UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WHATSAPP INC., et al.,

Plaintiffs,

v.

NSO GROUP TECHNOLOGIES LIMITED, et al.,

Defendants.

Case No. 19-cv-07123-PJH

ORDER GRANTING MOTION TO STAY, DENYING MOTION TO COMPEL, AND GRANTING MOTIONS TO FILE UNDER SEAL

Re: Dkt. Nos. 116, 117, 133, 143

Before the court is defendants NSO Group Technologies Ltd. ("NSO") and Q Cyber Technologies Ltd.'s (together with NSO, "defendants") motion to stay pending appeal, (Dkt. 117), and plaintiffs WhatsApp Inc. ("WhatsApp") and Facebook, Inc.'s ("Facebook" and together with WhatsApp, "plaintiffs") motion to compel discovery, (Dkt. 116). The matters are fully briefed and suitable for decision without oral argument. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court rules as follows.

BACKGROUND

On October 29, 2019, plaintiffs filed a complaint ("Compl.") alleging that defendants sent malware, using WhatsApp's system, to approximately 1,400 mobile phones and devices designed to infect those devices for the purpose of surveilling the users of those phones and devices. Dkt. 1, ¶ 1. The complaint alleges four causes of action: (1) violation of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030; (2) violation of the California Comprehensive Computer Data Access and Fraud Act, Cal. Penal Code § 502; (3) breach of contract; and (4) trespass to chattels.

On April 4, 2020, defendants filed a motion to dismiss the complaint, moving to dismiss under Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), 12(b)(6), and 12(b)(7). Dkt. 45. On July 16, 2020, the court issued an order granting in part and denying in part defendants' motion to dismiss and, as relevant to the present motion, determined that defendants could not assert any sovereign immunity derived from their clients who are sovereign nations. Dkt. 111. On July 21, 2020, defendants filed a notice of appeal, appealing the court's sovereign immunity finding. Dkt. 112.

Meanwhile, plaintiffs have attempted to take discovery of defendants and served their first requests for production on June 2, 2020. Dkt. 116. Defendants have refused to produce any documents and, as a result, plaintiffs have filed a motion to compel discovery, (id.) with the same briefing schedule as the motion to stay pending appeal.[1]

DISCUSSION

A. Legal Standard

As a general rule, "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982) (citations omitted). As a corollary to the divestiture rule, "where an appeal is taken from a judgment which does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters not involved in the appeal." Britton v. Co-op Banking Grp., 916 F.2d 1405, 1411 (9th Cir. 1990).

A court may stay proceedings as part of its inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). Use of this power "calls for the exercise of judgment, which must weigh competing interests and

[1] In addition, defendants filed a second motion to dismiss plaintiffs' request for injunctive relief under Rule 12(b)(1). (Dkt. 105), and plaintiffs filed a motion to strike portions of

maintain an even balance." Id. at 254–55; see also Mediterranean Enters., Inc. v. Ssangyong Corp., 708 F.2d 1458, 1465 (9th Cir. 1983) ("[T]he district court did not abuse its discretion by staying the action pending receipt of the results of arbitration.").

In determining whether it should exercise its discretion to grant a stay, the court should consider "the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962) (citing Landis, 299 U.S. at 254–55). Additionally, "[a] stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court." Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 864 (9th Cir. 1979).

B. Analysis

The ultimate question before the court is the extent to which defendants' appeal divests the court of jurisdiction over pretrial discovery and any pretrial proceedings. Both defendants' motion to stay pending appeal and plaintiffs' motion to compel discovery implicate this question. Defendants argue that their appeal involves claims of foreign sovereign immunity and because foreign sovereign immunity is immunity from suit, the aspects of the case involved in the appeal are quite broad. Mtn. at 2–3. In other words, if defendants prevail on their appeal, they would be able to assert sovereign immunity such that they would be free from all burdens of litigation, including discovery. Id. at 3. Plaintiffs respond that an appeal regarding the specific sovereign immunity defenses asserted by defendants does not warrant an automatic stay and those defenses only operate as affirmative defenses to liability, rather than the right not to be sued. Opp. at 1.

