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17 Attorneys for Foreign Non-Party  
18 **The Citizen Lab**

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 RESPONSE PURSUANT TO  
ORDER ON MOTION FOR ISSUANCE  
OF LETTER ROGATORY**

Action Filed: October 29, 2019

1 Foreign non-party The Citizen Lab respectfully submits this response pursuant to the  
2 Court's March 26, 2024 "Order re Motion for Issuance of Letter Rogatory" (ECF No. 299), which  
3 invited the parties and The Citizen Lab to address the relevance of, and the need for discovery  
4 relating to, Plaintiffs' allegation that "a relatively small proportion" of those targeted by NSO's  
5 Pegasus spyware via WhatsApp ("Target Users") are members of "civil society." As this Court  
6 already recognized, Plaintiffs' "civil society"-related allegation is not relevant to the parties'  
7 claims or defenses. **Underscoring that fact, the parties have now both made clear that neither**  
8 **intends to offer primary evidence at trial about the identities of the Target Users unless the**  
9 **other does so.** As NSO's main justification for seeking discovery from The Citizen Lab was  
10 Plaintiffs' pre-trial disclosures, Plaintiffs have eliminated that ground by making it abundantly  
11 clear that they do not intend to present evidence about the identities of the Target Users in their  
12 case-in-chief. For that reason, discovery concerning Plaintiffs' civil society allegation should now  
13 be recognized as irrelevant and disproportionate to the needs of the case. Moreover, Plaintiffs  
14 have already produced to NSO detailed information about the identities of the Target Users, and  
15 NSO has not shown a need for the further discovery that it seeks from The Citizen Lab, a foreign  
16 non-party, on this or any other issue. Finally, NSO's requested discovery on the Target Users and  
17 other spyware victims would impose unique burdens and harms both on The Citizen Lab and on  
18 the spyware victims who have participated as subjects in research studies with The Citizen Lab.  
19 The Court should deny NSO's motion in its entirety.

## 20 ARGUMENT

### 21 **I. Each Party Has Disclaimed the Need to Present Evidence About the Identities of the** 22 **Target Users Unless the Other is Permitted to Do So.**

23 Information about The Citizen Lab's limited role<sup>1</sup> in helping identify recipients of NSO's  
24 spyware is not a key element of this case that would justify discovery through the Letters Rogatory

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26 <sup>1</sup> As The Citizen Lab has previously explained, Plaintiffs did not rely on The Citizen Lab for any  
27 technical analysis of the 1,400 devices at issue here. *See* The Citizen Lab's Opp'n to Defs' Mot.  
28 (ECF No. 294-2) at 12. And, in any event, this Court already denied the portion of Defendants'  
letter-rogatory motion concerning Plaintiffs' allegations that NSO's spyware was installed on the  
targeted devices. *See* ECF No. 299 at 1-2.

1 procedure. As the Court has already correctly determined, Plaintiffs’ allegation that the Target  
2 Users include members of “civil society” is “an ancillary part of this case.” *See* Order (ECF No.  
3 292) at 6. Plaintiffs allege in a single sentence of their complaint that “[t]he Target Users included  
4 attorneys, journalists, human rights activists, political dissidents, diplomats, and other senior  
5 foreign government officials.” Compl. ¶ 42. Neither that single sentence, nor the similar  
6 statements that Plaintiffs have made in other filings, relates to a necessary element of any of their  
7 claims. Indeed, as Plaintiffs reaffirm in their Response to the Court’s March 26 Order, they “can  
8 prove that NSO violated the Computer Fraud and Abuse Act (“CFAA”), the California  
9 Comprehensive Computer Data Access and Fraud Act (“CDAFA”), and the WhatsApp Terms of  
10 Service, all without evidence about the identities of the Target Users.” Pls.’ Resp. (ECF No. 300)  
11 at 1. **Plaintiffs further disclaim any intent “to call Citizen Lab witnesses or seek to present  
12 evidence as to the identities of the Target Users as part of their case-in-chief,”** unless  
13 Defendants are permitted to present such evidence in support of their justification defense,  
14 discussed below. *Id.* (emphasis added).

