From: Marlene Mazel <MarleneM@justice.gov.il>
Sent: Thursday, June 11, 2020 11:37 PM
To: Marlene Mazel <MarleneM@justice.gov.il>
Subject: Conversation through 11:30 pm

Procedural status of the case
Motion to dismiss – judge doesn't need oral arguments
Motion to disqualify is also fully briefed – not clear if she will do this without oral arguments as well
Judge moving along fast on small orders
The motion to stay discovery is not fully briefed and will take some time
Probably will rule on disqualification, then on the stay of discovery and then on the motion to dismss

Courts' reaction to the stay and motion to disqualify will give us an idea where the judge is out – and will unfold more slowly – if she denies the motion to stay – things can move along more quickly. On the strength of the motion – they think the stronger argument is based on fact that MTD pending and then would be no need for discovery if granted. FS immunity cases are true that state not subject to discovery but it's a bit of a reach as NSO is not a state

What would be regular course of events for how discovery works – the rules that are default guidelines for average case – like car accident- 30 days would suffice. Case of this size not reasonable so court should craft reasonable guidelines. If discovery not stayed – NSO would produce documents on a rolling basis – either response to all or just start on question 1-5 and keep FB informed after collecting all docs/internal review to privilege and responsiveness – what are required to reduce/what can be alleged as privilege – prepare document of all docs potentially responsive that are not being turned over and the judge will make those judgement calls.

Can you redact a document if one section relevant to case and the rest of the document isn't – ordinarily parts that are not relevant would also not be secret and would be produced. If have long email chain and part is classified – need to think if can redact part for privliegge or claim the package is privileged.

In our case most of documents would be in Hebrew – how is this translated. Who gets retained to do the documentary review – we are concerned that documents would be circulated outside the country. As a baseline, company has no responsibility to translate them beforegoing to the other side. Generally two teams of attorneys- attorneys outsourced by the firm – hired out – given instructions by the parties producing the documents saying – upload all documents and you flag documents as responsive or non-responsive for first cull. Then attorney for team does spot check/review responsive documents and then do a privileged review. Where ti happens could be an economic. You can say first cull should be done within Israel or by an Israeli citizen. Would court allow more time for this to take place – if we cannot have first level review of unauthorized people without security clearance to review the document? Especially if Israel imposes this on the company. Reeves said – standard is proportionate and reasonable… We would try to figure out with firm what is best argument. As of now – NSO has request and they have to – despite the stay – from atechnical perspective – they should prepare these responses because they have not gotten

permission to stop. At this point would negotiate the key words to run through the servers (without producing documents right now). All thru lens as to whether sides are acting reasonably..

If we want to limit the production or give protection to some of the documents – what is the most effective way – do we need to intervene or let NSO argue it and we would give them supporting evidence? What kind of protections can they get…

Israel gives NSO categories of information we see at privilege
NSO would explain on privilege log why not prdocuing and will nto produce
FB would have to get a motion to compel
Generally 2 parties have a privelge
On state secrets only states have it
So Israel would intervene at motion to compel stage and assert state secrets

Lets say NSO had contracts with foreign states
Israel to protect its licensing and export control policy doesn't want the identity of those countries revealed
Can this be argued in the abstract without the judge seeing the dcouments themselves and in any case its not so relvant if itw as state a or b- we will give the K but redact any info which could identify the stae involved
Balance for giving enough info to the judge – diff options

(1) We will produce some info you need but will redact some info (they will see doc which is redacted) and less info as to repurcussions OR
(2) YH imagine country B we have no diplomatic ties why it could be a national security or foreign relations issue (Without docs)

John – at some point Israel is considering if we should file something directly with the court – probably will be a motion for protective order – let ct know there is classified info – would be difficult to do discussions and discovery . Would there be some utility in filing now while judge reviewing MTD that this would be a very tough case to litigate. Judges need a reason to dismiss the case and she can see it will be trench warfare on everything document and interested – would there be value to putting in a motion now? Reeves – may not sway the case but it could move the needle. As of now NSO did not allude to this as strongly as they could… there are escalating ways to do that:

1. Relay letter to NSO – obviously question 25 – relates to problematic category of docs – if submit to court through protective order and state secrets – or start with letter and then set the groundwork for the rest of the case

Acclimate the judge to this argument. There is a john doe mechanism -Israel would not qualify – can limit the participation itself – it would be public

John- we could ask it would be filed under seal – motion from state of Israel filed under seal..

