Q Cyber Technologies LTD)
ח"פ 514971522
מרחוב גלגלי הפלדה 22, הרצליה, מיקוד 4672222

שתיהן באמצעות בא-כוח עו"ד רועי בלכר
טלפון : 073-3202021, פקס : 073-3202031, דוא"ל : Royb@krb.co.il

<u>בקשה בהסכמה לתיקון צו איסור הפרסום והרחבת סייגי איסור הפרסום</u>

בית המשפט הנכבד מתבקש בזאת להורות על הרחבת סייגי איסור הפרסום כפי שנקבעו בהחלטה מיום 19.7.2020 ובהחלטת ההמשך מיום 21.7.2020, כך שיתאפשר למשיבות לעדכן את באי-כוחן בישראל ובארצות-הברית בדבר ההליך דנן, וכן יובהר, למען הסר ספק, כי יותר להן לעדכן גם את מנהליהן ועובדיהן הרלוונטיים לעניין מהעבר (ולא רק בהווה).

<u>תוכן הבקשה</u>:

1. ביום 19.7.2020, בעקבות פנייה במעמד צד אחד של המבקשת, ניתן על-ידי בית המשפט הנכבד צו חיפוש, תפיסה וחדירה לחומרי מחשב (להלן : **"הצו"**) בהתאם לסעיפים 23, 23א, 24א(1) ו-32(ב) לפקודת סדר הדין הפלילי (מעצר וחיפוש) [נוסח חדש], התשכ"ט-1969 (להלן : **"הפסד"פ"**). בד בבד עם מתן הצו, הורה בית-המשפט על איסור פרסום גורף, לרבות על עצם קיומו של צו איסור הפרסום, ולמעט מספר סייגים אשר פורטו בהרחבה במסמך ייעודי, אשר סומן על-ידי בית-המשפט הנכבד כ-צע/4.

2. עוד באותו היום נפגשו הצדדים, וכתוצאה מההידברות ביניהם, הוגשה לבית-המשפט הנכבד ביום 20.7.2020 בקשה בהסכמה, בה התבקשה, בין היתר, הרחבת סייגי איסור הפרסום כך שיותר למשיבות לקבל לידיהן וכן למסור לבאי-כוחן בהליך המשפטי המתנהל נגדן בבית-המשפט הפדראלי במחוז הצפוני של קליפורניה בארצות-הברית (מס' הליך CV-07123-PJH-19:4) (להלן: **"ההליך בארה"ב"**) גם את חלק הבקשה בטופס הצו, וזאת תוך מחיקת זהותו של הגורם המבצע את הצו.

   יתר תנאי צו איסור הפרסום, כפי שניתן ביום 19.7.2020 נותרו בעינם.

3. ביום 21.7.2020 נעתר בית-המשפט לבקשה דנן, ונתן תוקף להסכמת הצדדים.

4. היום פנה בא-כוח המשיבות לח"מ, ועדכן כי המשיבות עדכנו את באי-כוחן בהליך בארה"ב בפרטים המותרים במסירה על-פי החלטות בית-המשפט הנכבד המפורטות לעיל. בעקבות זאת, ביקשו באי-כוחן של המשיבות בארה"ב שיותר להם למסור את המידע המותר (כפי שיפורט להלן בסעיף 7) גם לשופטת בית-המשפט הפדראלי במחוז הצפוני של קליפורניה הדנה בהליך בארה"ב, וגם לבאי-כוחן של התובעות בהליך זה.

   בא-כוח המשיבות פנה למבקשת על מנת להרחיב את סייגי איסור הפרסום בנקודה זו, ולאחר דין ודברים הוסכם בין הצדדים כי יש מקום להיענות לבקשה.

5. כמו כן, במסגרת תהליך ביצוע הצו, עלה הצורך בהבהרות לגבי הגורמים הקשורים במשיבות שלהם ניתן – בכפוף ליידוע מראש של הגורם המבצע את הצו – למסור מידע את המידע המותר, כך שיובהר כי עובדים ומנהלים **לשעבר** אצל המשיבות, העשויים להיות רלוונטיים למימוש הצו – הם בין הגורמים שהמשיבות תוכלנה למסור להם את המידע המותר (כפי שיפורט להלן בסעיף 7), וזאת ביידוע מראש של הגורם המבצע את הצו.

6. לאור כל האמור לעיל, על יסוד הסכמת הצדדים, מתבקש בזאת בית-המשפט הנכבד לתקן את צו איסור הפרסום כדלקמן:

   א. יותר למשיבות באמצעות באי-כוחן בארץ ובארה"ב, למסור לשופטת בית המשפט הפדרלי במחוז הצפוני של קליפורניה הדנה בהליך בארה"ב, וכן לבאי-כוחן של התובעות בהליך בארה"ב את הפרטים הבאים:

      1) נוסח הצו הכולל הן את חלק הבקשה והן את חלק ההחלטה, להוציא זהותו של הגורם המבצע את הצו;

      2) מכתבו של הח"מ הממוען לעו"ד בלכר מיום 19.7.2020, אשר צורף כנספח לבקשה למתן צו איסור פרסום;

      3) כמו כן, יותר למסור לגורמים הנ"ל את הפרטים הבאים: עצם קיומם של ההליכים בבקשה להוצאת הצו; פרטי הצדדים לבקשה להוצאת הצו; העובדה כי התבקש צו חיפוש, תפיסה וחדירה לחומרי מחשב, ביחס לכל מסמך או חומר מחשב שבבעלותן או החזקתן של החברות, עובדיהן או מי מטעמן, מטעמים של מניעת נזק מדיני-ביטחוני חמור של מדינת ישראל.

ב. תיקון צו איסור הפרסום והרחבת סייגיו תותנה בהתחייבות של המשיבות בכתב, כי תפעלנה באמצעות באי-כוחן בהליך בארה״ב כמיטב יכולתן כדי לבקש מכב׳ השופטת הדנה בהליך בארה״ב, להבטיח כי המידע שיימסר לה ולבאי-כוח התובעות בהליך שם, לא יופץ לכל גורם נוסף ותישמר סודיותו.

ג. יודגש כי יתר פרטי צו איסור הפרסום כפי שנקבעו בהחלטותיו הקודמות של בית-המשפט הנכבד מיום 19.7.2020 ומיום 21.7.2020 נותרים בעינם.

____
רועי בלכר, עו״ד
בא-כוח המשיבות

____
ד״ר חיים ויסמונסקי, עו״ד
מנהל מחלקת הסייבר בפרקליטות המדינה

תל-אביב, א׳ אב התש״ף
22 יולי 2020

לכבוד: מר שלו חוליו

מנכ"ל חברת NSO

להוסיף כתובת החברה

שלום רב,

הנדון: צו חיפוש [ותפיסה] של בית משפט מיום 19.07.2020

אבקש להודיעך שהיום, בית המשפט (המחוזי?) בתל-אביב יפו, הורה, לבקשת המדינה, על הוצאת צו חיפוש ותפיסה, ביחס לחברות "קבוצת אן. אס. או. טכנולוגיות בע"מ" (מספר תאגיד: 514395409) ו- "קיו סייבר טכנולוגיות בע"מ" (מספר תאגיד: 514971522) (להלן: "**החברות**"). הצו מורה על (להשלים לפי לשון הצו).