15 Defendants concede that the civil society allegation is irrelevant to the elements of  
16 Plaintiffs’ claims. *See* Defs.’ Reply in Supp. of Mot. for Issuance of Letter Rogatory (ECF No.  
17 298) at 5 (“In relation to the elements of Plaintiffs’ claims, the relevance of this allegation appears  
18 dubious indeed.”). Nevertheless, they contend that “**if** Plaintiffs are allowed to make the “civil  
19 society” issue “a focal point of their case” at trial, then “discovery into the bases for, and reliability  
20 of, Plaintiffs’ allegation . . . will be relevant to NSO’s defenses.” *Id.* (emphasis added).  
21 Specifically, Defendants assert that, **if** Plaintiffs were to focus on victim identity evidence at trial,  
22 such evidence “**would**” also be relevant to their justification defense—*i.e.*, Defendants’ contention  
23 they “acted in good faith and pursuant to legitimate law enforcement, national security, intelligence  
24 and business justifications.” *Id.* (emphasis added).<sup>2</sup> But Plaintiffs have now made clear that they

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26 <sup>2</sup> Discovery in support of this purported defense would also be inappropriate because, as Plaintiffs  
27 persuasively argue, the defense is a nonstarter, both legally and factually. CFAA’s law enforcement  
28 exception applies only to the activities of domestic law enforcement or intelligence agencies; it is  
plainly inapplicable to the conduct of a foreign private entity like NSO. *See* 18 U.S.C. § 1030(f)  
(exempting “lawfully authorized investigative, protective, or intelligence activity of a law

1 do not intend to present evidence about the identities of the Target Users in their case-in-chief,  
 2 much less make it a “focal point” of their case at trial.<sup>3</sup> Accordingly, Defendants have no need to  
 3 offer evidence in response.

4 Because both parties have disclaimed the intent to present evidence about the identities of  
 5 the Target Users unless the other does so, it is clear that The Citizen Lab’s role is not key to either  
 6 party’s case. Accordingly, additional discovery on the issue would be neither relevant nor  
 7 proportionate to the needs of the case.<sup>4</sup>

## 8 **II. NSO Has Already Received Ample Discovery About the Identities of the Target Users.**

9 Defendants’ motion should also be denied because Defendants have already received  
 10 Plaintiffs’ communications with The Citizen Lab about The Citizen Lab’s assistance to Plaintiffs in  
 11 identifying and in notifying certain Target Users. Plaintiffs have already produced documents that  
 12 contain identifying information for each Target User, along with the sources supporting The Citizen  
 13 Lab’s categorization of certain Target Users as members of civil society. *See* Pls.’ Resp. (ECF No.  
 14 300) at 5. Plaintiffs have likewise already produced their pre-complaint communications with The  
 15 Citizen Lab, as well as documents relating to Plaintiffs’ response to NSO’s unauthorized intrusions.  
 16 *See id.*; *see also* Pls.’ Opp’n to Defs.’ Mot. to Compel (ECF No. 250) at 5 (“Plaintiffs have produced  
 17 all communications between Plaintiffs and Citizen Lab relevant to Citizen Lab’s role related to the  
 18 case, which occurred entirely before the complaint was filed.”). This information, together with

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 20 enforcement agency of the United States, a State, or a political subdivision of a State, or of an  
 21 intelligence agency of the United States”). Moreover, Defendants have provided no information  
 22 suggesting that any of them are or were the targets of legitimate law enforcement activities that  
 would support such a defense. *See* Pls.’ Resp. (ECF No. 300) at 3.

23 <sup>3</sup> Both parties state that victim identity evidence “could” also be probative of whether NSO  
 24 engaged in fraudulent, intimidating, harassing, malicious, or oppressive conduct, an issue that  
 25 could bear on Plaintiffs’ request for punitive damages. Defs.’ Reply (ECF No. 298) at 6; *see also*  
 Pls.’ Resp. (ECF No. 300) at 4-5 (stating that “the identities of Target Users may support Plaintiffs’  
 requests for injunctive relief and for punitive damages”). But Plaintiffs have made clear that such  
 information is “not necessary to Plaintiffs’ ability to recover.” *Id.* at 4.

26 <sup>4</sup> Defendants seek information from The Citizen Lab not only about the Target Users, but also  
 27 about known and suspected victims of *other* intrusions involving the Pegasus spyware. *See* Letter  
 28 Rogatory (ECF No. 288-1) at 5-6. Discovery about victims of different attacks would be even  
 more clearly irrelevant and disproportionate here.

