

Exhibit A

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19 UNITED STATES DISTRICT COURT
20 NORTHERN DISTRICT OF CALIFORNIA
21 OAKLAND DIVISION

22 WHATSAPP, INC., *et al.*,

23 Plaintiffs,

24 v.

25 NSO GROUP TECHNOLOGIES LIMITED,
26 *et al.*,

27 Defendants.

Case No. 4:19-CV-07123-PJH

Hon. Phyllis J. Hamilton
United States District Judge

**FOREIGN NON-PARTY THE CITIZEN
LAB'S PROPOSED OPPOSITION TO
DEFENDANTS' MOTION FOR
ISSUANCE OF LETTER ROGATORY**

Date: March 28, 2024
Time: 1:30pm
Courtroom: 3, 3rd floor

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PRELIMINARY STATEMENT..... 1

RELEVANT BACKGROUND..... 3

I. Citizen Lab’s Tangential Involvement in the Parties’ Dispute 3

II. NSO’s Belated and Overbroad Discovery Requests to Citizen Lab 5

LEGAL STANDARD 7

ARGUMENT 9

I. Through Its Wildly Overbroad Requests, NSO Seeks Discovery
That Is Not Relevant, Much Less Important, to the Litigation 9

II. The Sought Discovery Imposes Impermissible and Undue Burdens
on Citizen Lab 13

III. The Remaining *Richmark* Factors Warrant Denying NSO’s Motion 16

A. Factor 3: NSO Seeks Discovery Located Abroad 16

B. Factor 4: Defendants Already Possess Any Relevant, Proportional
Discovery Involving Citizen Lab 16

C. Factor 5: Issuance of the Letter Rogatory Would Undermine
Canadian Interests 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3 *Actava TV, Inc. v. Matvil Corp.*,

4 2021 ONCA 105..... 17-19

5 *Antamex Int’l, Inc. v. Zurich Am. Ins. Co.*,

6 2022 WL 20679662 (D.N.J. Aug. 1, 2022)..... 8

7 *Apple Inc. v. NSO Grp. Techs. Ltd.*,

8 No. 3:21-CV-09078-JD (N.D. Cal.)..... 13

9 *Apple Inc. v. NSO Grp. Techs. Ltd.*,

10 2024 WL 251448 (N.D. Cal. Jan. 23, 2024) 13

11 *Asis Internet Servs. v. Optin Glob., Inc.*,

12 2007 WL 1880369 (N.D. Cal. June 29, 2007) 7, 9

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14 2011 WL 1344195 (N.D. Cal. Apr. 8, 2011)..... 13-14, 15

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16 2009 WL 3823390 (S.D. Fla. Nov. 16, 2009)..... 7

17 *Campbell v. Facebook Inc.*,

18 2015 WL 4463809 (N.D. Cal. July 21, 2015)..... 15

19 *Gardner v. Starkist Co.*,

20 2021 WL 303426 (N.D. Cal. Jan. 29, 2021) 7

21 *Globe and Mail v. Canada (Attorney General)*,

22 2010 SCC 41 18

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28 2021 WL 3700749 (S.D. Cal. July 27, 2021)..... 12

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486 F. Supp. 2d 1078 (N.D. Cal. 2007)..... 10

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 2 542 U.S. 241 (2004) 7

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 4 2020 WL 7042861 (N.D. Cal. Dec. 1, 2020)9-10

5 *Luminati Networks Ltd. v. Code200, UAB*,
 6 2021 WL 2819457 (E.D. Tex. Feb. 1, 2021) 7

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 12 2014 QCCS 132..... 18

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 14 332 F.R.D. 117 (S.D.N.Y. 2019)..... 9, 12

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17 *Richmark Corp. v. Timber Falling Consultants*,
 18 959 F.2d 1468 (9th Cir. 1992)..... 8-10, 16-17

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 20 590 F. Supp. 2d 832 (E.D. Tex. 2008) 7, 8

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27 Rules

28 Fed. R. Civ. P. 267-8, 12, 13, 17

Ontario Rules of Civil Procedure Rule 30.10..... 18-19

Ontario Rules of Civil Procedure Rule 31.10..... 19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
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PRELIMINARY STATEMENT¹

1
2 The letter rogatory requested by Defendants NSO Group Technologies Limited and
3 Q Cyber Technologies Limited (together, “NSO”) should not issue. NSO seeks discovery that the
4 Court has already determined to be an “ancillary part of this case” and that would impose unique
5 burdens and harms both on Citizen Lab, a foreign non-party, and on the spyware victims who have
6 participated as subjects in research studies with Citizen Lab. The sprawling discovery NSO seeks
7 on matters unrelated whatsoever to the present litigation suggests the letter rogatory is being
8 requested for an improper purpose: either to gather information for unrelated litigation between
9 NSO and other parties, or to prevent Citizen Lab and others from being able to detect and mitigate
10 the effect of NSO’s products. In light of this Court’s recent order concluding that communications
11 between Plaintiffs and Citizen Lab postdating the complaint are irrelevant to the claims and
12 defenses here (*see* ECF No. 292 at 5-6), NSO has not remotely carried its burden to justify the
13 issuance of the proffered letter rogatory, which calls for information that post-dates the complaint
14 and pertains to Citizen Lab’s work with any person who was believed to have been targeted by
15 Pegasus from 2016 to the present, even if such target was unrelated to WhatsApp systems.

16 Citizen Lab is, at most, a marginal player in the parties’ dispute. Over the course of a few
17 months in 2019, Citizen Lab helped Plaintiffs identify users of some of the approximately 1,400
18 devices targeted by NSO and then notify those users that their devices may have been
19 compromised. When helping to identify those users, Citizen Lab relied on information given to it
20 by WhatsApp and did not examine any of the 1,400 devices at issue in this case. Moreover,
21 Plaintiffs are not relying on Citizen Lab to identify NSO as responsible for the attack. Plaintiffs
22 also have already produced all responsive communications with Citizen Lab and have committed
23 to work with Defendants to resolve outstanding document production disputes. No further
24 discovery from Citizen Lab is relevant, much less proportional to the needs of the case. When
25 NSO’s discovery requests are further evaluated through the lens of comity, as they must, given

26
27 ¹ Citizen Lab and its undersigned counsel represent that they have authored this brief. No party
28 or counsel for any party made any monetary contribution to fund the preparation or submission
of this brief.