תשומת לבכם להחלטת בית המשפט לחסות הליך זה תחת צו איסור פרסום (בהתאם לסעיף X לחוק) (להרחיב מהצו– ככל שיש אכן חריג בצו כגון לקבל אישור בית משפט להעביר מידע וכו' אז להתייחס גם אליו). נוכח האמור, כפי שצוין בצו, החברות אינן רשאיות לשתף או למסור מידע אודות הליך זה בין אם בתוך מדינת ישראל ובין אם מחוצה לה, ללא אישור בית המשפט.

מטרת הצו היא לאבטח מידע שמצוי בידי החברה והמשך החזקתו ו/או חשיפתו עלולים לגרום נזק חמור לביטחון מדינת ישראל ו/או יחסי החוץ שלה:

ככל שניתן, כאן לצטט מההחלטה/הצו את ההתייחסות לאינטרסים של מדינת ישראל ומדוע המסמכים רגישים]

מדובר בצעד מניעתי הננקט בהתאם להוראות חוק שירות הביטחון הכללי, ואין המדובר בצו שהוצא במסגרת חקירה פלילית.]

אנחנו מודעים שיש אפשרות שיישום הצו ישליך על הניהול של החברות. בכוונתנו לפעול ביעילות ככל הניתן, על מנת לצמצם את ההפרעה שעשויה להיגרם לתפקודן של החברות. לצורך כך, נציע להיפגש עם נציגי החברות היום על מנת לדון באופן יישום צו בית המשפט.

בכבוד רב,

העתק:

תמצית מזכר של משרד King & Spalding מיום 17.4.2020:

המזכר עוסק בנושא של המשמעויות האפשריות כלפי ההליך גילוי הראיות ביחס לאפשרות הוצאת "צו חוסם" מטעם ממשלת ישראל האוסר על חברת NSO מהעברת מידע מסוים.

המזכר מציין כי, ככלל, גם כאשר קיים חוק במדינות מחוץ לארה"ב האוסר על גילוי מידע מסוים – הדבר אינו מונע מבית משפט אמריקאי להפעיל את סמכותו להורות על גילוי ראיות, גם אם יש בכך כדי להפר את החוק במדינה הזרה.

בפרט, המזכר מתייחס לפסיקה של ה ה-9th Circuit (The Richmark case) המתייחסת למשמעות של צו חוסם זר בהליכי גילוי ראיות בארה"ב. על אף שבית המשפט הכיר בכך שהחברה בתיק תהיה חשופה להליכים פליליים בסין אם תגלה את המידע המבוקש בהליך, הוא בכל זאת הורה לחברה לבצע את גילוי הראיות הנדרש.

נוכח האמור, פסיקה זו עשויה להוביל בתי המשפט השייכים ל-9 th Circuit, כולל The Northern District of California, לקבוע החלטות דומה בנושא זה.

אשר על כן, ככל שמדינת ישראל תוציא "צו חוסם", עורכי הדין מ-KS מציעים לעצב אותו בהתאם לקריטריונים שנקבעו בפס"ד Richmark כדלקמן:

1. **חשיבות המסמכים** – על-פי קריטריון זה, יש להעדיף גילוי הראיות כאשר הן רלבנטיות באופן ישיר. יחד עם זאת, נאמר כי ככל שתוצאת ההליך אינה נשענת על צו הגילוי הספציפי הנדרש, בתי המשפט בדרך כלל נוטים לא לרמוס את הצו הזר.

2. **ספציפיות הבקשה** – אם הבקשה מנוסחת כחיפוש כללי עבור מידע, בתי המשפט יטו לדחות את הבקשה.

3. **מיקום המידע והצדדים** – כאשר כל המידע המבוקש והאנשים המספקים אותו ממוקמים במדינה זרה, יש לכך משקל כנגד גילוי הראיות המבוקש. שיקול זה יטה לטובת NSO.

4. **אמצעים חלופיים** – כדי לנקוט באמצעי חלופי לגילוי ריאות הוא צריך להיות דומה במהותו לגילוי הנדרש. כך למשל, אם האמצעי החלופי יהיה יקר משמעותית וידרוש משאבי זמן רבים או שמא האמצעי החלופי לא יהיה יעיל – אזי אין המדובר בחלופה מתאימה. במקרה דנן, האמצעי החלופי היחיד שמשרד KS מזהים הינו הלקוחות של NSO, וככל שאלו יתנגדו לגילוי ראיות – הדבר לא ישמש חלופה הולמת. לכן סביר, כי במקרה דנן שיקול זה יטה לטובת גילוי הראיות מטעם החברה.

5. **האינטרס של ארה"ב ושל המדינה בה ממוקם המידע** – זה הקריטריון החשוב ביותר. לצורך שקילת קריטריון זה, בית המשפט ישקול הבעת אינטרסים על-ידי המדינה הזרה, חשיבות הגילוי של הרגולציה של הפעילות המדוברת וכן אינדיקציה לדאגה של המדינה הזרה לסודיות טרם התגלות המחלוקת.
האינטרס של המדינה הזרה צריך להישקל אל מול זה של ארה"ב הנוגע להבטחת זכויות התובעים בארה"ב ואכיפה של החלטות של בתי המשפט שלה. אשר על כן, KS מציינים, כי על מנת לגבור על המשקל של האינטרסים של ארה"ב, אם ישראל מתנגדת להליך גילוי הראיות, יהיה צורך **בעמדה בכתב** – לבית המשפט או לחברת NSO – המביעה ענין בתיק הספציפי הזה ומסבירה באופן ספציפי למה גילוי ראיות משפיע על האינטרסים שלה. העמדה תצטרך להתייחס לגילוי הראיות הספציפי אליה היא מתנגדת ולספק הסבר ברור לשאלה מדוע גילוי זה יסכן אינטרס ממשלתי חשוב. לדבריהם, אין ספק כי הביטחון הלאומי של ישראל הוא אינטרס חשוב, אבל בית המשפט עשוי לתת משקל פחות, ככל שישראל לא הביעה את האינטרס שלה בסודיות המידע, **לפני** הליך הליטיגציה. על כן, ישראל תצטרך להצביע על פעמים אחרות בהן שמרה על אינטרס הסודיות בסוג כזה של בקשות מידע. לדבריהם, הדבר עשוי להיות מושג חלקית על-ידי סיפוק הסבר של מדיניות הפיקוח על הייצוא של מדינת ישראל, לרבות איסור על חברות אחרות מגילוי המידע הרגיש ביחס למוצרים המפוקחים.

עוד צוין במזכר, כי אם בית המשפט יורה על "צו מגן" האוסר על הצדדים להליך לגלות את המידע של החברה לכל מי שאינו חלק מההליך המשפטי – בית המשפט עשוי לראות בכך אמצעי מספק

לצורך הגנה על האינטרסים של ישראל. אשר על כן, "צו חוסם" מטעם מדינת ישראל צריך להבהיר מפורשות מדוע גילוי המידע רק לפייסבוק או לבית המשפט עדיין יפגע באינטרסים שלה.