1 publicly available information about the Target Users, is sufficient to permit Defendants to confirm  
2 or rebut Plaintiffs' categorizations of them as attorneys, journalists, human rights activists, political  
3 dissidents, diplomats, and other senior foreign government officials, in the event that the need later  
4 arises. Additional information about what The Citizen Lab thinks about these Target Users is not  
5 relevant. Moreover, NSO has noticed the depositions of Plaintiffs' current and former employees  
6 who interfaced with The Citizen Lab, and can question them about their interactions with The  
7 Citizen Lab to the extent they believe those interactions have some import. *See id.* Given the  
8 minimal relevance of The Citizen Lab's views on the boundaries of "civil society" and the extensive  
9 information NSO has already received about the Target Users, the Court should reject NSO's  
10 demand for further discovery from foreign non-party The Citizen Lab.

11 **III. The Requested Discovery Would Impose Impermissible Burdens on The Citizen**  
12 **Lab that Far Outweigh any Benefit.**

13 The discovery NSO seeks would subject The Citizen Lab to undue and impermissible  
14 burdens, as The Citizen Lab explained in its opposition to NSO's motion. *See* ECF No. 294-2. The  
15 surviving portion of NSO's proposed letter rogatory seeks a broad range of information (and related  
16 testimony) about the Target Users and other known or suspected victims of NSO's spyware,  
17 spanning a period of more than eight years. The disclosure of such sensitive victim-related  
18 information would threaten The Citizen Lab's continued operations in support of its mission, which  
19 entails investigating digital espionage against civil society, documenting the effects of online  
20 technologies and practices on freedom of expression, analyzing the privacy, security, and  
21 information controls of popular applications, and examining transparency and accountability  
22 mechanisms relevant to the relationship between corporations and state agencies regarding personal  
23 data and other surveillance activities.<sup>5</sup>

24 Particularly given NSO's animosity toward The Citizen Lab, *see* Defs.' Mot. for the Issuance  
25 of Letter Rogatory (ECF No. 288) at 2, allowing Defendants to have broad discovery into The  
26 Citizen Lab's work relating to NSO spyware victims would roll back years of progress, expose

27  
28 <sup>5</sup> *See* The Citizen Lab, *About The Citizen Lab*, <https://citizenlab.ca/about/>.

1 individuals already victimized by NSO’s activities to the risk of further harassment, including from  
2 their own governments, impinge upon academic freedom, and severely chill The Citizen Lab’s  
3 forward-looking initiatives. Importantly, The Citizen Lab is obligated under its research ethics  
4 protocol and its agreements with research subjects—templates of which Plaintiffs have produced to  
5 Defendants as exhibits to their agreements with The Citizen Lab—to maintain the confidentiality of  
6 subjects’ information.<sup>6</sup> Individuals impacted by NSO’s activities in the future would very likely be  
7 unwilling to work with The Citizen Lab if doing so could result in further disclosure of their sensitive  
8 information to NSO in discovery. The immediate and irreversible impact of allowing broad victim-  
9 related discovery on The Citizen Lab’s operations is both foreseeable and cognizable. These  
10 burdens would greatly outweigh any marginal benefit that the requested discovery might offer and  
11 provide an additional reason for denying Defendants’ motion for the issuance of a letter rogatory in  
12 its entirety. *See* Fed. R. Civ. P. 26(b)(1); *see also Gonzales v. Google, Inc.*, 234 F.R.D. 674, 684  
13 (N.D. Cal. 2006) (non-party subpoena recipient’s potential loss of goodwill that would result from  
14 subpoena compliance was a cognizable burden); *Bickley v. Schneider Nat’l, Inc.*, No. C 08-5806  
15 JSW (JL), 2011 WL 1344195, at \*4 (N.D. Cal. Apr. 8, 2011) (quashing subpoenas that would have  
16 burdened plaintiffs’ privacy rights and had a “chilling effect” on plaintiffs’ future employment  
17 prospects).

### 18 CONCLUSION

19 For the foregoing reasons, and the additional reasons stated in The Citizen Lab’s opposition  
20 to NSO’s motion (ECF No. 294-2), NSO’s motion for a letter rogatory as to The Citizen Lab  
21 should be denied.  
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26 <sup>6</sup> Those agreements also provide a strong basis for The Citizen Lab to invoke the researcher-  
27 participant and journalist-source privileges available under Canadian law, calling into question  
28 whether the information NSO seeks is even discoverable. *See* The Citizen Lab’s Opp’n to Defs’  
Mot. (ECF No. 294-2) at 18.

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DATED: April 12, 2024

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