1 that Citizen Lab is a foreign nonparty over whom this Court lacks jurisdiction, the basis for NSO’s
2 motion vanishes entirely.

3 NSO’s arguments in favor of discovery fall flat. In a flagrant distortion of the record, NSO
4 asserts that Plaintiffs “engaged” Citizen Lab “to investigate whether . . . certain WhatsApp service
5 users were targeted by use of Pegasus” and that Citizen Lab “agreed to investigate instances in
6 which Citizen Lab suspects Pegasus may have been installed on certain Targeted Devices.” Defs.’
7 Mot. for The Issuance of Letter Rogatory to The Ontario (Canada) Superior Court of Justice for
8 the Citizen Lab at The University of Toronto’s Munk School of Global Affairs (the “Motion”)
9 (ECF No. 288) at 1, 4. NSO claims information about that purported investigation is discoverable.
10 But NSO’s factual predicate is false: as NSO’s own cited sources make clear, Citizen Lab
11 performed no analysis for Plaintiffs of whether Pegasus was installed on any Target Device.²

12 NSO also claims it needs extensive discovery, spanning *eight years*, about Citizen Lab’s
13 work on Pegasus and NSO that is *entirely unrelated* to the allegations here. NSO claims this
14 information goes to the reliability of Citizen Lab’s investigative methods, including for identifying
15 members of civil society. But NSO’s position is flawed several times over. Because WhatsApp
16 did not rely on Citizen Lab to attribute the hack here to NSO, Citizen Lab’s analyses of NSO’s
17 involvement in other hacks, and the reliability of those analyses, are wholly irrelevant. NSO also
18 cannot explain why extensive discovery about *any* entity’s views, including Citizen Lab’s, about
19 the composition of “civil society” is relevant, material, or proportional here. It is not. As this
20 Court conclusively held, Plaintiffs’ “‘civil society’ allegation appears to be an ancillary part of this
21 case – rather than relating to one of the elements of the asserted claims or defenses in this case.”
22 *See* Order (ECF No. 292) at 6.

23 The consequences of permitting NSO’s overreach are grave. NSO seeks, among other
24 things, information about how Citizen Lab identifies victims of NSO’s exploits and Citizen Lab’s
25 communications with those victims. That information, which has nothing to do with the claims
26 and defenses here and is generally protected by confidentiality agreements with research subjects,

27
28 ² Capitalized terms not otherwise defined have the meanings assigned in Plaintiffs’ complaint.

1 would expose those victims to a concrete risk of harm and harassment. Its disclosure would also
2 impose an impermissible and existential burden on a foreign non-party by threatening to chill all
3 of Citizen Lab’s future work to help victims detect and deter spyware attacks by perpetrators such
4 as NSO. If ultimately permitted, the discovery NSO seeks would require Citizen Lab to turn over
5 all of its research and development to the makers of the spyware that Citizen Lab is trying to detect.
6 That is tantamount to permitting a burglar to seek discovery from an alarm company to learn about
7 each and every time the alarm company has detected a theft so the burglar can better defeat the
8 alarm systems in the future. The information NSO seeks from Citizen Lab lies far outside the
9 bounds of permissible discovery, both under the Federal Rules of Civil Procedure and well-
10 established principles of international comity. NSO’s motion for the issuance of a letter rogatory
11 as to Citizen Lab should be denied.

12 **RELEVANT BACKGROUND**

13 **I. Citizen Lab’s Tangential Involvement in the Parties’ Dispute**

14 As Plaintiffs have explained, Citizen Lab’s only involvement in this matter was to work
15 with Plaintiffs “to assist in identifying some of the Target Users,” and to notify those users that
16 NSO may have compromised their mobile devices. Pls.’ Opp. to Defs.’ Mot. to Compel (ECF No.
17 250) at 2. Based on information that Plaintiffs provided, Citizen Lab determined that the Target
18 Users included attorneys, journalists, human rights activists, and government officials. *See id.*
19 “Citizen Lab’s work to identify Target Users and notify those users of NSO’s attack concluded
20 before Plaintiffs filed their complaint on October 29, 2019.” *Id.* Plaintiffs, moreover, “have
21 produced all communications between Plaintiffs and Citizen Lab relevant to Citizen Lab’s role
22 related to the case, which occurred entirely before the complaint was filed.” *Id.* at 5. Critically,
23 “Plaintiffs did *not* rely on Citizen Lab to identify NSO as responsible for the unauthorized access
24 and abuse of WhatsApp’s computers, nor did Plaintiffs ‘hire’ Citizen Lab.” *Id.* (emphasis added).³

25
26 ³ NSO cites one document to suggest Citizen Lab had an “independent” opinion that NSO was
27 responsible for the attack at issue whereas Plaintiffs were less confident about that matter. *See*
28 Mot. at 4 (citing ECF No. 257-3, Ex. F). To the extent accurate, that dynamic indicates that
Plaintiffs were *not* relying on Citizen Lab’s analysis attributing NSO to the attack here.

1 *Contra* Mot. at 6 (alleging Citizen Lab had a “pivotal” role in “investigating alleged installation
2 of Pegasus on Targeted Devices”).

3 Undeterred, NSO claims Plaintiffs “produced three agreements, pursuant to which Citizen
4 Lab agreed to investigate instances in which Citizen Lab suspects Pegasus may have been installed
5 on certain Targeted Devices.” Mot. at 4. NSO cites generically to those agreements without any
6 pin-citations. The reason is clear: *nothing* in those documents reflects an agreement between
7 Citizen Lab and Plaintiffs for Citizen Lab to “investigate instances in which Citizen Lab suspects
8 Pegasus may have been installed on certain Targeted Devices.” Instead, the agreements
9 established the terms by which WhatsApp would disclose information about Target Users to
10 Citizen Lab and by which Citizen Lab would advise and support WhatsApp in its efforts to engage
11 with certain users about the incident and assist those users in mitigating the impact of the incident.