John if we wait for judge to decide the MTD and she does not dismiss then it will be a very long haul, could we tip the balance now by letting court know how difficult it would be…

Its actually because the FB – goal of showing its just the company – Israel could say what seems facially innocuous has deep implications for the regulators of the State of Israel. If the court sees that it will see wont be any easy discovery cases

Saying it to the court – adds a meaningful layer of urgency if Israel weighs in direction.

Could DOJ weigh in by filing a SOI to protect the national security info of a foreign state. I don't recall any cases – except the lawsuit – united against nuclear Iran – a private org and someone named by them and sued for libel and US gov gave a state secrets affidavit to protect them. So maybe there was foreign government request that was involved. You know US gov would file on immunity of national security info on a foreign government

Is a questions as to chips you can use with US. Don't see a downside to it. Also if true use DEA – they would be protecting their own counter-terrorism interests.

DOJ would have to be convinced there is a real national security interest.

What about US DOD – and the regulator – would they have the same concern over disclosure of export control regulation and documentatry information?

I could see US gov being supportive that foreign governments using this software in counter-terrorism and crime. US gov also has their own issues – the get cooperation from FB but have been frustrated that they are not helpful enough. It might be they would be willing to pushback on FB. Also have fact this is election year and possible if high level request from right ministry to MOJ here that that would be something that would be taken in to account. They would have to discuss it publicly to a certain extent cuz if US gov filed a brief –could do affidavit under seal and if had to go this route – they would say we take Israel's security very seriously (or some press line like that). They would need to consider how they would defend their intervention in this case.

John said its better to say its breach of Israeli national security – this is a better argument to the US government and to the court then that is a breach of Israeli law. I think the court will be more persuaded to hear that is protective national security information - as in BOC – statement that requiring Uzi to testify would jeopardize Israel's national security.

Reeves – I agree with john that it is not necessary to say that it is a violation of law – but in Uzi Shaya – the disclosure was criminalized and that did lend credence to the argument of the State – and lends support to the public issue of not having the information disclosed.

David: Our classification not as developed of US – there are documetns even marked unclassified which we would still consider their disclosure would violate national security

John: I cant think of a case where US government intervened on behalf of a foreign government to protect its information – probably would say this may harm US national security and foreign relations and would need to be accompanied by an affidavit as to why it implicates the US national security an would say something like we benefit from information about investigations against terrorism or law enforcement that other countries have attained using the software.

In response to Ram: we would hope that the judge would be persuaded to grant some protection of Israeli government information –there really isn't much precedent – there is

not so many cases except the ones we cited for Uzi shaya – which was thin and the gov didn't decide it on that gound but on immunity. We have some cases that there is a privilege to protect foreign gov info – we would hope it would come out that way but not a lot of precedent.

Roy – my conclusion so far:

1. We cannot allow the production to go in the regular course of business;
2. We will have to instruct the company not to send all the info somewhere outside of Israel and we want document to be reviewed by people with security clearance in Israel – if that is the case – there is no way for us to hide from the Court our security interest in the case because the company will need to inform the court of this and the reason it needs some time
3. So, as John recommends, it may be better for us to identify our interest earlier in the case and we will need to take steps to expose our interests and take steps to protect our interests and want the court to help us to do that. Its unavoidable cuz our interest will become available – conversation convinced me we wont be able to hide for very long and our interest with surface.
4. Who do you think would be the best person to approach in the US gov to discuss this issues (DOJ/State/another agency…) that it may make sense to approach

John: It depends on personality (who gets along from whom) & who benefits the most from the work of NSO… ie if CIA or FBI already knows the benefits of the software then you are essentially preaching to the choir.

