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9
10 **UNITED STATES DISTRICT COURT**
11 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

12
13 REPUBLIC OF KAZAKHSTAN,

14 Plaintiff,

15 v.

16 DOES 1-100 INCLUSIVE,

17 Defendants.
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20
21
22

) Case No. 2:15-mc-00159-TLN-KJN

) USDC SDNY Case No. 1:15-cv-01900-ER

) **NON-PARTIES RESPUBLIKA AND LLC**
) **MEDIA-CONSULT'S OPPOSITION TO**
) **KAZAKHSTAN'S MOTION TO COMPEL**
) **COMPLIANCE WITH SUBPOENA FOR**
) **PRODUCTION OF BUSINESS RECORDS**
) **TO FACEBOOK, INC.**

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1 **I. INTRODUCTION**

2 The subpoena at issue in this motion seeks unpublished confidential information generated
3 during the course of newsgathering and reporting by an internationally recognized news media
4 organization.¹ The extraordinary non-party discovery of the material sought by Kazakhstan is
5 protected by the reporters' privilege, and Kazakhstan makes only a minimal effort to carry its
6 burden of proving that the privilege is overcome in this specific case.

7 Respublika² is the leading media critic of Kazakhstan's ruling regime. That the
8 independent media might criticize and scrutinize the actions of the government, while unknown
9 in Kazakhstan, is one of the foundational liberties preserved here by the First Amendment and
10 indeed an everyday occurrence in the United States and much of the free world. *See Bridges v.*
11 *California*, 314 U.S. 252, 274 (1941) (voiding as unconstitutional contempt orders against
12 newspaper editors who criticized judicial conduct, explaining that "[i]n view of the paper's long-
13 continued militancy in this field, it is inconceivable that any judge in Los Angeles would expect
14 anything but adverse criticism from it in the event probation were granted"). As our Supreme
15 Court has explained: "The press was to serve the governed, not the governors. The government's
16 power to censor the press was abolished so that the press would remain forever free to censure the
17 Government. The press was protected so that it could bare the secrets of the government and
18 inform the people. Only a free and unrestrained press can effectively expose deception in
19 government." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J.
20 concurring). *See also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (explaining
21 that "handing out leaflets in the advocacy of a politically controversial viewpoint—is the essence
22 of First Amendment expression").

23 Unfortunately, freedom of the press does not exist in Kazakhstan. And through this
24 subpoena, Kazakhstan attempts to bring its own national notions of a sharply diminished free and

25 _____
26 ¹ *See infra*, notes 3-5.

27 ² LLC Media-Consult is the owner of Respublika. The non-party entities are collectively referred to
28 herein as "Respublika."

1 independent press to the U.S. court system. As a result, Kazakhstan’s subpoena and
2 accompanying arguments are based on the assumption that Respublika is worthy of suspicion and
3 scrutiny merely because it has published numerous articles criticizing the ruling regime and
4 used—just as numerous other international media outlets have—excerpts from publicly available
5 materials in its reporting.

6 Independent of the privilege, this Court has a duty to ensure that any specific discovery
7 permitted is not unduly burdensome and does not subject any person to annoyance or oppression.
8 Here, given Kazakhstan’s history of harassing and intimidating Respublika, the Court must act to
9 protect Respublika from continued acts of the long-standing oppression to which Kazakhstan has
10 subjected it.

11 No court has yet examined whether this specific discovery request overcomes the
12 reporters’ privilege or would subject Respublika to such annoyance or oppression.

