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Memorandum

To: Gil Avriel
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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

[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.
>
> 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.