6. **Hardship** (קשיים) - על צד המסתמך על חוק זר הנטל להראות כי חוק זה אכן אוסר על הפקת המידע. בהתאם, צו חוסם צריך להצביע על החוקים המקומיים האוסרים גילוי ולהסביר מדוע הגילוי הספציפי המבוקש נופל בגדר איסור חוקי זה. ככל שקיים חוק האוסר על הפקת המידע, בית המשפט ישקול את חומרת העונש עבור הפרת החוק. אפשרות להעמדה לדין, למשל, תשמש טיעון לאי הפקת החומר. אשר על כן, KS סבורים כי רצוי שהצו החוסם ממדינת ישראל יפרט את העונש לו צפויה חברת NSO במידה ותספק את המידע המבוקש לפייסבוק.
KS מציינים כי האפשרות של סנקציות פליליות אינה מבטיחה שבית המשפט ידחה את בקשת גילוי הראיות. בפרט, בית המשפט לא יתן קרדיט לצו מניעה זר ביחס לגילוי ראיות, שלא נאכף בעבר. אשר על כן, לדעת KS קריטריון ה Hardship יבוסס בתיק דנן אם ישראל תספק דוגמאות לצדדים אחרים שנענשו עבור גילוי מידע דומה.

7. **Likelihood of Compliance (סבירות הציות)** – אם סביר שצו גילוי ראיות לא ייאכף, הדבר יהווה משקל כנגד הוצאת צו אכיפה. קרי – אם NSO תסרב לציית לצו גילוי ראיות, גם בעומדה אל מול סנקציות, הדבר עשוי לשמש כפקטור עבור בית המשפט כנגד הוצאת צו המחייב גילוי. יחד עם זאת, בRichmark נקבע כי צו עשוי להיות בעל אפקטיביות, גם אם סביר שלא יצייתו לו. זאת, למשל משיקולי הרתעה - ככל שהצד להליך מבצע עסקים בארה"ב או ירצה לעשות כן בעתיד – האפקט ההרתעתי עשוי לעודד את בית המשפט להוציא בכל זאת צו לגילוי ראיות.

לסיכום - KS מציינים שהאפקטיביות של צו חוסם ממדינת ישראל תהיה תלויה בתוכן של הצו החוסם ובבקשת גילוי המידע הספציפית, וכי אין ערבון לכך שצו חוסם אכן ימנע מהוצאת צו על-ידי בית המשפט כלפי NSO להפיק את החומרים המבוקשים.

על מנת למקסם את סיכויי ההצלחה, על הצו החוסם להיות מנוסח כהתנגדות לבקשת גילוי ראיות ספציפית, לכלול הסבר ברור כיצד גילוי הראיות משפיע על האינטרסים של מדינת ישראל, לכלול הסבר לגבי הסנקציות ולשכנע שאיום העונש הוא אכן אמיתי. KS מציינים, כי גם עם צו חוסם חזק, בית המשפט עשוי עדיין להורות לNSO על גילוי המידע, דבר שעשוי להשאיר את NSO ללא מוצא המאפשר הימנעות מגילוי ראיות מבלי שתבצע זילות של בית המשפט.

לדעתם, הצגת טיעון של "סוד מדינה" עשוי להיות חזק הרבה יותר כבסיס לדחיית בקשת גילוי הראיות. הדבר ידרוש ממשלת ישראל (או ממשלה אחרת) להצהיר שגילוי המידע יגרום נזק לביטחון הלאומי שלה. ככל שישראל או מדינה אחרת מודאגת מהפקת מידע המתייחס ללקוחותיה של NSO ולטכנולוגיה שלה – לדבריהם, שימוש ב"סוד מדינה" יהיה הכלי האמין ביותר – ויתכן שהיחיד – לעשות כן.

*** למזכר צורף **נספח** המפרט בקשות אפשריות לגילוי ראיות בקטגוריות שונות (כגון רשימות לקוחות החברה, מידע לגבי אופן הפעילות בעולם ומידע לגבי הטכנולוגיה של התוכנה ועוד) – אנו מציעים שתעיינו בנספח זה.

King & Spalding LLP
633 West Fifth Street
Suite 1600
Los Angeles, CA 90071
Tel: +1 213 443 4355
Fax: +1 213 443 4310
www.kslaw.com

KING & SPALDING

CONFIDENTIAL AND ATTORNEY-CLIENT PRIVILEGED MEMORANDUM

TO: NSO Group Technology Limited

FROM: King & Spalding LLP

DATE: April 17, 2020

RE: WhatsApp v. NSO Group – Blocking Orders

This memorandum analyzes the effect a "blocking order" from Israel—an order prohibiting NSO from producing certain information to Plaintiffs—would have on discovery. Our conclusion is that NSO cannot be confident that a blocking order will excuse NSO from its obligation under U.S. law to produce relevant information. If Israel issues a blocking order, it will have to carefully tailor the order under Ninth Circuit law to maximize the chances of success.

Conflicts Between U.S. and Foreign Discovery Laws

The permissible scope of discovery in federal courts in the United States is broad. A party may "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Many countries have much more restrictive discovery systems than the United States. Some of those countries have laws that prohibit the disclosure of information that would otherwise have to be produced in the United States. Countries may also issue orders prohibiting disclosure.

As a general matter, foreign laws prohibiting disclosure do "not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that [law]." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 543 n.29 (1987). Instead, whether a foreign person must produce the information depends on a multi-factor balancing test, which considers:

> [i] the importance to the investigation or litigation of the documents or other information requested; [ii] the degree of specificity of the request; [iii] whether the information originated in the United States; [iv] the availability of alternative means of securing the information; [v] and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1475 (9th Cir. 1992). The Ninth Circuit also considers "the extent and the nature of the hardship that inconsistent enforcement would impose upon the person" and "the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state." *Id.* (cleaned up).[1]

Richmark is the leading Ninth Circuit case addressing the effect of a foreign blocking law on U.S. discovery. The plaintiff in *Richmark* sought discovery of a Chinese corporation's assets to satisfy a judgment the corporation had refused to pay. 959 F.2d at 1471. The corporation argued that Chinese "secrecy laws prevent[ed] it from complying with the discovery order and that it would be subject to prosecution in [China] were it to comply." *Id.* China issued an order to the corporation forbidding it from producing most of the requested information and informing the corporation that it "shall bear any or all legal consequences should you not comply with th[e] order." *Id.* at 1476.

The Ninth Circuit accepted that the corporation could face criminal prosecution in China if it disclosed the requested information. *Id.* at 1474, 1477. But it still ordered the corporation to provide the discovery. Weighing the applicable factors, the court found that (1) the requested information was relevant, favoring disclosure; (2) the plaintiff's requests were specific, favoring disclosure; (3) the information and corporation were located in China, favoring nondisclosure; (4) there was no substantially equivalent alternative source for the information, favoring disclosure; (5) the United States' interest in disclosure outweighed China's expressed interest in protecting the corporation's information because China had not expressed the interest prior to the litigation and had not explained how the corporation or China would be negatively affected by disclosure; (6) although the corporation could face criminal prosecution, it could avoid discovery by paying the plaintiff's judgment or posting a bond; and (7) although the corporation was not likely to comply with a discovery order, sanctions for noncompliance could still be effective by making it harder for the corporation to do business in the United States in the future. *Id.* at 1475-78. Balancing these factors, the court ordered disclosure.