13 **II. STATEMENT OF FACTS**

14 As the Honorable Judge Edgardo Ramos has already found, Respublika is an online
15 newspaper.³ Respublika’s Request for Judicial Notice in Support of Opp. to Mot. to Compel
16 (“RJN”), Ex. 1 (October 27, 2015 Opinion and Order clarifying scope of preliminary injunction
17 order, SDNY Case No. 1:15-cv-01900-ER, ECF 57, at 1). Respublika reports on a wide range of
18

19 ³ Judge Ramos had abundant reason to do so. Respublika has been recognized as a news
20 organization by the U.S. State Department, the European Parliament, and the European Union, as
21 well as numerous international press organizations that have recognized Respublika for its
22 journalistic achievements. Respublika’s parent corporation, LLC Media-Consult, holds a mass
23 media registration certificate issued by the Russian Federal Service for Supervision of
24 Communications, Information Technology and Mass Media, for Respublika’s online publication,
25 labeled El No. FS77-44199 (Эл № ФС77-44199). See Declaration of Irina Petrushova in Support
26 of Opp. to Mot. to Compel (“I. Petrushova Decl.”), ¶ 10. In addition, Respublika has received
27 multiple awards. In 2007, Kazakhstan’s Union of Journalists named Respublika “The Best Media
28 Project” in Kazakhstan. The same year, Kazakhstan’s Center of Business Journalism “BizMedia”
recognized Respublika as the best business newspaper in Kazakhstan. *Id.* at ¶ 16. Respublika’s
founder, Irina Petrushova, has also received international recognition. *Id.*; Declaration of David
Greene in Support of Opp. to Mot. to Compel (“Greene Decl.”), ¶ 5 (Committee to Protect
Journalism (“CPJ”), International Press Freedom Awards, Profile, “2002 Awardee: Irina
Petrushova”).

1 topics regarding Kazakhstan and international issues that are relevant to Kazakhstan. I.
 2 Petrushova Decl., ¶¶ 11-19. Respublika circulated a print newspaper from 2000 to 2012, with
 3 various interruptions and name changes due to attempts by the Kazakhstan government to shut
 4 down and censor the newspaper.⁴ I. Petrushova Decl., ¶¶ 6, 21-31. Respublika launched its
 5 website in 2008 and now publishes its news only online—through its website, English-language
 6 news blog, and Facebook page—despite that its website is blocked within Kazakhstan.⁵

7
 8 ⁴ See RJN, Exs. 6–18 (2003-2014 State Department Human Rights Reports for Kazakhstan)
 9 (documenting Respublika’s various name changes through the years and the many attempts by
 10 Kazakhstan authorities to force the newspaper to cease distribution); see, e.g., *id.*, Ex. 7 (2003 State
 11 Department Human Rights Report for Kazakhstan) (noting that “[t]he newspaper continued to
 12 change its name to avoid what it termed illegal judgments against it”); *id.*, Ex. 24 (Organization for
 13 Security and Co-operation in Europe (“OSCE”), Press Release, “OSCE media freedom
 14 representative protests over authorities’ actions against one of Kazakhstan’s few independent
 15 newspapers” (Sep. 22, 2009)); *id.*, Ex. 25 (OSCE, Press Release, “OSCE media freedom
 16 representative criticizes ‘misuse’ of libel laws to muzzle the press in Kazakhstan, Tajikistan, and
 17 Hungary” (Feb. 8, 2010)); *id.*, Ex. 26 (OSCE, Press Release, “OSCE representative concerned over
 18 threat to media pluralism in Kazakhstan” (Nov. 30, 2012)). See also Greene Decl., Ex. 10
 19 (Reporters Without Borders, “Main Opposition Media Silenced in Space of a Month” (Dec. 28,
 20 2012)) (noting how on December 25, 2012, an Almaty court “issued an order . . . banning the eight
 21 different versions that the newspaper *Respublika* had been forced to create over time to avoid the
 22 consequences of legal proceedings[,]” including “*Golos Respubliki* (Voice of the Republic),
 23 *Respublika-Delovoye Obozrenye* (Republic-Business Magazine) and *Vsya Respublika* (Entire
 24 Republic)” and that “[t]he prohibition also applied to the 23 websites and online social network
 25 accounts that carried these newspapers’ content”); *id.*, Ex. 8 (Reporters Without Borders, “Copies
 26 of Opposition Weekly Seized, Journalists Arrested” (Jan. 21, 2011)); *id.*, Ex. 9 (Reporters Without
 27 Borders, “Main Independent National Media Threatened With Closure” (Nov. 21, 2012)); *id.*, Ex.
 28 15 (Joanna Lillis, “Kazakhstan: Critical Newspaper Loses Appeal on Government Ban,”
EurasiaNet (Feb. 9, 2013)); *id.*, Ex. 19 (Roy Greenslade, “Kazakh authorities seek closure of
 independent media,” *Guardian* (Nov. 22, 2012)); *id.*, Ex. 20 (Rayhan Demytrie, “Kazakhstan’s
 independent media under fire,” BBC News (Mar. 10, 2013)).

