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ATTORNEY-CLIENT COMMUNICATION

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MEMORANDUM FOR MINISTRY OF JUSTICE OF ISRAEL

Re: NSO Litigation – Service and Other Preliminary Issues

This memorandum addresses the service and some other preliminary issues you raised in your e-mails of December 24 and 26, 2019, concerning the litigation brought by Facebook and WhatsApp against NSO Global in the Northern District of California.

Service

It does not appear that Israel has objected, pursuant to Article 10(a) of the Hague Service Convention, to service by mail from outside of Israel. If there is no such objection, then plaintiffs might claim that service was properly effected via DHL. The fact that they have not filed a proof of service based on DHL delivery may suggest that they intend instead (or in addition) to rely on Hague Service. But plaintiffs sometimes delay filing proof of service until after the time for responding to the complaint has run (presuming that such service was effective)[1] to try to position themselves to claim a default, or at least to gain negotiating leverage regarding when a response should be filed or other aspects of the course of proceedings.

When Hague Service Convention methods are used for service abroad, U.S. courts will generally consider service to be effective on the date of delivery of the summons and complaint to the defendant by the foreign state's Central Authority, without regard to when confirmation is delivered to the plaintiff or to the U.S. court. If the plaintiffs have already received notice of service from the agent, or if they learn of actual service, they might rely on it to file a proof of service, notwithstanding any further communications from the Central Authority suggesting that service was still under consideration. And because date of service is

[1] The federal rules provide that a response is due 21 days after service.

generally determinative, NSO would take considerable risk if it were to rely on such communications from the Central Authority as a basis to ignore the actual service.

Considering that NSO has now apparently received the summons and complaint by two separate means of service, it would not be surprising if its U.S. counsel has communicated with the plaintiffs, or will soon do so, to seek an extension of time to respond to the complaint. That would be completely normal and can be accomplished by the parties' counsel filing a stipulation on the court docket, without need for a court order, so long as the extended date would not affect the date of the initial case management conference. The court would need to approve an extension agreed between the parties if it would affect the date of the initial conference, but that would also not be controversial, particularly since additional time was required to complete service outside of the United States. Note that such an extension, properly crafted, could preserve all defenses NSO might have, including as to jurisdiction and service.

Article 13

By its terms, Article 13 of the Hague Service Convention permits a requested state to decline an otherwise proper request for service "only if it deems that compliance would infringe its sovereignty or security." Because Article 13 speaks to the issue of "compliance" with a request for service, "[t]he focus is therefore not on the [underlying] action from which the document to be served arises."[2]

Invocation of Article 13 risks being a "bombshell" event, in that it would be a public statement that Israel has sovereignty or security interests associated with NSO. While the limited court practice in the U.S., consistent with Hague Convention guidance, would not require that the Israeli Central Authority elaborate at any length on the reasons for invoking Article 13, simply making such a statement may attract attention and inquiry by the media or advocacy organizations into the relationship (if any) between NSO and the State of Israel. It may also lead plaintiffs in the present case to pursue that issue in discovery if the case proceeds, and might inspire separate litigation by people who may think they were subjected to surveillance by NSO through WhatsApp on behalf of the Israeli government, which carries its own discovery risks.

Most importantly, however, invocation of Article 13 is not a "magic bullet" that will stop the litigation from proceeding. There is a division of authority about whether a U.S. court has jurisdiction to evaluate the validity of the use of Article 13. The majority view seems to be that there is no such jurisdiction. But those courts also generally hold that because the foreign state has declined service under the Hague Convention, Hague service is not available, which triggers the court's authority to allow the plaintiff to use alternative means of service under Rule 4(f)(3) of the Federal Rules of Civil procedure.[3] That rule allows service by other

[2] Practical Handbook on the Operation of the Service Convention, Hague Conference on Private International Law 71 (2016).

[3] We have not located any decisions in the Northern District of California addressing issues under Article 13. While most courts have concluded that they lack authority to inquire into the grounds for invoking Article 13, there is a notable exception in which a judge in the Southern District of New York rejected the grounds expressed by the Government of India, which concerned diplomatic immunity. The court held that if India had properly invoked

means not prohibited by international agreement. Examples of methods courts have allowed include service by e-mail, service on a domestic agent of the foreign party, and service on U.S. counsel for the foreign party. This list is not exhaustive, and the courts are afforded considerable discretion to fashion a method of service, so long as it comports with minimum requirements of due process. In this case, the court might deem service by DHL or even aborted (but actual) service under Article 5(1)(b) of the Convention to be effective.

Next Litigation Steps

As you note, an initial case management conference has been scheduled for January 30, 2020. The local rules mandate that such a conference "shall be [scheduled] on the first date available on the assigned Judge's calendar that is not less than 90 days after the action was filed." At the moment, the case is assigned to Magistrate Judge Corley, and the plaintiffs have consented to have all proceedings conducted by her. That is, in my experience, unusual. If NSO does not consent to proceed before Magistrate Judge Corley, the case will be reassigned to a District Court Judge, and the initial case management conference will need to be re-scheduled to fit the calendar of the judge. And the parties might agree to a further extension of that date to a time after NSO has responded to the complaint, presumably with a motion to dismiss.

The parties are required to file a joint case management statement at least seven days before the initial case management conference, *i.e.*, by January 23. I am attaching a copy of a standing order of the Northern District of California that sets forth the subjects to be addressed by the case management statement and to be discussed at the conference. Discovery is among those subjects. NSO could take the position that discovery should not commence until after its motion to dismiss is decided. Different judges take different approaches to that question, so we would consider it further after the case is assigned to a District Judge, assuming NSO does not consent to have the case proceed before Magistrate Judge Corley. We could also discuss whether it would be appropriate and desirable for NSO to raise the possibility that its ability to comply with discovery would be constrained by secrecy or security interests of foreign governments (without necessarily identifying the government(s) at issue), which could be a further reason to defer discovery until after a decision on the motion to dismiss.

As you note, the local rules (and case management order) require the parties to address the possibility of resolving the case through ADR. ADR is not mandatory under the WhatsApp terms of service agreement for non-U.S./Canadian users. It is also not mandatory under the court's rules, but during the course of the litigation the court has discretion to require the parties to attempt ADR. In that context, it is not unusual for the parties to state in the initial case management statement that they are open to the use of ADR, but that it is premature to commit to or start ADR proceedings until the case is farther along.

It is difficult for us to assess whether there is any reasonable prospect of terminating the litigation through ADR before discovery. It seems doubtful that plaintiffs would agree to terminate the litigation without some form of agreement constraining further activities by NSO, most likely in the form of an injunction, and we have no basis to assess whether NSO is

Article 13, it would not be permissible to authorize alternative service. But because it held that Article 13 was used improperly to block Hague Service, the court could (and did) authorize alternative service under Rule 4(f)(3).

in a position to agree to reach such an agreement. If it is, NSO could explore that possibility, potentially through ADR, before incurring the various risks associated with litigation, but that is not something we can assess now.