Richmark suggests that courts within the Ninth Circuit—including the Northern District of California, where Facebook filed its lawsuit against NSO—will be reluctant to excuse discovery based on a foreign prohibition/blocking order, even when the foreign country has expressly ordered the party not to comply and has threatened criminal prosecution. For example,

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[1] As an alternative to excusing production outright, a court may require the party seeking discovery to do so through the Hague Convention on the Taking of Evidence Abroad. *Aerospatiale*, 482 U.S. at 541. The Hague Convention "prescribes certain procedures by which a judicial authority in one contracting state may request evidence located in another contracting state." *Id.* at 524. The Hague Convention procedures can be "time consuming and expensive," and result in less discovery than the U.S. rules. *Id.* at 542. The factors for deciding whether to apply the Hague Convention are the same as those for deciding whether to excuse production outright. *Sun Grp. U.S.A. Harmony City, Inc. v. CRRC Corp. Ltd.*, 2019 WL 6134958, at *2–3 (N.D. Cal. Nov. 19, 2019). Accordingly, we would expect the court to analyze the issue in the same way. *See id.* at *3–5.

the court in *In re Air Crash* ordered the defendant to produce information despite a letter from the Attorney General of Singapore prohibiting the defendant from doing so under Singapore's privacy laws. 211 F.R.D. 374, 377-79 (C.D. Cal. June 19, 2002). And in *Fenerjian v. Nong Shim Co.*, the court ordered a company to produce information about its employees despite a Korean statute criminalizing disclosure. 2016 WL 245263, at *2-6 (N.D. Cal. Jan. 21, 2016).[2]

<u>Application to NSO</u>

In this case, we think it is likely that Facebook may request documents or other discovery that Israel or NSO's other customers prohibit NSO from providing. For example, Facebook may request NSO's contracts with its customers or all documents relating to each Pegasus license to any of its customers. Facebook will doubtlessly seek discovery related to how the Pegasus technology operates.[3] If NSO refuses to provide the discovery, the Court will apply the factors from *Richmark*. It will, therefore, be important that any blocking order from Israel adhere closely to *Richmark*'s requirements.

1. Importance of Documents

This factor favors discovery when "the evidence is directly relevant." *Id.* at 1475. On the other hand, "[w]here the outcome of litigation does not stand or fall on the present discovery order, or where the evidence sought is cumulative of existing evidence, courts have generally been unwilling to override foreign secrecy laws." *Id.* Whether the evidence sought by Facebook is relevant will, of course, depend on Facebook's specific requests, but we would expect that much of the discovery to which Israel would object would be relevant to Facebook's claims.

2. Specificity of Request

Whether the discovery request is specific bears on "how burdensome it will be to respond to that request." *Id.* If the request is a "[g]eneralized search[] for information," courts are more likely to deny the request. *Id.* Again, it is not possible to say whether Facebook's requests will be sufficiently specific until Facebook makes the requests.

3. Location of Information and Parties

When "all the information to be disclosed (and the people who will be deposed or who will produce the documents) are located in a foreign country," that "weighs against disclosure." *Id.* This factor will favor NSO. *See id.* (finding "[t]his factor weighs against requiring disclosure" when party "ha[d] no United States office" and "[a]ll of its employees, and all of the documents . . . requested" were located in China).

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[2] Other Circuits take a similar approach. *See, e.g.*, *In re Sealed Case*, 932 F.3d 915, 933 (D.C. Cir. 2019) (ordering discovery from Chinese bank despite threat of criminal penalties by Chinese government); *Linde v. Arab Bank, PLC*, 706 F.3d 92, 114 (2d Cir. 2013) (ordering discovery from Jordanian bank despite letters from Jordan, Lebanon, and Palestinian Monetary Authority threatening legal sanctions).

[3] A preliminary list of anticipated discovery topics is included in an appendix to this memorandum.

4. Alternative Means

For an alternative means of discovery to weigh against disclosure, it "must be 'substantially equivalent' to the requested discovery." *Id.* If an alternative means would cost more "time and money" or is unlikely to be effective, it is not an adequate alternative. *United States v. Vetco Inc.*, 691 F.2d 1281, 1290 (9th Cir. 1981).

Here, we expect that the only alternative source for the information Facebook will seek would be NSO's customers. If those customers are objecting to discovery, they will not be an adequate alternative means of discovery. This factor is likely to favor disclosure. *See id.* at 1476 ("The absence of other sources for the information . . . is a factor which weights strongly in favor of compelling disclosure.").

5. Interests of the United States and of the State Where the Information is Located

"This is the most important factor." *Id.* To analyze the foreign country's interest in preventing disclosure, courts "will consider expressions of interest by the foreign state, the significance of disclosure in the regulation of the activity in question, and indications of the foreign state's concern for confidentiality prior to the controversy." *Id.* (cleaned up).

Even if the foreign country has an interest in prohibiting disclosure, that interest "must be weighed against the United States' interests in vindicating the rights of American plaintiffs and in enforcing the judgments of its courts." *Id.* at 1477. Those interests are "substantial" in every case. *Id.*

To overcome the United States' substantial interests, if Israel objects to discovery, they would need to create a writing—either to the court or to NSO—that expresses an interest in this specific case and explains with particularity why discovery would impair its interests. The writing will have to identify the specific discovery to which it objects and provide a clear explanation for why that discovery would endanger an important governmental interest. It will not be enough to simply object to discovery in general or to make a broad assertion of an interest in confidentiality. *See In re Air*, 211 F.R.D. at 379 (discounting Singapore's interest when government's letter did "not mention any of the specific document requests at issue").

There is no question that Israel's national security would be a weighty interest, and a court would likely understand that. *See In re CRT Antitrust Litig.*, 2014 WL 1247770, at *3 (N.D. Cal. Mar. 26, 2014) (finding significant foreign interest in antitrust enforcement); *cf. Richmark*, 959 F.2d at 1477. But the court may discount Israel's statement if it has "not express[ed] interest in the confidentiality of th[e] information prior to the litigation." *In re CRT*, 2014 WL 1247770, at *3. Israel will, therefore, need to be able to identify other times when it has asserted a confidentiality interest in the kind of information requested. In this case, that may be partially accomplished through an explanation of Israel's export control regime, including instances in which it has prohibited other companies from disclosing the details of sensitive regulated products.

Finally, a court may also discount the foreign government's interest in confidentiality if "the court has entered a protective order preventing disclosure of the secret information." *Finjan, Inc. v. Zscaler, Inc.*, 2019 WL 618554, at *3 (N.D. Cal. Feb. 14, 2019). If the court issues a protective order prohibiting the parties from disclosing NSO's information to anyone outside of the lawsuit, the court may consider that order sufficient to protect Israel's interests. To be most persuasive, Israel's blocking order should explain why disclosing the information only to Facebook and the court would still damage its interests.

6. Hardship

"The party relying on foreign law has the burden of showing that such law bars production." *Vetco*, 691 F.2d at 1289. If the foreign law does not actually bar production, then there is no hardship on the producing party. *Id.* at 1289–90. Therefore, any blocking order from Israel must identify the law barring disclosure and explain why the specific discovery falls within that law.