12 NSO later asserts that Plaintiffs’ “*document production* illuminates that Citizen Lab has
13 information relevant to Plaintiffs’ allegations . . . that Pegasus was in fact installed on the Targeted
14 Devices.” Mot. at 5 (emphasis added). Yet NSO fails to cite a single produced document for that
15 proposition. Instead, NSO cites Plaintiffs’ amended initial disclosures, whose content NSO
16 misdescribes. Whereas NSO repeatedly asserts that those initial disclosures “identify Citizen Lab
17 as a witness *having information* ‘relevant to the identification of [NSO] as responsible for
18 unauthorized access and abuse of the WhatsApp service’ that Plaintiffs may seek to use to support
19 their claims in the litigation” (Mot. at 4 (emphasis added)), the disclosures state only that “The
20 Citizen Lab *may have information*” about that subject (*see* ECF No. 239-4 at 17 (emphasis
21 added)). In any event, Plaintiffs “have already produced 5,026 internal communications and
22 hundreds of technical documents showing *Plaintiffs’* real-time attribution of the attack to NSO.”
23 Pls.’ Opp. to Defs.’ Mot. to Compel (ECF No. 250) at 7 (emphasis added).

24 Setting aside Citizen Lab’s non-involvement in the investigation of any devices in this
25 matter, the one area where Citizen Lab played a role—identifying victims as members of civil
26 society—has already been determined to be ancillary to the case. Precisely one sentence in the
27 complaint alleges that “[t]he Target Users included attorneys, journalists, human rights activists,
28 political dissidents, diplomats, and other senior foreign government officials.” Compl. ¶ 42. And

1 that single sentence does not relate to a necessary element of the claim or an asserted defense, as
2 this Court recently held in denying Defendants’ motion to compel further discovery from Plaintiffs
3 about their communications with Citizen Lab. The Court pointed out that “defendants have not
4 explained how the ‘civil society’ allegation relates to any of the specific three causes of action that
5 remain operative in the case, or any of the specific affirmative defenses asserted in response.”
6 Order (ECF No. 292) at 6. Rather, far from being a “core allegation” in this litigation, the Court
7 concluded that Plaintiffs’ “civil society” allegation is merely “an ancillary part of this case,” as
8 Defendants themselves acknowledged in their motion to compel discovery on this issue from
9 Plaintiffs. *Id.* That same discovery topic is even less appropriate when directed at a foreign non-
10 party. But as set forth more fully below, the bulk of the discovery NSO seeks through its proposed
11 letter rogatory either relates to that topic, or to Citizen’s Lab work with victims of NSO spyware
12 that is unrelated to the claims Plaintiffs have brought here. *See* Mot. at 9 (“The documents and
13 testimony sought by the requested letter rogatory are directly relevant to explore Citizen Lab’s
14 findings which allegedly support Plaintiffs’ allegations that Pegasus has been abused to target
15 ‘civil society’ . . .”).

16 **II. NSO’s Belated and Overbroad Discovery Requests to Citizen Lab**

17 A full *year* after the case reactivated in this Court, and mere weeks before the previous
18 fact-discovery deadline, NSO’s counsel first attempted to seek discovery from Citizen Lab that it
19 now describes as “critical.” Mot. at 6. NSO’s counsel contacted Citizen Lab directly to ask if it
20 would voluntarily provide documents and testimony in this matter. *See* Decl. of Aaron S. Craig in
21 Support of [Defendants’] Motion for Issuance of Letter Rogatory to The Ontario Superior Court
22 of Justice for The Citizen Lab at The University of Toronto’s Munk School of Global Affairs
23 (“Craig Decl.”) (ECF No. 288-2), Ex. 1. Counsel for Citizen Lab responded the following day
24 asking NSO’s counsel to treat Citizen Lab as a represented party and stating that, “[s]hould your
25 client decide to pursue letters rogatory, we intend to resist their recognition in Ontario as overbroad
26 and inconsistent with our domestic discovery regime.” Craig Decl., Ex. 2. In response, NSO’s
27 counsel asked Citizen Lab to confirm if it “will not provide any document(s) or make any
28 witness(es) available for deposition” absent letters rogatory. *See id.* Counsel for Citizen Lab

1 “confirm[ed] that the Citizen Lab and the University will provide documents or testimony in
2 response to U.S. legal process only to the extent required to do so under Canadian law.” *See id.*

3 Through its proposed letter rogatory, NSO seeks expansive document discovery and
4 deposition testimony from Citizen Lab almost exclusively on matters ancillary or entirely
5 unrelated to this litigation. NSO’s document requests rely on several expansive definitions⁴ and
6 seek documents over an *eight-year period* relating to, *inter alia*, Citizen Lab’s investigation of *any*
7 devices on which Pegasus was installed at any time (beyond the 1,400 devices at issue here); the
8 identity of the users of those devices; communications with those users; and Citizen Lab’s analysis
9 of whether those users were members of civil society. *See generally* Proposed Letter Rogatory to
10 The Ontario Superior Court of Justice (ECF No. 288-1), Schedule A. NSO’s proposed deposition
11 topics are equally sprawling. *See id.*, Schedule B. Only one document request and deposition
12 topic are arguably limited to Citizen Lab’s role in this matter. *See id.* at Schedule A, Request No.
13 1 (seeking “All Documents and Communications relating to any analysis, investigation, or other
14 work performed, and any recommendations made, pursuant to any of” five agreements between
15 affiliates of Plaintiffs and Citizen Lab); *see id.* at Schedule B, Topic No. 1 (similar). But Plaintiffs
16 have already “produced all communications between Plaintiffs and Citizen Lab relevant to Citizen
17 Lab’s role related to the case,” Pls.’ Opp. to Defs.’ Mot. to Compel (ECF No. 250) at 5, and have
18 agreed to work with Defendants to address alleged gaps in their production, *see* Order (ECF No.
19 292) at 5-6.

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21
22 ⁴ To take just a few examples, “Citizen Lab” is defined to include “current and former employees,
23 director(s), staff and research fellows, researchers, research fellows, and PhD candidates and post-
24 doctoral fellows.”; “Meta” means “Plaintiff Meta Platforms, Inc., including its predecessors
25 (including Facebook, Inc.), successors, subsidiaries, and parents, and agents, attorneys,
26 contractors, employees, and representatives of any of the foregoing.” And the term “relating to”
27 means “in any way, directly or indirectly, alluding to, amending, assisting with, canceling,
28 describing, discussing, endorsing, evidencing, identifying, incorporating, mentioning, modifying,
pertaining to, qualifying, referring to, regarding, relevant to, representing, revoking, setting forth,
showing, suggesting, supplementing, supporting, terminating, underlying, or otherwise involving
the subject matter of the specified request.”