⁵ RJN, Exs. 14-18 (2010-2014 State Department Human Rights Reports for Kazakhstan); *id.*, Ex.
 23 23 (European Union, OSCE Permanent Council Nr 901, Vienna, “statement on opposition
 24 activities in Kazakhstan” (Feb. 9, 2012)) (“The EU is equally concerned about the reported
 25 blocking of several internet portals linked to the ‘Respublika’ newspaper. Encouraging an open and
 26 effective press will only help improve the environment for long-term social, political and economic
 27 stability.”); Greene Decl., Ex. 1 (CPJ Alert, “State-owned Internet provider blocks Kazakh news
 28 sites” (Apr. 29, 2010)); *id.*, Ex. 7 (Human Rights Watch, “Kazakhstan: Growing Crackdown on
 Free Speech; A Year After Clash at Labor Strike Site, Those Who Reported on Violence Under
 Threat” (Dec. 14, 2012)); *id.* Ex. 10 (Reporters Without Borders, “Main Opposition Media
 Silenced in Space of a Month” (Dec. 28, 2012)).

1 I. Petrushova Decl., ¶¶ 7-9, 31.

2 Respublika’s readers live around the world, including a sizable readership in the United
 3 States. I. Petrushova Decl., ¶ 17. The newspaper is published through U.S.-based servers and on
 4 Facebook, which is based in California. One of Respublika’s contributors is a U.S. resident, and
 5 Respublika regularly reports on legal, economic, and political issues in the United States.⁶ I.
 6 Petrushova Decl., ¶ 18.

7 It is undisputed that what Kazakhstan calls the “Stolen Materials”⁷ appeared online in or
 8 around August 2014, indexed in the publicly accessible website
 9 <http://www.kazaword.wordpress.com> (“kazaword”), more than five months before Respublika
 10 first used them in its reporting.⁸ Respublika and other news organizations across Europe and
 11 Central Asia have also reported on the documents since they appeared in August 2014.⁹

12 ⁶ For example, in January 2015, Respublika published an interview with Herbert Meyer, former
 13 Vice Chairman of the CIA’s National Intelligence Council. Respublika also recently reported on
 14 how the Kazakhstan government has hired U.S.-based companies, such as Arcanum, to participate
 15 in the persecution of Kazakhstan’s opposition from outside of the country. I. Petrushova Decl., ¶
 16 19.

17 ⁷ Kazakhstan’s Computer Fraud and Abuse Act (“CFAA”) claim is based on allegations that the
 18 government’s email accounts were “hacked.” Kazakhstan will ultimately have to prove that there
 19 was *unauthorized access* to its email accounts and not merely *unauthorized use* of the system by
 20 someone who had authorized access, as both the Second and Ninth Circuits have held. *United*
 21 *States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) (en banc) (holding that the CFAA does not apply
 22 to claims against individuals who are authorized to access at computer system but who make
 23 improper use of that access); *United States v. Valle*, 807 F.3d 508, 527 (2d Cir. 2015) (same). The
 24 mere fact that Kazakhstan’s emails were leaked does not prove—or even hint at—a *prima facie*
 25 case of a CFAA violation.