If the law does forbid production, then the court will consider the severity of the punishment for violating the law. The possibility of "criminal prosecution," for example, is "a weighty excuse for nonproduction." *Richmark*, 959 F.2d at 1477. To be effective, a blocking order from Israel should spell out the punishment NSO would face if it provided the information to Facebook.

Even the possibility of criminal sanctions, however, does not guarantee that a court will excuse discovery. *See id.* (ordering discovery despite possibility of criminal prosecution in China); *Vetco*, 691 F.2d at 1287 (finding possibility of criminal prosecution did not automatically excuse discovery where party had not "made good faith efforts to comply" with discovery). In particular, courts will not credit a foreign prohibition on disclosure if it has not been enforced in the past. *See Fenerjian*, 2016 WL 245263, at *6 (discounting foreign criminal prohibition because defendant could not cite an instance in which the prohibition had been enforced). The strongest argument for hardship would be established if Israel provides examples of other parties that have been punished for disclosing similar information.

7. Likelihood of Compliance

"If a discovery order is likely to be unenforceable, and therefore have no practical effect, that factor counsels against requiring compliance with the order." *Richmark.* 959 F.2d at 1478. If NSO refused to comply with a discovery order even in the face of sanctions, that could be "a factor counseling against compelling discovery." *Id.* However, the *Richmark* court ruled that an order may "be effective" even if it is unlikely to result in compliance. If the party does business in the United States or might "wish to do business in the [United States] in the future," that possibility can support a discovery order. *Id.*

8. Summary

Although any multi-factor test involves uncertainty as to how it would be applied by a particular judge, our research indicates that U.S. courts overwhelmingly require disclosure despite a foreign prohibition.[4] Thus, while the effectiveness of a blocking order from Israel will depend on the contents of the order and the discovery requests at issue, there is no guarantee that the blocking order would prevent NSO from being ordered to produce the same discovery the blocking order prohibits it from producing. To maximize the chance of success, the blocking order should be a targeted objection to specific discovery requests, explain clearly how that discovery will impair Israel's interests, explain the sanctions for production, and make a persuasive case that the threat of punishment is real.

Even with a strong blocking order, however, a court may still order discovery, which could leave NSO no way to avoid disclosure without being held in contempt of court. As we have previously discussed with you, a proper invocation of the state secrets privilege would present a much stronger basis to deny discovery to Facebook. The state secrets privilege would require the Government of Israel (or another government) to assert that disclosure of the information would cause harm to its national security. But if Israel or another government is concerned about avoiding production of information about NSO's customers and technology, asserting the state secrets privilege is the most reliable —and likely the only—way to do so.

[4] There are cases within the Ninth Circuit in which a court has excused production, but they involved factors that strongly opposed production on top of the foreign country's significant interests. *See Campbell v. Facebook Inc.*, 2015 WL 4463809, at *3–5 (N.D. Cal. July 21, 2015) (excusing production because discovery was irrelevant and available through other sources); *In re CRT Antitrust Litig.*, 2014 WL 6602711, at *3 (N.D. Cal. Nov. 20, 2014) (excusing production based on comity, the location of discovery abroad, and the possibility of obtaining the same discovery from a different source); *In re TFT-LCD Antitrust Litig.*, 2011 WL 13147214, at *4–6 (N.D. Cal. Apr. 26, 2011) (excusing production because discovery was irrelevant, cumulative, based overseas, and available elsewhere, and foreign governments has expressed strong interest in nondisclosure); *In re Rubber Chemicals Antitrust Litig.*, 486 F. Supp. 2d 1078, 1082–84 (N.D. Cal. May 9, 2007) (same). Many of those factors—such as the relevance, specificity, and availability of the discovery—cannot be analyzed until Facebook actually serves its discovery requests.

Appendix of Possible Discovery Requests

Documents and Witness Testimony

1. **Information relating to NSO's Clients**
    a. Full customer list
        i. U.S. customers (goes to personal jurisdiction)
    b. All customer contracts
        i. Terms of "appropriate use" in contracts (Hulio Declaration ¶ 12)
        ii. Pricing terms and records of contracts / licensing
    c. *All end use certificates* (Hulio Decl. ¶ 8)
    d. *Due Diligence Materials* (Hulio Decl. ¶ 11)
        i. Questionnaires to customers
        ii. Records / testimony on any reports of "abuses" or investigations into abuses (Hulio Decl. ¶ 17)
    e. *MoD Registrations* (Hulio Decl. ¶ 5)
    f. *Correspondence with the Israeli Ministry of Defense* regarding Pegasus and/or export control licenses
    g. Marketing materials to customers
        i. U.S. customer requests (may argue is relevant to personal jurisdiction argument)
    h. *Westbridge*—relationship with NSO and operations in the U.S.
        i. Relationship between Westbridge and NSO
        ii. Correspondence with existing or potential U.S. clients
    i. *Financing*—did NSO have sources of U.S. financing during the period of the allegations? (may argue is relevant to personal jurisdiction argument)
2. **Information Relating to NSO Operations Generally**
    a. Employee lists—where are employees located geographically (will argue it goes to personal jurisdiction)
3. **Information Relating to NSO Pegasus Technology**
    a. Whether NSO employees ever created WhatsApp accounts
        i. Details of how those accounts were created

1. Identities Used
2. Agreement to ToS

b. **Details on the NSO Hardware and Software Deployed** to the Customer (Compl. ¶¶ 58, 61; Hulio Decl. ¶ 14)

c. NSO "Hacking" Techniques and Support

i. Any information or *use of NSO "zero days" or OS system exploits* that would be applicable to a wide range of targets (Compl. ¶ 25)

ii. NSO *use of spearphishing or other malware delivery methods* (Comp. ¶ 25)

iii. *Platforms against which Pegasus* could be used (iMessage, Skype, Telegram, WeChat, Facebook) (Comp. ¶ 27)

iv. *What information can Pegasus extract from a target* (Comp. ¶ 27)

v. *How does Pegasus otherwise work*?

vi. Does NSO provide training for its users

1. Documents of the same

vii. Whether and how NSO updated Pegasus on users' phones

viii. Does NSO have remote support capabilities for its customers

1. Any specific details of technical support?

d. **How does NSO "set up" technology**?

e. **Aside from Pegasus software, what other technology does NSO create / maintain for customers after the setup**?

i. How do NSO's network of "remote servers" work? (Compl. ¶ 32)

1. Do they have a role in deploying Pegasus
2. How do they conceal the identities of NSO Group or its customers so Pegasus is not discovered

f. What ongoing access does NSO have to its technology once its installed at a customer location

g. **How does Pegasus change after its installed** (Compl. ¶ 27 "modular software")

h. Information on limitations on use of Pegasus

i. Audit trail

ii. Any Other Technical Safeguards

iii. *Limitation on US phones* (Hulio Decl. ¶ 13)

1. Can NSO's customers modify/evade this limitation
2. Known instances of failure (e.g. was a US person or phone ever surveilled)
3. How does it work for a U.S. person/phone overseas

iv. Extraterritorial Limitations

1. Can a government customer use Pegasus extraterritorially, outside of their own nation? (Goes to derivative sovereign immunity; Bezos scenario)