LEGAL STANDARD

1
2 This Court has the discretion and inherent authority to issue a letter rogatory. *See Asis*
3 *Internet Servs. v. Optin Glob., Inc.*, No. C-05-05124 JCS, 2007 WL 1880369, at *3 (N.D. Cal.
4 June 29, 2007). A letter rogatory or letter of request “is the request by a domestic court to a foreign
5 court to take evidence from a certain witness.” *Intel Corp. v. Advanced Micro Devices, Inc.*, 542
6 U.S. 241, 247 n.1 (2004). A letter rogatory may also be used to request the production of
7 documents. *See Asis*, 2007 WL 1880369, at *3.

8 In considering whether to issue a letter rogatory, a “court should determine both whether
9 the discovery sought falls within the scope of discovery authorized by the Federal Rules [of Civil
10 Procedure], as well as whether considerations of comity warrant the requested discovery.” *Viasat,*
11 *Inc. v. Space Sys./loral, Inc.*, No. 12-CV-0260-H (WVG), 2013 WL 12061801, at *4 (S.D. Cal.
12 Jan. 14, 2013); *see also Calixto v. Watson Bowman Acme Corp.*, No. 07-60077-CIV, 2009 WL
13 3823390, at *18 (S.D. Fla. Nov. 16, 2009) (same); *Seoul Semiconductor Co. v. Nichia Corp.*, 590
14 F. Supp. 2d 832, 834 (E.D. Tex. 2008) (same); *Luminati Networks Ltd. v. Code200, UAB*, No.
15 2:19-CV-00396-JRG, 2021 WL 2819457, at *1 (E.D. Tex. Feb. 1, 2021) (“Courts consider five
16 [comity] factors in assessing the propriety of issuing a Letter Rogatory”). Although some courts
17 in this district have suggested that the party resisting the issuance of a letter rogatory must show
18 good cause for the letter not to issue, *see, e.g., Gardner v. Starkist Co.*, No. 19-CV-02561-WHO,
19 2021 WL 303426, at *2 (N.D. Cal. Jan. 29, 2021), good cause exists when the discovery sought,
20 as here, lies beyond the scope of permissible discovery, *see Asis*, 2007 WL 1880369, at *3-4.

21 Under the Federal Rules, nonprivileged matter is discoverable only if it is “relevant to any
22 party’s claim or defense” and “proportional to the needs of the case,” a standard that considers
23 “the importance of the discovery in resolving the issues” and “whether the burden . . . of the
24 proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1). Also under Rule 26,
25 the Court *must* limit the requested discovery if it “can be obtained from some other source that is
26 more convenient, less burdensome, or less expensive” or if “the party seeking discovery has had
27 ample opportunity to obtain the information by discovery in the action.” Fed. R. Civ. P.
28

1 26(b)(2)(C). In addition, Rule 26(c) empowers courts to, for good cause, “issue an order to protect
2 a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”

3 Comity considerations are also integral to an analysis of whether a letter rogatory should
4 issue. The Supreme Court has directed lower courts to “exercise special vigilance to protect
5 foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place
6 them in a disadvantageous position.” *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.*
7 *for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987). Accordingly, the Ninth Circuit’s longstanding
8 teaching that “nonparties subject to discovery requests deserve extra protection from the courts,”
9 *Shopify (USA), Inc. v. Express Mobile, Inc.*, No. 19-MC-80251-TSH, 2019 WL 5893235, at *2
10 (N.D. Cal. Nov. 12, 2019) (citation omitted), holds true especially for *foreign* non-parties. *See*
11 *Seoul*, 590 F. Supp. 2d at 834–35 (concluding that, “when requesting burdensome discovery from
12 a [foreign] citizen, the Supreme Court’s policy as articulated in *Societe Nationale Industrielle*
13 *Aerospatiale* favors placing the burden on the party requesting discovery” to “not only show why
14 the request is relevant, but also why it is not unduly burdensome to a foreign party”); *see also*
15 *Antamex Int’l, Inc. v. Zurich Am. Ins. Co.*, No. 20-15232 (JHR/AMD), 2022 WL 20679662, at *6
16 (D.N.J. Aug. 1, 2022) (noting that moving party had failed to “address any of the *Societe Nationale*
17 [comity] factors to support their request for issuance of a letter of request for [a foreign nonparty’s]
18 deposition” and concluding that “principles of international comity do not support Plaintiffs’
19 request at this time”), *reconsideration denied*, No. 20-15232 (JHR/AMD), 2022 WL 20679664
20 (D.N.J. Nov. 9, 2022).

21 In this Circuit, courts consider several factors in any comity analysis. *See Richmark Corp.*
22 *v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992). They are primarily: **(i)** the
23 importance to the investigation or litigation of the documents or other information requested;
24 **(ii)** the degree of specificity of the request; **(iii)** whether the information originated in the United
25 States; **(iv)** the availability of alternative means of securing the information; and **(v)** the extent to
26 which noncompliance with the request would undermine important interests of the United States,
27 or compliance with the request would undermine important interests of the state where the
28

1 information is located. *See id.* at 1475–76. Courts consider two additional factors⁵ when a foreign
2 entity is already subject to the court’s jurisdiction and the court is faced with the decision whether,
3 as a matter of comity, to compel that entity’s compliance with discovery orders under the Federal
4 Rules of Civil Procedure or instead rely on a form of international process. Here, however, Citizen
5 Lab is not subject to this Court’s jurisdiction, as NSO concedes, so the only means to potentially
6 obtain discovery from Citizen Lab is through the letter rogatory process. *See* Mot. at 9; Proposed
7 Letter Rogatory to The Ontario Superior Court of Justice (ECF No. 288-1), at 6.

8 Because the *Richmark* factors overlap with the discovery standards under the Federal
9 Rules, Citizen Lab addresses them together.