26 ⁸ The first entry on the kazaword website is dated August 8, 2015. *See* Greene Decl., Ex. 23
 27 (August 8, 2014 blog post on kazaword website) (“We begin a series of publications on the
 28 political participation of the leadership of Kazakhstan in the affairs of R. Aliyev and M.
 Ablyazova.”); *id.*, Ex. 21 (Agathe Duparc, “Bernard Squarcini, at Kazakhstan’s service against
 regime opponent Ablyazov,” Mediapart.fr (Feb. 26, 2015)) (“In August 2014, a mysterious site,
 Kazaword, appeared on the Internet, a kind of KazakhLeaks site that contains tens of thousands of
 emails hacked from the highest echelons of the Kazakh regime.”). *See also* Plaintiff’s Request for
 Judicial Notice in Support of Mot. to Compel, ECF No. 8, Ex. 23 (Kazakhstan’s Memorandum of
 Law in Opp. to Respublika’s Motion for Clarification of Preliminary Injunction Order, SDNY ECF
 No. 43), at 5; *id.*, Ex. 12 (Declaration of Michael R. Graif in Opp. to Respublika’s Mot. for
 Clarification, SDNY ECF No. 45), at ¶¶ 6, 8.

⁹ *See, e.g.*, Greene Decl., Ex. 22 (Sylvain Besson, “Le Kazakhstan enrôle un expert genevois dans
 sa campagne d’influence occulte,” *Le Temps* (Jun. 17, 2015)); *id.*, Ex. 21 (Agathe Duparc,
(footnote continued on following page)

1 That Respublika, given its focus on Kazakhstan, was more active than others in using the
2 kazaword materials in its reporting is neither surprising nor suspicious. Kazakhstan is correct that
3 Respublika published several articles of investigative journalism on the case of Mukhtar
4 Ablyazov, and the related case of Alexandr Pavlov. But this reporting accounted for a small
5 percentage of its overall reporting. I. Petrushova Decl., ¶ 20(b). Moreover, what Kazakhstan
6 characterizes as a “propaganda campaign” and a “public relations campaign” is well established
7 and constitutionally protected journalistic activity, both in the United States and the rest of the
8 free world. *See Miami Herald Co. v Tornillo*, 418 U.S. 241, 258 (1974) (holding that a newspaper
9 had an absolute First Amendment right to editorialize and endorse one candidate in an election
10 and exclude the opposing candidate from responding); *New York Times*, 403 U.S. at 714 (per
11 curiam) (vacating injunction against the publication of the Pentagon Papers, an allegedly stolen
12 classified Department of Defense document, by the *New York Times* and *Washington Post* as
13 violative of the First Amendment).

14 Kazakhstan responded to the posting of documents on kazaword by filing the above-
15 captioned Southern District of New York lawsuit on March 12, 2015 (the “Main Action”),
16 alleging that unnamed “Doe” defendants had accessed the kazaword documents without
17 authorization in violation of the Computer Fraud and Abuse Act (“CFAA”).¹⁰ Neither Respublika
18 nor any of its editors are defendants in the Main Action.

19 Kazakhstan’s recitation of the procedural background of this litigation in its motion to
20 compel contains incomplete detail, material omissions, and errors.

21
22
23 *(footnote continued from preceding page)*

24 “Bernard Squarcini, at Kazakhstan’s service against regime opponent Ablyazov,” *Mediapart.fr*
(Feb. 26, 2015).

25 ¹⁰ Kazakhstan also filed an almost identical Doe lawsuit in California state court alleging violations
26 of both the CFAA and the California Comprehensive Computer Data Access and Fraud Act. *See*
27 *RJN, Ex. 5* (Complaint filed in *The Republic of Kazakhstan v. Does 1-100 inclusive*, Santa Clara
28 County Superior Court, No. 1-15-cv-277067, filed on Feb. 20, 2015 (ECF No. 1)). Respublika is
also not named as a defendant in the California lawsuit, which remains pending.

1 First, Respublika—in moving to clarify that the Preliminary Injunction could not
2 constitutionally apply to it—did not “intervene” in the Main Action as Kazakhstan suggests. *See*
3 Kazakhstan’s MPA, ECF 7, at 8. Rather, Respublika moved the court as an interested non-party.
4 RJN, Ex. 2 (Motion of Non-Parties Respublika and LLC Media Consult for Clarification of
5 Preliminary Injunction Order, SDNY ECF 35). Indeed, Judge Ramos’s Order reflected
6 Respublika’s status as a non-party to the Main Action. RJN, Ex. 1 (SDNY ECF No. 57), at 1.

