

**Date:** September 6, 2020

**Re:** WhatsApp v. NSO Litigation - Litigation Strategy Outline

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This memorandum provides a high-level outline of the Government of Israel's options for preventing third parties (and potentially NSO) from disclosing national security or other sensitive information in the WhatsApp v. NSO litigation. In particular, you have asked us to address the following questions:

- What are the legal arguments that could be raised with regard to the legal basis not to disclose national security or sensitive information requested by FB in their subpoenas, such as information currently being held by FP or by other parties (such as employees of NSO located abroad with company computers).
- Are there arguments available to NSO or FP that are not available to the State of Israel?

For purposes of this outline, we have included options that are already in progress or are likely to be utilized in the near term, as well as options that are not likely to become relevant until a later stage, once other options have been exhausted. Please let us know which of the topics below are most relevant from the Government of Israel's perspective. This information will allow us to focus our analysis and prioritize the most significant issues.

## **I. Overview of the Government of Israel's Options to Protect Israeli National Security Information**

### *Low-level involvement*

- A. Continue to communicate and coordinate with NSO.
  - a. Potential actions and timing:
    - i. Continue communicating with K&S and NSO.
    - b. **Areas for further analysis:**
      - i. **None at this time.**
- B. Speak with recipients of plaintiffs' third-party discovery requests to emphasize the Government of Israel's concerns.

- a. Potential actions and timing:
    - i. Continue communicating with K&S to monitor third-party subpoenas.
    - ii. Continue communicating with K&S regarding the third parties they represent.
    - iii. Continue communicating with outside counsel for Francisco Partners.
    - iv. Consider whether to reach out to other recipients of third-party discovery requests from plaintiffs. The appropriate timing will depend on when the discovery requests were issued and when responses are due, among other factors.
  - b. Areas for further analysis:
    - i. None at this time.
- C. Ask recipients of plaintiffs' third-party discovery requests not to provide the requested information.
- a. Potential actions and timing:
    - i. Continue communicating with K&S to monitor third-party subpoenas.
    - ii. Continue communicating with K&S regarding the third parties they represent.
    - iii. Continue communicating with outside counsel for Francisco Partners.
    - iv. Consider whether to reach out to other recipients of third-party discovery requests from plaintiffs. The appropriate timing will depend on when the discovery requests were issued and when responses are due, among other factors.
  - b. Areas for further analysis:
    - i. None at this time.
- D. Offer to assist recipients of plaintiffs' third-party discovery requests with the development of arguments, to pay for research and drafting, or to otherwise assist.
- a. Potential actions and timing:
    - i. Continue communicating with K&S to monitor third-party subpoenas.
    - ii. Continue communicating with K&S regarding the third parties they represent.
    - iii. Continue communicating with outside counsel for Francisco Partners.
    - iv. Consider whether to reach out to other recipients of third-party discovery requests from plaintiffs. The appropriate timing will depend on when the discovery requests were issued and when responses are due, among other factors.

- b. Areas for further analysis:
  - i. None at this time.

*Medium-level involvement*

- E. Provide declarations or documents to support filings by NSO or third parties.
  - a. Potential actions and timing:
    - i. Provide declarations or supporting documents in connection with particular filings.
  - b. Areas for further analysis:
    - i. None at this time.
- F. Communicate directly with plaintiffs' counsel regarding settlement of the litigation.
  - a. Potential actions and timing:
    - i. Consider reaching out to Jennifer Newstead. This outreach could occur at any time.
    - ii. Consider whether it would be useful to approach plaintiffs' outside counsel directly. This outreach could occur at any time.
  - b. Areas for further analysis:
    - i. Research issues related to settlement discussions, such as confidentiality and the use of information from those discussions in the litigation.
    - ii. Assess advantages and disadvantages of outreach at particular stages of the case.