10 ARGUMENT

11 **I. Through Its Wildly Overbroad Requests, NSO Seeks Discovery That Is Not** 12 **Relevant, Much Less Important, to the Litigation**

13 NSO makes scant effort to tether its exceedingly broad requests for discovery from Citizen
14 Lab to the complaint’s allegations. The information NSO seeks from Citizen Lab is not relevant
15 under Rule 26, let alone sufficiently important to warrant discovery under *Richmark*. This Court,
16 moreover, has already ruled that much of the information NSO now seeks from Citizen Lab is
17 neither relevant nor discoverable from Plaintiffs. That ruling applies with greater force to NSO’s
18 efforts to obtain the same or similar information from a foreign entity that is not a party to this
19 litigation.

20 Although relevance under Rule 26 is a broad standard, it is not “unlimited.” *See Pearlstein v.*
21 *BlackBerry Ltd.*, 332 F.R.D. 117, 121 (S.D.N.Y. 2019), *on reconsideration in part*, No. 13-CV-
22 07060 (CM)(KHP), 2019 WL 5287931 (S.D.N.Y. Sept. 20, 2019); *see also Asis*, 2007 WL 1880369,
23 at *3-4; *Int’l Swimming League, Ltd. v. Fed’n Internationale de Natation*, No. 18-CV-07394-JSC,
24 2020 WL 7042861, at *3 (N.D. Cal. Dec. 1, 2020) (denying motion to issue letters rogatory as to

25
26 ⁵ Those factors are the extent and the nature of the hardship that inconsistent enforcement would
27 impose upon the person, and the extent to which enforcement by action of either state can
28 reasonably be expected to achieve compliance with the rule prescribed by that state. *See*
Richmark, 959 F.2d at 1475.

1 document requests that sought “marginally relevant” information and therefore “d[id] not warrant
2 the burden on a third party”). And, as here, when discovery is sought from a foreign non-party, the
3 question under *Richmark* and its progeny is whether the outcome of the litigation will “stand or fall”
4 on the sought discovery. *Richmark*, 959 F.2d at 1475. *See also In re Rubber Chems. Antitrust Litig.*,
5 486 F. Supp. 2d 1078, 1082 (N.D. Cal. 2007) (“Here, plaintiff has failed to persuade me of the
6 importance of the EC documents.”); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-CV-01827-
7 SI, 2011 WL 13147214, at *4 (N.D. Cal. Apr. 26, 2011) (“Case law teaches that where the disputed
8 documents are cumulative or not ‘outcome-determinative’ or ‘directly relevant,’ a court should be
9 cautious about requiring disclosure in the face of comity objections.”). Accordingly, “where the
10 relevancy or materiality of the testimony sought is doubtful, the court should not grant the
11 application for letters rogatory.” *Merck Sharp & Dohme Corp. v. Sandoz, Inc.*, No. CV 12-3289
12 (PGS), 2013 WL 12203112, at *3 (D.N.J. June 7, 2013) (citation omitted).

13 NSO’s discovery requests are irrelevant, facially overbroad, and plainly not geared towards
14 eliciting outcome-determinative information. Several examples illustrate the point:

- 15 • NSO seeks documents over an eight-year period, from January 1, 2016 through the
16 present—even though Citizen Lab’s work with Plaintiffs to identify and notify certain
17 Target Users took place during a few months in 2019. *See Proposed Letter Rogatory to*
18 *The Ontario Superior Court of Justice* (ECF No. 288-1), Schedule A.
- 19 • NSO seeks “[a]ll documents and communications relating to the security vulnerability in
20 the WhatsApp communication service described in CVE-2019-3568 (as referenced in
21 paragraphs 25 and 44 of the WhatsApp Complaint)”—even though Plaintiffs did not rely
22 on Citizen Lab to identify NSO as responsible for the unauthorized access and abuse of
23 WhatsApp’s computers. *See Proposed Letter Rogatory to The Ontario Superior Court of*
24 *Justice* (ECF No. 288-1), Schedule A, Document Request No. 3; *see also id.* at Schedule
25 B, Deposition Topic No. 4.
- 26 • NSO seeks deposition testimony about “[a]ny analysis, investigation, or other work
27 performed by Citizen Lab relating to any security vulnerability or other vulnerability in
28 any communication service, website, computer or mobile application or platform offered

1 by Meta”—even though NSO concedes that Plaintiffs’ claims relate to a specific security
 2 vulnerability exploited during a “specific, narrow timeframe” and even though, again,
 3 Plaintiffs did not rely on Citizen Lab to identify NSO as responsible for the unauthorized
 4 access and abuse of WhatsApp’s computers. *See id.* at Schedule B, Deposition Topic No.
 5 5; *see also* Defs.’ Opp. to Pls.’ Mot. to Compel (ECF No. 252) at 6.

- 6 ● NSO seeks information about “any electronic device upon which you and/or, to your
 7 knowledge, any representative of Citizen Lab believe, or at any time believed, Pegasus was
 8 installed”—even though NSO admits Plaintiffs’ claims are “expressly limited” to “a
 9 specific use of a specific technology” against “specifically defined set of WhatsApp users”
 10 during a limited time frame. *See* Proposed Letter Rogatory to The Ontario Superior Court
 11 of Justice (ECF No. 288-1), Schedule A, Document Request No. 4; *see also id.* at Schedule
 12 B, Deposition Topic No. 5; *see also* Defs.’ Opp. to Pls.’ Mot. to Compel (ECF No. 252) at
 13 6.
- 14 ● NSO likewise seeks information about Citizen Lab’s identification of and communications
 15 with users of *any* electronic devices on which Citizen Lab believed Pegasus was installed,
 16 and its analysis of whether those users were members of civil society—even though
 17 Plaintiffs’ claims here are limited to the 1,400 Target Devices. *See* Proposed Letter
 18 Rogatory to The Ontario Superior Court of Justice (ECF No. 288-1), Schedule A,
 19 Document Request Nos. 5-8; *see also id.* at Schedule B, Deposition Topic Nos. 7-8.