4. Information Relating to NSO / MoD Interactions

a. Whether MoD has ever conducted an investigation into NSO technology or customer use of the technology

b. Whether MoD has ever revoked an export control license

5. NSO Specific Operations

a. Any information about the 1,400 targets identified by Facebook

b. Information about the Jeff Bezos hack or Khashoggi killing

6. NSO's Relationship to Facebook

a. Documents and emails regarding the Facebook's attempt to purchase NSO services in 2017

שלום רב,

כזכור, בסוף אוקטובר 2019 הוגשה בקליפורניה תביעה נזיקית על-ידי החברות Whatsapp ו-facebook כנגד החברה הישראלית NSO Group Technologies, בטענה כי בין התאריכים 29.4.2019 ועד ה- 10.5.2019 השתמשה הנתבעת בשרתי וואטסאפ, כדי להפיץ תוכנת ריגול בשם "פגסוס" לכ-1400 מכשירים ניידים לצורך ביצוע מעקב אחר משתמשי וואטסאפ מסוימים. הליך גילוי המסמכים הצפוי בתביעה זו מגלם סיכונים לא מבוטלים לביטחונה הלאומי של מדינת ישראל.

בשלב זה תלויה ועומדת בקשה למחיקה על הסף אשר הגישה חברת NSO לבית המשפט. יחד עם זאת, הבקשה איננה, כשלעצמה, מעכבת את הליך גילוי המסמכים, וההכרעה בנושא נתונה לבית המשפט. אכן, ב-8 ליוני נודע לנו אודות בקשה ראשונה לגילוי מסמכים, אשר הגישו התובעות לחברת NSO. המדובר בבקשה מקיפה ורחבה, אשר על פניו, חלה גם על מסמכים המצויים ברשות החברה ואשר חשיפתם עלולה לגרום נזקים משמעותיים למדינת ישראל. בנוסף, החלו להישלח דרישות לגילוי מסמכים לעובדים של החברה המתגוררים בארה"ב.

ככלל, סד הזמנים ביחס לבקשה לגילוי מסמכים, בהתאם לכללי הפרוצדורה המקומיים, הינו מהיר ביותר, ועל החברה לשלוח לתובעות את המידע המבוקש בתוך 30 ימים, אלא אם כן היא תקבל אורכה או החלטה שתעכב את הליך גילוי המסמכים. לאחרונה, החברה אכן ביקשה מבית המשפט לעכב את הליך גילוי המסמכים עד לקבלת החלטה בבקשתה לדחייה על הסף, אולם טרם התקבלה החלטה בענין. גם ככל שיוחלט לעכב את הליך גילוי המסמכים, עדיין ייתכן שהשופטת תגביל זאת רק לחלק מהמידע ולא לכולו, וממילא יתכן כי השופטת תקבל את החלטתה בבקשה לדחייה על הסף בפרק הזמן הקרוב.

אשר על כן, האפשרות לחשיפת המידע הרלבנטי לאינטרסים של מדינת ישראל, הולכת וקרבה, ועלינו להיערך למניעה, ולכל הפחות לצמצום של הפגיעה האפשרית.

לשם כך, הצעדים אותם יש ללבן בשלב זה, לטעמי, בין היתר, הם:

1. יש לבחון את האפשרות לתפיסה של המסמכים על-ידי שירות הביטחון הכללי. מניתוח משפטי שנערך במחלקת ייעוץ וחקיקה, עולה כי מבחינת הדין בישראל ניתן לנקוט בצעד זה, אף כי הדבר מחייב מידה של פרשנות תכליתית של הדין. עורכי הדין המלווים אותנו בחו"ל, לא הצביעו על סיכון משמעותי שעשוי להיגרם למדינת ישראל בעקבות מהלך זה, במסגרת ההליך בחו"ל. היתרון של הליך זה הוא שמדובר באמצעי אפקטיבי להשגת המטרה של מניעת הוצאת המסמכים מישראל ופרסומם. יחד עם זאת, יש לציין כי

Commented [VS1]: להבנתנו יצטרכו הסמכה ספציפית של ועדת שרים בנושא זה לפי הכיוון האחרון שהן חושבות עליו

ההיבטים הפרקטיים והמשמעות המעשית של מהלך זה טרם לובנו. כמו כן, יש לתת את הדעת לנזק התדמיתי שעשוי להיגרם למדינת ישראל מנקיטה בצעד חריג זה.

2. יש לבחון אפשרות להגשת תצהיר מטעמו של גורם בטחוני, לפיו גילוי מסמכים יגרום נזק לביטחון המדינה וליחסי החוץ שלה, אשר יצורף לבקשה ישירה שתוגש מטעם המדינה לבית המשפט בהליך בחו"ל. בהקשר זה, עורכי הדין המלווים אותנו בחו"ל מסרו, כי ביחס לטענתה של ישראל להחלת דוקטרינה של "סוד מדינה" בהסתמך על התצהיר האמור, קיימת סבירות נמוכה שבית המשפט יחליט למנוע את גילוי המסמכים באופן **מלא**. עורכי הדין העריכו בפחות מ-50% את הסיכוי כי בית המשפט יקבל את הטענה (ביחס ל"סוד מדינה") באופן **חלקי** – וגם זאת, רק ככל שהטענה תהא מצומצמת. גם בתרחיש זה, יובהר כי בית המשפט עשוי לדרוש לעיין במסמכים אותם מבקשת המדינה להחריג מהבקשה לגילוי מסמכים, על מנת לאפשר לשופטת להעריך את אמינות והיקף הטיעון של "סוד מדינה" במקרה זה. לגבי חומרים שבית המשפט יורה על גילויים, ייתכן שבית המשפט יהיה מוכן לשקול צעדים שונים כגון, הגבלת חשיפת המידע רק לגורמים חיוניים (למשל, לעורכי הדין שמייצגים את החברה ולא לחברה עצמה). נוכח האמור, ברי כי גם במסגרת התייצבות המדינה בהליך על בסיס דוקטרינת "סוד מדינה", הנתמכת בתצהיר של גורם ביטחוני, עדיין קיים סיכון מהותי שבית המשפט יורה על גילוי של חלק מהמסמכים הרגישים, או שיאפשר חשיפת מידע רגיש במהלך תצהירים וגביית עדויות (depositions).

בנוסף, וללא קשר לדרך הפעולה שתיבחר, יש חשיבות לכך שהמדינה תיתן בהקדם הנחיות קונקרטיות לחברה כיצד עליה לנהוג בקשר להליך גילוי המסמכים, ואילו מגבלות עליה לקחת בחשבון בהקשר זה. כך לדוגמא, יש מקום לשקול להגביל את הטיפול בהפקת ומיון המסמכים בהליך גילוי המסמכים לגורמים ישראלים (בעלי סיווג ביטחוני מתאים) בלבד. ללא הנחיות כאמור, עלולה החברה לשכור גורמים זרים על מנת למיין עבורה את המסמכים הרלוונטיים לבקשה לגילוי מסמכים מתוך כלל המסמכים.

נוכח הניתוח האמור, נראה כי הכלי המשפטי האפקטיבי ביותר – הגם שאינו נטול חסרונות - למניעת מסירתם ופרסומם של המסמכים הוא תפיסתם על ידי שירות הביטחון הכללי. כמו כן, יש צורך דחוף במתן הנחיות לחברה בקשר להליך גילוי המסמכים. נוכח לוחות הזמנים הצפויים בהליך בארצות הברית, אציע כי ההחלטות ביחס לדרך הפעולה הרצויה יתקבלו מהר ככל הניתן.