The Supreme Court has held that certain types of immunity cases are immediately appealable based on the collateral order doctrine. In Nixon v. Fitzgerald, 457 U.S. 731 (1982), and Mitchell v. Forsyth, 472 U.S. 511 (1985), the Court determined that orders denying individual officials' claims of absolute and qualified immunity could be

immediately appealed. In Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 147 (1993), the Court held that States and state entities that claim to be "arms of the State" could also take advantage of the collateral order doctrine based on their Eleventh Amendment immunity.[2] The common element of these cases is that they involve immunity from suit rather than a defense to liability. Thus, in Metcalf & Eddy, the Court explained the import of Fitzgerald and Mitchell:

> We found that, absent immediate appeal, the central benefits of qualified immunity—avoiding the costs and general consequences of subjecting public officials to the risks of discovery and trial—would be forfeited . . . . "The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."

506 U.S. at 143–44 (quoting Mitchell, 472 U.S. at 526).

The Ninth Circuit has held that orders denying motions to dismiss for lack of jurisdiction under the Foreign Sovereign Immunity Act ("FSIA") are also immediately appealable under the collateral order doctrine. Doe v. Holy See, 557 F.3d 1066, 1074 (9th Cir. 2009) (per curiam) (citing Schoenberg v. Exportadora de Sal, S.A., 930 F.2d 777, 779 (9th Cir. 1991)). "An interlocutory appeal insures that 'a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided [in the FSIA].'" Compania Mexicana De Aviacion, S.A. v. U.S. Dist. Ct. for Cent. Dist. of Cal., 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam) (quoting 28 U.S.C. § 1604). Thus, the reason foreign sovereign immunity under the FSIA is immediately appealable is because it is immunity from suit.[3]

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[2] The term Eleventh Amendment immunity is a shorthand for state sovereign immunity. Del Campo v. Kennedy, 517 F.3d 1070, 1075 (9th Cir. 2008). Eleventh Amendment immunity is "something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Instead, immunity is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution and which they retain today[,] except as altered by the plan of the Convention or certain constitutional amendments." Id. (alteration in original) (citations and quotation marks omitted).

[3] The reason that cases involving immunity from suit are immediately appealable under the collateral order doctrine is because the value of immunity "is for the most part lost as litigation proceeds past motion practice." Metcalf & Eddy, 506 U.S. at 145. Conversely,

Plaintiffs acknowledge this line of cases and characterize them as relating to status-based immunities, e.g., absolute immunity, qualified immunity, Eleventh Amendment immunity, and double jeopardy. Opp. at 4. Nonetheless, they argue that defendants cannot avail themselves of these status-based immunities because the foreign sovereign immunity on which defendants rely is not immunity from suit. Id. at 5–6. As plaintiffs point out, not all types of immunities necessarily require immunity from suit. For example, in Alaska v. United States, 64 F.3d 1352, 1356 (9th Cir. 1995), the Ninth Circuit noted that "federal sovereign immunity is a defense to liability rather than a right to be free from trial" and held that an order denying federal sovereign immunity was not immediately appealable under the collateral order doctrine.

With that framing in mind, the court must determine whether either of the two types of foreign sovereign immunities asserted by defendants would qualify as immunity from suit, i.e., Compania Mexicana (foreign sovereign immunity), Fitzgerald (absolute immunity), Mitchell (qualified immunity), and Metcalf & Eddy (Eleventh Amendment), or immunity from liability, i.e., Alaska (federal sovereign immunity).

1. Foreign Official Immunity

In its prior order, the court examined whether defendants could assert a common law foreign official immunity. Dkt. 111 at 10–12. Beginning with the Supreme Court's opinion in The Schooner Exchange v. McFaddon, 7 Cranch 116, 3 L.Ed. 287 (1812), up until the enactment of the FSIA in 1976, the doctrine of foreign sovereign immunity was entirely a matter of common law. See Samantar v. Yousuf, 560 U.S. 305, 311 (2010). The Schooner Exchange "came to be regarded as extending virtually absolute immunity to foreign sovereigns." Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) (citations omitted). The enactment of the FSIA generally "codifie[d], as a matter of federal law, the restrictive theory of sovereign immunity." Id. at 488. Yet, until the

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review is postponed." Alaska, 64 F.3d at 1356. It is not for this court to decide whether defendants meet the collateral order doctrine, but if they prevail on appeal, that decision would necessarily entail a holding that their immunity entails the immunity from suit, not

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