20 This Court’s recent ruling denying NSO’s motion to compel further discovery from Plaintiffs
 21 establishes that the bulk of the discovery NSO now seeks from Citizen Lab is irrelevant and plainly
 22 not aimed at obtaining outcome-derivative information. According to NSO, the documents and
 23 testimony it now seeks are “highly relevant to explore Citizen Lab’s findings which allegedly
 24 support Plaintiffs’ allegations that Pegasus has been abused to target civil society.” Mot. at 3. But
 25 Plaintiffs’ complaint includes only one sentence alleging that certain Target Users included
 26 “attorneys, journalists, human rights activists, political dissidents, diplomats, and other senior
 27 foreign government officials.” Compl. ¶ 42. And, more importantly, this Court has already squarely
 28 rejected Defendants’ contention that Plaintiffs’ “civil society” allegation is a “core” part of the case,

1 observing that “defendants have not explained how the ‘civil society’ allegation relates to any of the
2 specific three causes of action that remain operative in the case, or any of the specific affirmative
3 defenses asserted in response.” Order (ECF No. 292) at 6. Instead, because “the ‘civil society’
4 allegation appears to be an ancillary part of this case,” the Court concluded that discovery of
5 information bearing on whether some users of the 1,400 devices at issue in the complaint belong to
6 civil society is irrelevant and therefore unwarranted under Rule 26(b)(1). *See id.* at 5-6. Moreover,
7 NSO has already received Plaintiffs’ communications with Citizen Lab about Citizen Lab’s
8 assistance to Plaintiffs in identifying and in notifying certain Target Users. Given the minimal
9 relevance of Citizen Lab’s views on the boundaries of “civil society” and the extensive information
10 NSO has already received about that subject in connection with the allegations here, the Court
11 should not countenance NSO’s demand for further discovery from foreign non-party, Citizen Lab,
12 on that ancillary question, which amounts to an attempted end-run around the Court’s ruling that
13 such information is not discoverable.

14 NSO claims Citizen Lab’s technical work concerning NSO and Pegasus—but unrelated to
15 the allegations here—is relevant because it purportedly goes to the reliability of Citizen Lab’s
16 investigative methods and conclusions, as well as Citizen Lab’s purported bias against NSO. *See,*
17 *e.g.*, Mot. at 2, 3. But NSO’s argument rests on the false premise that Plaintiffs relied on Citizen
18 Lab for any technical analysis of the 1,400 devices at issue here. They did not. As a result, Citizen
19 Lab’s technical and analytical methods with respect to NSO or Pegasus generally (and the
20 reliability of those methods, including whether they reflect any purported bias) have no bearing on
21 the claims and defenses here. *Cf. Pearlstein*, 332 F.R.D. at 121 (discovery from a non-party about
22 a “different type of product” than the one at issue in the complaint was not proportional to the
23 needs of the case); *see also In re Bofi Holding, Inc. Sec. Litig.*, 2021 WL 3700749, at *5 (S.D. Cal.
24 July 27, 2021) (concluding that party’s asserted need to “test the reliability” of witness statements
25 did not excuse party’s underlying obligation demonstrate the relevance of communications
26 between witnesses and plaintiffs). In any event, as Plaintiffs have explained, NSO is free to test
27 the reliability of any Citizen Lab analysis it may believe is relevant using documents in the public
28

1 record, the extensive record developed here, and NSO’s own data. *See* Pls.’ Opp. to Defs.’ Mot.
2 to Compel (ECF No. 250) at 6.

3 Given the lack of a logical explanation for why discovery of Citizen Lab’s investigation of
4 unrelated Pegasus victims is needed here, NSO’s attempt to seek such discovery may be motivated
5 by the desire to seek an advantage in a different litigation, which is yet another reason to deny
6 NSO’s motion. *See* Fed. R. Civ. P. 26(g)(1)(B)(ii) (discovery requests may “not be interposed for
7 any improper purpose”). NSO is facing claims similar to those here in a case brought by Apple
8 Inc. *See Apple Inc. v. NSO Grp. Techs. Ltd.*, No. 3:21-CV-09078-JD (N.D. Cal.). Unlike the
9 complaint here, Apple’s complaint at least references Citizen Lab’s analysis of an NSO exploit in
10 2021. *See id.*, Complaint ¶ 48, ECF No. 1. Recently, the *Apple* court denied NSO’s motion to
11 dismiss, *see id.*, 2024 WL 251448 (N.D. Cal. Jan. 23, 2024), and NSO has since answered the
12 complaint, *see id.*, ECF No. 89. Accordingly, NSO’s demand *here* for sweeping discovery from
13 Citizen Lab about its work related to NSO and Pegasus, but unrelated to Plaintiffs’ allegations,
14 suggests an abuse of the letter rogatory process. *See, e.g., Oppenheimer Fund, Inc. v. Sanders*,
15 437 U.S. 340, 352 n.17 (1978)) (“[W]hen the purpose of a discovery request is to gather
16 information for use in proceedings other than the pending suit, discovery properly is denied.”).

17 **II. The Sought Discovery Imposes Impermissible and Undue Burdens on Citizen Lab**

18 NSO’s proposed letter rogatory seeks highly proprietary and victim-related information that
19 threatens Citizen Lab’s continued operations. Under Rule 26, in addition to assessing relevance,
20 the Court must also examine whether “the burden . . . of the proposed discovery outweighs its likely
21 benefit.” Fed. R. Civ. P. 26(b)(1). Here, the burden to Citizen Lab should not be measured solely
22 in terms of the expenses related to collecting eight years’ worth of information that would be
23 responsive to NSO’s wide-ranging discovery requests, but also its overall effect on Citizen Lab’s
24 operations. *See Gonzales v. Google, Inc.*, 234 F.R.D. 674, 684 (N.D. Cal. 2006) (non-party
25 subpoena recipient’s potential loss of goodwill that would result from subpoena compliance was a
26 cognizable burden); *Bickley v. Schneider Nat., Inc.*, No. C 08-5806 JSW JL, 2011 WL 1344195, at
27 *4 (N.D. Cal. Apr. 8, 2011) (quashing subpoenas directed towards plaintiffs’ former employers
28 when permitting the subpoenas would have burdened plaintiffs’ privacy rights and had a “chilling

1 effect” on plaintiffs’ future employment prospects); *cf. In Re Apple, Inc.*, 149 F. Supp. 3d 341, 371-
2 73 (E.D.N.Y 2016) (rejecting notion that burden on third parties is limited to unreimbursed financial
3 costs).