בברכה,

לכבוד: מר שלו חוליו

מנכ"ל חברת NSO

להוסיף כתובת החברה

שלום רב,

הנדון: צו חיפוש [ותפיסה] של בית משפט מיום 19.07.2020

אבקש להודיעך שהיום, בית המשפט (המחוזי? בתל-אביב יפו, הורה, לבקשת המדינה, על הוצאת צו חיפוש ותפיסה, ביחס לחברות "קבוצת אן. אס. או. טכנולוגיות בע"מ" (מספר תאגיד: 514395409) ו- "קיו סייבר טכנולוגיות בע"מ" (מספר תאגיד: 514971522) (להלן: "**החברות**"). הצו מורה על (להשלים לפי לשון הצו).

תשומת לבכם להחלטת בית המשפט לחסות הליך זה תחת צו איסור פרסום (בהתאם לסעיף X לחוק) (להרחיב מהצו– ככל שיש אכן חריג בצו כגון לקבל אישור בית משפט להעביר מידע וכו' אז להתייחס גם אליו). נוכח האמור, כפי שצוין בצו, החברות אינן רשאיות לשתף או למסור מידע אודות הליך זה בין אם בתוך מדינת ישראל ובין אם מחוצה לה, ללא אישור בית המשפט.

מטרת הצו היא לאבטח מידע שמצוי בידי החברה והמשך החזקתו ו/או חשיפתו עלולים לגרום נזק חמור לביטחון מדינת ישראל ו/או יחסי החוץ שלה:

ככל שניתן, כאן לצטט מההחלטה/הצו את ההתייחסות לאינטרסים של מדינת ישראל ומדוע המסמכים רגישים]

מדובר בצעד מניעתי הננקט בהתאם להוראות חוק שירות הביטחון הכללי, ואין המדובר בצו שהוצא במסגרת חקירה פלילית.]

אנחנו מודעים שיש אפשרות שיישום הצו ישליך על הניהול של החברות. בכוונתנו לפעול ביעילות ככל הניתן, על מנת לצמצם את ההפרעה שעשויה להיגרם לתפקודן של החברות. לצורך כך, נציע להיפגש עם נציגי החברות היום על מנת לדון באופן יישום צו בית המשפט.

בכבוד רב,

העתק:

Commented [VS1]: מורן תוכלי להשלים?

Commented [VS2]: חיים ומורן תצליבו מול מה שכתוב בצו המבוקש?

Commented [VS3]: נצטרך לסיוע שלכם להשלים זאת

Commented [VS4]: מורן תוכלי להשלים?<

Commented [VS5]: חיים/מיכל – אנא ראו – האם תוכלו להשלים בהתאם לנוסח מוצע שתגבשו?

Commented [VS6]: מורן - תוכלי להשלים לפי טיוטת הצו בבקשה?

Commented [VS7]: חיים לעיונך והערותיך

Commented [MM8]: Impact NSO's business operations

ב׳ בטבת, התש״פ
30 בדצמבר, 2019

לכבוד
ד״ר רועי שיינדורף, משנה ליועץ המשפטי לממשלה
מר סדריק (יהודה) צבע, מחלקת ייעוץ וחקיקה (בינלאומי)

שלום רב,

הנדון: מערך הסייבר הלאומי – תביעת פייסבוק נגד NSO

בהמשך לדיון שהתקיים בלשכתך ביום 23.12.19, ולבקשתך אנו מציינים את העניין של מערך הסייבר הלאומי.

1. בתמצית, מערך הסייבר הלאומי נדרש לשילוב בגיבוש העמדה הלאומית בהיבטים הבאים: היבטים משפטיים ומקצועיים הקשורים בפעילות טכנולוגית במרחב הסייבר, השפעת הדיון על המוניטין של תעשיית הסייבר הישראלית והפיקוח הישראלי עליה, וכפועל יוצא משני אלה, התדמית והיציבה הישראלית בסייבר.
2. נציג היבטים אלה בקצרה להלן.

היבטים מקצועיים הקשורים בפעילות טכנולוגית במרחב הסייבר

3. הפעילות המפורטת בכתב התביעה מתארת מעשים המהווים פעולות אסורות לכאורה לפי דיני המחשבים, הדינים האוסרים על פגיעה במחשב או במידע השמור בו, וזאת לצד טענות בדבר הפרות הוראות ״תנאי שימוש״ מסוגים שונים. טענות אלה עוסקות בפגיעה בהגנת הסייבר של מוצרים ושירותים במרחב הסייבר.
4. בעידן שבו מערכות מחשב מחוברות אחת לשנייה, ולנוכח הקישוריות הרבה במרחב הסייבר, עולות תדיר שאלות של גבולות המותר והאסור בביצוע פעולות הקשורות בחדירה אסורה לחומר מחשב.
5. בהקשר זה מערך הסייבר היה מעורב בהמלצות להנחיית פרקליט המדינה 2.38 בנושא ״מדיניות העמדה לדין וענישה בעבירה של חדירה לחומר מחשב״, פסקה 15(א).[1]
6. בנוסף, כידוע מתנהל בשנים האחרונות שיח מורכב אודות המתח שבין התועלת להגנת פרטיות והגנת הסייבר שבפריסה רחבה של הצפנה חזקה במוצרים ושירותים טכנולוגים, לבין הסיכון לפעילות המודיעין והאכיפה הממשלתית. משרד המשפטים האמריקני טוען שעקב פריסת הצפנה חזקה רשויות המודיעין והאכיפה אינן יכולות לבצע את תפקידן ולמנוע אירועי ביטחון או פשיעה חמורים.

[1] פרקליט המדינה, הנחייה 2.38 בנושא ״מדיניות עמדה לדין וענישה בעבירה של חדירה לחומר מחשב״, https://www.justice.gov.il/Units/StateAttorney/Guidelines/02.38.pdf

7. במובן זה למערך הסייבר עניין בהשתתפות בשיח מורכב זה, על היבטיו השונים, ועל הקשריו השונים.

השפעת הדיון על המוניטין של תעשיית הסייבר הישראלית והפיקוח הישראלי עליה

8. ככל שיש סיכון שייקבע כי הפעילות המפורטת בכתב התביעה אינה חוקית, לקביעה זו לגבי חברה ישראלית גדולה מאוד, עלולה להיות השפעה על הדימוי של תעשיית הסייבר הישראלית.
9. בנוסף, התביעה מעוררת שאלות לגבי היקפו וטיבו של הפיקוח מראש שמבוצע לגבי מוצרי ושירותי החברה הנתבעת בישראל.
10. בפרט עולה השאלה האם המעשים המתוארים בכתב התביעה היו ידועים לרשויות הפיקוח, האם יש בהם הפרה של הוראות הפיקוח, ומה עמדת הגורמים המוסמכים בנושא הפיקוח על הייצוא בנושא.
11. לכל אלה השפעה על תעשיית הסייבר הישראלית, אשר מערך הסייבר הלאומי מופקד בין היתר על קידומה בהתאם להחלטות הממשלה בנושא הסייבר.