*High-level involvement (likely would require intervention or formal appearance in the action)*

- G. Appear as an *amicus curiae* ("friend of the court") in the appeal.
  - a. Potential actions and timing:
    - i. Draft and file an amicus brief in support of defendants. Such briefs typically are due one week after the party's brief is due. Defendants' brief currently is due September 21, 2020.
  - b. Areas for further analysis:
    - i. Research substantive issues to be addressed in brief.
    - ii. Research process for filing amicus brief in the Ninth Circuit.
- H. Seek to participate (through counsel) in depositions that affect Israel's interests.
  - c. Potential actions and timing:
    - i. Seek permission from the parties and/or court to participate in the relevant depositions.
  - d. Areas for further analysis:
    - i. Research process for participating in depositions as a third party.



process for raising them, in connection with the particular motion or other form of participation (outreach to third parties, settlement discussions, etc).

## Arguments the Government of Israel must raise on its own behalf

### A. State secrets doctrine

#### a. Potential actions and timing:

- i. The form of assertion varies based on the circumstances, but the Government of Israel would need to formally appear in order to file the relevant motion (motion to dismiss, motion to quash, motion for a protective order, etc.) or opposition to a motion (most likely an opposition to a motion to compel), along with a supporting declaration by a senior Israeli official. The assertion of the state secrets doctrine could be either proactive (at a strategically calculated point in the litigation) or reactive (in response to a particular discovery request or motion).

#### b. Areas for further analysis:

- i. Research substantive requirements for state secrets doctrine.
- ii. Research procedural requirements for state secrets doctrine.

## Arguments the Government of Israel could either raise on its own behalf or support if raised by others (for example, by providing a declaration from an Israeli official)

### B. Argument that responses to plaintiffs' discovery requests would violate Israeli law.

#### a. Potential actions and timing:

- i. Move to intervene for the limited purpose of filing or responding to a motion. For example, if plaintiffs sought information that is protected under Israeli law from a third party, the Government of Israel could (1) move to intervene for the limited purpose of seeking a protective order that would prohibit disclosure or (2) wait for the plaintiffs to move to compel, then move to intervene for the limited purpose of responding to the motion to compel.
- ii. Provide declarations or supporting documents in connection with particular filings by defendants or third parties.

#### b. Areas for further analysis:

- i. Consult with Israeli lawyers and officials on the relevant provisions of Israeli law.
- ii. Research doctrine of international comity and other bases for objecting to a discovery request where disclosure would violate a foreign country's law.
- iii. Research process for raising such arguments in connection with particular motions or responses.

- C. Derivative sovereign immunity
  - a. Potential actions and timing:
    - i. If the court denies defendants' motion for stay while the appeal is pending or grants' plaintiffs' motion to compel responses to plaintiffs' requests for production of documents, the Government of Israel could raise or support a renewed immunity defense by defendants (for example, in connection with a motion for reconsideration of the court's order).
  - b. Areas for further analysis:
    - i. Research relevant immunity issues.
    - ii. Research process for raising such arguments.

### Arguments to be raised by NSO and third parties, rather than the Government of Israel

There are a wide variety of grounds upon which defendants and third parties in U.S. civil litigation may object to a plaintiff's discovery requests. Indeed, both defendants and Francisco Partners have already relied upon these kinds of routine objections to resist discovery in this case. Although there may be exceptions, we expect that it will not generally be necessary or useful for defendants and third parties to involve the Government of Israel in such arguments. Possible arguments include:

- D. Arguments under the Federal Rules of Civil Procedure, including that the discovery requests are overly broad, unduly burdensome, not relevant to the parties' claims or defenses, and not proportional to the needs of the case.
- E. Attorney-client privilege, work product doctrine, common interest privilege, and other privileges or protections available under U.S. law.

### **III. Other Mechanisms to Protect Information**

- A. Ensure that any defendant or third party disclosing or producing sensitive information designates that information as "CONFIDENTIAL," "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY," or "HIGHLY CONFIDENTIAL - SOURCE CODE" under the protective order.
  - a. Areas for further analysis:
    - i. None at this time. We have analyzed the provisions of the stipulated protective order in prior memoranda.
- B. File sensitive documents or portions of such documents under seal (and, to the extent possible, ensure that others do so).
  - a. Areas for further analysis:
    - i. None at this time. We have analyzed sealing issues in prior memoranda.

- C. Where appropriate, ensure that defendants and third parties ask the court to review documents requested by plaintiffs *in camera* (without disclosing them to plaintiffs) and rule on whether they must be disclosed.
  - a. Areas for further analysis:
    - i. None at this time. We have analyzed *in camera* review in prior memoranda.