4 Citizen Lab is based at the University of Toronto. As described on the home page of its
5 website, Citizen Lab’s mission includes: “investigating digital espionage against civil society,
6 documenting Internet filtering and other technologies and practices that impact freedom of
7 expression online, analyzing privacy, security, and information controls of popular applications, and
8 examining transparency and accountability mechanisms relevant to the relationship between
9 corporations and state agencies regarding personal data and other surveillance activities.”⁶

10 In no uncertain terms, NSO seeks all of Citizen Lab’s documents and communications
11 between 2016 and 2024 (and related testimony) concerning Citizen Lab’s efforts to identify and
12 communicate with any user whose devices Citizen Lab believes have been compromised by
13 Pegasus. NSO also seeks documents and communications (and related testimony) about any
14 analysis, investigation, or other work Citizen Lab has performed to attempt to determine whether
15 Pegasus was installed on any electronic device. In effect, NSO seeks the entirety of Citizen Lab’s
16 proprietary research and analysis as it relates to NSO as well as the identities of all individuals whose
17 devices Citizen Lab believes have been impacted by Pegasus.

18 Setting aside that that information has no connection to the litigation here, its disclosure would
19 subject Citizen Lab to burdens fundamentally different in kind from those ordinarily borne by non-
20 parties subject to discovery requests. That is because NSO is openly hostile to Citizen Lab, which
21 it clearly views as a threat because Citizen Lab detects NSO software and warns the public about its
22 activities. In its motion, NSO paints Citizen Lab as having pursued a “highly critical media and
23 investigative campaign against NSO and Pegasus” and “authored numerous publications, stretching
24 back at least to 2016 and continuing through the present, attacking NSO and Pegasus and purporting
25 to describe investigations concerning Pegasus’s use (and alleged abuse) by certain of NSO’s
26 sovereign government clients.” Mot. at 2. Against that backdrop of antagonism, allowing NSO to

27
28 ⁶ See The Citizen Lab, *About The Citizen Lab*, <https://citizenlab.ca/about/>.

1 have unfettered discovery into Citizen Lab’s research into NSO would roll back years of progress,
2 expose individuals already victimized by NSO’s activities to the risk of further harassment,⁷ impinge
3 upon academic freedom, and severely chill Citizen Lab’s forward-looking initiatives.

4 Accepting NSO’s view that Citizen Lab is essentially its sworn adversary because Citizen Lab
5 exposes NSO’s use of Pegasus on a global basis, permitting NSO to seek all of Citizen Lab’s
6 research and detection analysis would undoubtedly compromise Citizen Lab’s ability to detect
7 NSO’s software in the future. The same is true if NSO were provided a full view into Citizen Lab’s
8 engagement with research subjects and others who have been targeted by Pegasus, as well as those
9 victims’ identities. Citizen Lab is obligated under its research ethics protocol and its agreements
10 with research subjects—templates of which Plaintiffs have produced to NSO as exhibits to their
11 agreements with Citizen Lab—to maintain the confidentiality of subjects’ information. Individuals
12 impacted by NSO’s activities in the future would be unwilling to work with Citizen Lab, knowing
13 that doing so could result in further disclosure of sensitive information through NSO’s discovery
14 tactics. *Cf. Campbell v. Facebook Inc.*, No. 13-CV-05996-PJH (MEJ), 2015 WL 4463809, at *4
15 (N.D. Cal. July 21, 2015) (endorsing argument that foreign companies may be “less forthcoming
16 with [a regulator] in the future if they know that their communications will be judged and dissected
17 for entirely unrelated purposes in a United States court”). The immediate and irreversible impact
18 of allowing such discovery on Citizen Lab’s operations is both foreseeable and cognizable. *See*
19 *Gonzales*, 234 F.R.D. at 684; *Bickley*, 2011 WL 1344195, at *4; *cf. In Re Apple, Inc.*, 149 F. Supp.
20 3d at 371-73 (finding that reputational and mission-related burdens on Apple, even if not easily
21 quantifiable, should be considered in determining burden of a demand on a third-party).

22
23
24
25 _____
26 ⁷ NSO’s discovery requests seeking to identify users or owners of any devices on which Citizen
27 Lab believes Pegasus may have been installed give Citizen Lab concern, especially considering
28 reporting suggesting that undercover operations have been launched against NSO’s critics. *See*
Raphael Satter, *AP Exclusive: Undercover Spy Exposed in NYC Was 1 of Many*, AP News (Feb.
11, 2019), <https://apnews.com/general-news-9bdbbfe0c8a2407aac14a1e995659de4>.

1 **III. The Remaining *Richmark* Factors Warrant Denying NSO’s Motion**

2 **A. Factor 3: NSO Seeks Discovery Located Abroad**

3 As the *Richmark* court explained, “[t]he fact that all the information to be disclosed (and the
4 people who will be deposed or who will produce the documents) are located in a foreign country
5 weighs against disclosure, since those people and documents are subject to the law of that country
6 in the ordinary course of business.” 959 F.2d at 1475. In pursuing its letter rogatory, NSO
7 effectively acknowledges that the discovery it seeks is not located in the United States. This factor
8 accordingly weighs against disclosure.

9 **B. Factor 4: Defendants Already Possess Any Relevant, Proportional Discovery
10 Involving Citizen Lab**

11 The only arguably relevant discovery NSO seeks from Citizen Lab—concerning its work
12 with Plaintiffs under several data sharing agreements—is duplicative of discovery Plaintiffs have
13 already produced, so does not justify the issuance of a letter rogatory. *See* Proposed Letter
14 Rogatory to The Ontario Superior Court of Justice (ECF No. 288-1), Schedule A, Document
15 Request No. 1; *see id.* at Schedule B, Deposition Topic No. 1. As Plaintiffs explained, “Plaintiffs
16 have produced all communications between Plaintiffs and Citizen Lab relevant to Citizen Lab’s
17 role related to the case, which occurred entirely before the complaint was filed.” Pls.’ Opp. to
18 Defs.’ Mot. to Compel (ECF No. 250) at 5. *See also Viasat*, 2013 WL 12061801 at *7 (denying
19 request for letter rogatory that sought “unnecessarily duplicative information which Plaintiffs can
20 request from the United States-based Defendants,” such as documents that the domestic
21 defendants likely possessed). To the extent NSO seeks Citizen Lab’s uniquely held internal
22 documents concerning Citizen Lab’s work with Plaintiffs under the various data sharing
23 agreements, NSO has failed to offer any non-conclusory explanation for why those documents are
24 relevant. *See supra* Argument § II. And, in any event, on relevance grounds, this Court recently
25 held that NSO is not entitled to documents that allegedly bear on Plaintiffs’ “civil society
26 allegation.” Order (ECF No. 292) at 6.