חשש ליצירת זיקה בין הדיון הנוכחי לבין עמדות לכאורה של ישראל בתחום כללי התנהגות בסייבר

12. מעורבות ישראלית ממשלתית בתיק זה, משיקולים שונים, מעלה חשש ליצירת זיקה, ולו תדמיתית, בין עמדותיה של הממשלה והאינטרסים שהיא מקדמת לבין פעילות החברה.
13. בהקשר זה נזכיר את הפרופיל הגבוה שבו מנהלת חברת פייסבוק את התביעה, באופן הכולל מאמר דעה בעיתונות המובילה בארה״ב.[2]

סיכום

14. על רקע האמור אנו מבקשים להשתתף בדיונים על מנת לבטא זוויות אלה במסגרת הליך קבלת ההחלטות, תוך איזון בין האינטרסים השונים העולים לבין היבטים אלה.

בכבוד רב,

עמית אשכנזי
היועץ המשפטי
מערך הסייבר הלאומי

העתק: מר יגאל אונא, ראש מערך הסייבר הלאומי
גב׳ יעל גורן חזקיה, יועצת בכירה לראש מערך הסייבר הלאומי
גב׳ רעות ימין, הלשכה המשפטית, מערך הסייבר הלאומי

[2] **Will Cathcart** , Why WhatsApp is pushing back on NSO Group hacking, [Will Cathcart is head of WhatsApp, which is owned by Facebook.], Washington Post, 29.10.19, https://www.washingtonpost.com/opinions/2019/10/29/why-whatsapp-is-pushing-back-nso-group-hacking/

JOSEPH N. AKROTIRIANAKIS (Bar No. 197971)
jakro@kslaw.com
AARON S. CRAIG (Bar No. 204741)
acraig@kslaw.com
KING & SPALDING LLP
633 West Fifth Street, Suite 1700
Los Angeles, CA 90071
Telephone: (213) 443-4355
Facsimile: (213) 443-4310

Attorneys for Defendants NSO GROUP TECHNOLOGIES LIMITED and Q CYBER TECHNOLOGIES LIMITED

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

WHATSAPP INC., a Delaware corporation, and FACEBOOK, INC., a Delaware corporation,

Plaintiffs,

v.

NSO GROUP TECHNOLOGIES LIMITED and Q CYBER TECHNOLOGIES LIMITED,

Defendants.

Case No. 4:19-cv-07123-PJH

DECLARATION OF CHAIM GELFAND

Ctrm: 3
Judge: Hon. Phyllis J. Hamilton

Action Filed: 10/29/2019

1 I, Chaim Gelfand, declare as follows:

2 1. I am an attorney licensed to practice law in Israel, and I am employed by NSO
3 Group Technologies as its Head of Compliance. I have been NSO's Head of Compliance since I
4 joined the company in January 2020. I have personal knowledge of the facts set forth below and,
5 except as otherwise stated, could testify competently to each fact averred herein.

6 2. I was born in the United States and grew up in New Jersey. I moved to Israel and
7 attended high school and university in Israel.

8 3. Prior to my employment with NSO, I was a partner in the law firm of Shibolet &
9 Co., one of the largest law firms in Israel. I have practiced international commercial law in Israel
10 in a variety of law firm and in-house positions since I received my law degree from Bar-Ilan
11 University in 2003.

12 4. I have native fluency in both Hebrew and English, and I have spoken, read, and
13 written both languages for most of my life. Throughout my legal career, I have worked in both
14 Hebrew and English.

15 5. I have reviewed the documents attached hereto as Exhibits 1 through 6. Based on
16 my review of Exhibits A-F and my fluency in Hebrew and English, I can attest:

17 a. Exhibit B is an accurate English language translation of Exhibit A, a document
18 written in Hebrew.

19 b. Exhibit D is an accurate English language translation of Exhibit C, a document
20 written in Hebrew.

21 c. Exhibit F is an accurate English language translation of Exhibit E, a document
22 written in Hebrew.

23 6. The Request (Exhs. A-B) and the resulting Order (Exhs. C-D) were neither
24 announced to, not expected by, Defendants. Since the issuance of the Order, the Government of
25 Israel has removed from NSO's physical premises in Herzliya, Israel, many boxes of documents
26 previously maintained in NSO's offices. The Government of Israel has also begun seizing
27 Defendants' electronically-stored data.

28 I declare under the penalty of perjury and the laws of the United States that the foregoing

is true and correct this __th day of July 2020, at Herzliya, Israel.

____

CHAIM GELFAND

JOSEPH N. AKROTIRIANAKIS (Bar No. 197971)
jakro@kslaw.com
AARON S. CRAIG (Bar No. 204741)
acraig@kslaw.com
KING & SPALDING LLP
633 West Fifth Street, Suite 1700
Los Angeles, CA 90071
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Case No. 4:19-cv-07123-PJH

DECLARATION OF CHAIM GELFAND

Ctrm: 3
Judge: Hon. Phyllis J. Hamilton

Action Filed: 10/29/2019

I, Chaim Gelfand, declare as follows:

1. I am an attorney licensed to practice law in Israel, and I am employed by NSO Group Technologies as its Head of Compliance. I have been NSO's Head of Compliance since I joined the company in January 2020. I have personal knowledge of the facts set forth below and, except as otherwise stated, could testify competently to each fact averred herein.

2. I was born in the United States and grew up in New Jersey. I moved to Israel and attended high school and university in Israel.

3. Prior to my employment with NSO, I was a partner in the law firm of Shibolet & Co., one of the largest law firms in Israel. I have practiced international commercial law in Israel in a variety of law firm and in-house positions since I received my law degree from Bar-Ilan University in 2003.

4. I have native fluency in both Hebrew and English, and I have spoken, read, and written both languages for most of my life. Throughout my legal career, I have worked in both Hebrew and English.

5. I have reviewed the documents attached hereto as Exhibits ~~1~~ A through ~~6~~F. Exhibits B, D, and F are English translations of documents in Hebrew (Exhibits A, C, and E, respectively). I have compared the original Hebrew language documents and the English translations and, based on ~~Based on my review of Exhibits A-F and~~ my fluency in Hebrew and English, I can attest:

a. Exhibit B is an accurate English language translation of Exhibit A, a document written in Hebrew.

b. Exhibit D is an accurate English language translation of Exhibit C, a document written in Hebrew.

c. Exhibit F is an accurate English language translation of Exhibit E, a document written in Hebrew.

6. Defendants had no knowledge that the Government of Israel was planning to pursue the Request (Exhibit A) until the Order (Exhibit C) was served on NSO on July 19, 2020.

~~6. The Request (Exhs. A-B) and the resulting Order (Exhs. C-D) were neither announced to, not expected by, Defendants. Since the issuance of the Order, the Government of Israel has removed from NSO's physical premises in Herzliya, Israel, many boxes of documents previously maintained in NSO's offices. The Government of Israel has also begun seizing Defendants' electronically-stored data.~~

I declare under the penalty of perjury and the laws of the United States that the foregoing is true and correct this —31st~~th~~ day of July 2020, at Moreshet~~Herzliya~~, Israel.

____

CHAIM GELFAND