National Security Adviser to NSA adviser (though he is new and learning – and he can direct the issue from top down)

Or call someone who knows the issue and let them work the issue now

I would not first call DOJ – because they are the lawyers – will need NSD or FBI or CIA who woll be the client and say we agree with Israel on this point – then they will instruct DOJ as to the natonal security perspective

What is the percentage likelihood that the MTD will win?

1. If good chance --- we can stand down for now
2. If less than 50 percent chase – maybe better to come in now to try to trip her over. My own analysis is that the MTD is not terribly strong and she may not dismiss it based on motion right now (30 percent change and you will head into discovery later) so maybe increase the chance from 30 to 50 percent change

Also all will go up on appeal. FB may be then want to settle –b ut we want a good record for the 9th circuit.

Reeves agrees with John – so if can move needle to dismissal may be helpful.

The last point is that Israel has two ways to participate in an eventual appeal – it will be decided by 9th circuit – israel's participation in the trial court her participation will be part of the record. Also Israel could participate thru an amicu brief in the 9th circuit – not so suitable for the appeal – as issue for appeal will be the itnerp of statute (israel's interest is more tangential to that motion)….I think israel's participation now would –though seems counter intuitive- would have a more conducive effect.

Roy: what are up and downsides to Israel participating at this stage.. we later still need to directly intervene – so what is the real advanatage – ie lay low for 2-3 months and maybe the case settles or are there other advantages?

- Reeves if the MTD is gratned then the stop light may never be shone on Israel
- Advantage is that the court can be in contact with state of Israel directly and not through the hague process
- John doesn't think motion to quash does open the channel to the state directly as opposed to the hague
- I think Israel early appearance throws hand grenade in her lap – litigating it would seriously jeop nat sec of Israel in fighting terrorism - usually is the business interest of their country when foreign states get involved. For her to write an opinion which goes the oterh way is much harder. Ie. I seriously reviewed state of Israel and ruled they are wrong
- Roy- I don't think we would say cant litigate case without the information as we will be overly identified with actions of NSO. NSO is private company and they took some legal risk and are sued by FB – if ct decides they breached US law – ok – NSO may go out of business- -we want to protect our information – we don't want to come out against litigation just against disclosure of our information (we don't want to take positon as to whether company action violated US law)
- Ram agrees with Roy – this is commercial litigation between 2 companies which involves info which is info that is partially confidential and otherwise sensitive
- Roy- If I was judge would think would get more sympathy if we address judge directly with our declared interest and not just going through the company – as it will be a series of letters we will send to the company – maybe best to say that at outset – this is complicated so we need to weigh in to protect our interests
- John – even if you take no position as to the merits of the case – however – it would essential be saying while we take no position on the merits of this case from the complaint, pleadings and discovery requests, this will be included info that the GOI is being requested to give info which impacts or nat. sec and if case were to proceed the GOI would take steps to protect this info. This would be lobbing a hand grenade and maybe shift her from the 30-50 percent
- John to Ram –not as persuasive to send the company a letter saying not to produce the info – if we go directly the Court needs to address our submission directly – she could still say too early for her to deal with it
- Reeves: on the possible downside – is GOI waiving immunity? If Israel intervenes – specifically for limited purpose of protecting info and we have no position on the merits – I think there is credibility which comes from neutrality. In BOC we didn't agree with outcome Ps sought – but cuz they were seeking the info we chose to protect. I think its imp to telegraph early on that our stake is in the information not in the outcome. This neutral approach - not pro P or pro D – so less likely to get info from us. IN BOC they imposed discovery on Israeli officials and here FB may do it as well – and the way we came into the case would help us argue against this discovery.

- If we were to participate we need to find a natural entry point –s o now we can participate in support of our motion to stay discovery and the court will be considering it. IF wait and MTD to stay is granted –we don't have a natural entry point. Roy – I don't like idea as coming in the case in support of NSO. Roy can we come in separately saying we have an interest in this without asking for a stay..
- Advanatges/Disadvantages of discussions with Jennifer:

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