27 The fourth *Richmark* factor also weighs heavily against NSO’s request for documents and
28 communications “sent to or received from any employee or former employee or representative of

1 either Defendant.” Proposed Letter Rogatory (ECF No. 288-1), Schedule A, Document Request
2 No. 2; *see also id.* Schedule B, Deposition Topic No. 3. Presumably, any communications
3 between Citizen Lab or its employees and NSO, and documents exchanged thereby, are already
4 available to Defendants, who provide no explanation about why they require production of
5 materials already in their possession from a non-resident non-party. Because such discovery is
6 “unreasonably cumulative” and “can be obtained from some other source that is more convenient,
7 less burdensome, or less expensive,” it should not be permitted. Fed. R. Civ. P. 26(b)(2)(C)(i).
8 *See also Viasat*, 2013 WL 12061801, at *7.

9 **C. Factor 5: Issuance of the Letter Rogatory Would Undermine Canadian**
10 **Interests**

11 Under the fifth factor in the *Richmark* analysis, the Court must balance the “interests of each
12 nation in requiring or prohibiting disclosure, and determine whether disclosure would ‘affect
13 important substantive policies or interests’ of either the United States” or the country in which the
14 foreign entity is located. *Richmark*, 959 F.2d at 1476. In assessing the strength of the foreign
15 country’s interests, courts consider the “expressions of interest by the foreign state, the significance
16 of disclosure in the regulation of the activity in question, and indications of the foreign state’s
17 concern for confidentiality *prior to the controversy.*” *Id.* (cleaned up). This analysis derives from
18 the Supreme Court’s mandate that lower courts should “demonstrate due respect for any special
19 problem confronted by the foreign litigant on account of its nationality or the location of its
20 operations, and for any sovereign interest expressed by a foreign state” and should “exercise special
21 vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome,
22 discovery may place them in a disadvantageous position.” *Aerospatiale*, 482 U.S. at 546.

23 Issuance of the requested letter rogatory would impinge on Canadian sovereign interests in
24 at least three respects.

25 **First**, requiring a non-party to disclose sensitive, confidential information that “strike[s] at
26 the heart” of the non-party’s business operations contravenes Canadian public policy. *Actava TV,*
27 *Inc. v. Matvil Corp.*, 2021 ONCA 105, ¶¶ 82, 93-97 (reversing order enforcing letter of request from
28 U.S.) (Lane Decl., Ex. B). NSO’s request does exactly that. As discussed, NSO seeks sensitive,

1 confidential information, spanning years, about Citizen Lab’s research capabilities and its methods
2 to detect Pegasus, as well as the Lab’s work publishing cyber threat information while protecting
3 victims and other sources of information. NSO also seeks sensitive, confidential information that
4 could expose individuals who have been targeted by spyware attacks in the past, some of whom face
5 threats to their personal safety and security. Yet the sought information is far afield from the claims
6 and defenses in this case. Accordingly, any potential benefit of the information sought in this case
7 (which would be negligible) is significantly outweighed by risks associated with permitting NSO’s
8 sought discovery. *Actava*, ¶ 88.

9 **Second**, Citizen Lab’s relationship, as both researcher and journalist, with spyware victims
10 (many who have participated as human subjects in Citizen Lab’s research) is subject to zealous
11 protection in Canada. *See, e.g., Parent v. R.*, 2014 QCCS 132, ¶ 123 (holding that “academic
12 freedom and the importance of institutions of higher learning and academic research are key
13 components of a democracy that values freedom of thought and expression”) (Lane Decl., Ex. E).
14 In particular, Canadian law recognizes case-by-case relationships of privilege between researchers
15 and research participants and between journalists and journalistic sources. A researcher-participant
16 and journalist-source privilege will be recognized when: (i) the relationship originates in a
17 confidence that the source’s identity will not be disclosed, (ii) the element of confidentiality is
18 essential to the full and satisfactory maintenance of the parties’ relationship, (iii) the relationship—
19 like that which exists between researcher and research participant and journalist and source—is one
20 that, in the eyes of the community, ought to be sedulously fostered, and (iv) the injury resulting from
21 disclosure is greater than any benefit gained for the correct disposal of the litigation. *R. v. National*
22 *Post*, 2010 SCC 16, ¶¶ 52-53, 55-64 (Lane Decl., Ex. C); *Globe and Mail v. Canada (Attorney*
23 *General)*, 2010 SCC 41, ¶¶ 22-24, 57-66 (Lane Decl., Ex. D). Here, as demonstrated by template
24 research and consent agreements produced by Plaintiffs in discovery, Citizen Lab has strong
25 arguments for invoking the privilege.

26 **Third**, Canada’s sovereign interest in enforcing its own discovery rules also weighs against
27 issuance of a letter rogatory. *See Actava*, ¶¶ 97-98 (reversing enforcement of U.S. letter of request
28 for third-party discovery as, among other things, inconsistent with Canadian sovereignty as reflected

1 in Ontario’s discovery laws). Rule 30.10 of Ontario’s *Rules of Civil Procedure* governs
2 documentary production from non-parties. Under that provision, “[t]he moving party must establish
3 that the documents requested are relevant to a material issue in the action and that it would be unfair
4 to require the moving party to proceed to trial without having discovery of them.” *Actava*, ¶¶ 94.
5 *See also* Lane Decl., Ex. F. Canadian courts apply a more stringent standard of relevance than U.S.
6 courts, and they generally do not permit third-party discovery, which is instead available “only in
7 exceptional cases.” *Id.* ¶ 95. Further, under Rule 31.10 of the Ontario *Rules of Civil Procedure*,
8 examination of non-parties is permitted only with leave of the court and only if the court is satisfied
9 that the moving party has been unable to obtain the information from other persons whom the
10 moving party is entitled to examine or from the person they seek to examine. *See* Lane Decl., Ex. G.
11 For the same reasons, discussed above, that the broad discovery sought by NSO is impermissible
12 under U.S. law, it would likewise be impermissible under Canadian law.

13 **CONCLUSION**

14 NSO’s motion for the issuance of a letter rogatory as to Citizen Lab should be denied.

15
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17
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