7 Second, in granted Respublika’s Motion for Clarification, Judge Ramos held that
8 Respublika had a near absolute First Amendment right to publish portions of the leaked kazaword
9 documents, as long as it was not directly involved in the purported theft:

10 The fact that Respublika may have used or posted certain of the Stolen Materials on
11 its website, is not, without more, sufficient to subject it to the Injunction. The First
12 Amendment grants persons a near absolute right to publish truthful information
13 about matters of public interest that they have lawfully acquired. *Smith v. Daily*
14 *Mail Publishing Co.*, 443 U.S. 97, 103 (1979). The Supreme Court affirmed that the
15 *Daily Mail* rule applies even if the re-publisher of the information that is of public
16 concern knew that its source had obtained the information illegally. *Bartnicki v.*
17 *Vopper*, 532 U.S. 514, 535 (2001). Thus, the *Daily Mail* rule protects the
18 publication of the kazaword documents by anyone other than those directly involved
19 in their purported theft. *Daily Mail Publishing Co.*, 443 U.S. at 103.

20 RJN, Ex. 1 (SDNY ECF No. 57), at 4. Judge Ramos further found that the Preliminary Injunction
21 as applied to Respublika was an unconstitutional prior restraint.

22 Third, Kazakhstan is correct that it moved Judge Ramos for permission to conduct
23 expedited discovery. But the motion was made only for the limited purpose of gathering evidence
24 to support its belief that the Preliminary Injunction should apply to Respublika, not as a general
25 investigation into Respublika or for the purpose of supporting its underlying claims. RJN, Ex. 3,
26 (Transcript of October 28, 2015 discovery conference before the Honorable Magistrate Judge
27 Henry B. Pitman), at 10:13-19 (Kazakhstan’s counsel indicating that it was “proceeding to try to
28 obtain” evidence to support a preliminary injunction order against Respublika); *id.* at 13:20-23,
19:21-25 (same). Judge Ramos did refer Kazakhstan’s motion to conduct expedited discovery to
Magistrate Judge Pitman, as Kazakhstan recites, but Judge Pitman limited the requested
deposition of Respublika to only five of Kazakhstan’s eight proposed Matters of Examination.

1 Fourth, Kazakhstan omits material portions of the discovery hearing before Judge Pitman
2 in which the judge repeatedly referred to the limited nature of the permitted discovery due to both
3 the reporters' privilege and Respublika's status as a non-party. Namely, Judge Pitman observed
4 that much of the information sought through the deposition will be subject to a claim of the
5 reporters' privilege, predicting that the deposition transcript would "wind up being very thin" as a
6 result. *Id.* at 31:1-2. Although Judge Pitman allowed the deposition to go forward "with respect to
7 the claims asserted in the complaint," *id.* at 41:12-14, he held that Respublika could assert the
8 reporters' privilege in response to any questions calling for information covered by the privilege
9 and that Kazakhstan must wait to challenge those assertions through later proceedings. *Id.* at
10 14:14-22, 15:19-21, 17:7-15. As Judge Pitman stated, "it's clear to me that there are going to be a
11 lot of assertions of privilege here. . . . I have a strong sense that if you go over to London and take
12 the deposition it may well be a very short deposition and I think there's going to wind up
13 necessarily being motion practice afterwards." *Id.* at 14:18-21.

14 Judge Pitman was also highly skeptical of Kazakhstan's proposed Matters of Examination
15 5 and 6, in which Kazakhstan sought testimony regarding "Respublika's . . . removal of its own
16 posts at Plaintiff's request during the period May 11, 2015 to June 15, 2015." Judge Pitman
17 questioned the relevance of this line of inquiry, agreeing with Respublika's argument that
18 whether Respublika mistakenly believed that the Preliminary Injunction applied to it is entirely
19 irrelevant to determining whether Respublika was actively involved in the alleged hacking. He
20 ordered Kazakhstan to make a further showing of why such information would be relevant,
21 stating that this discovery seemed geared only to determining whether Kazakhstan had a claim
22 against Respublika. But, he held, "the cases indicate you don't get [such discovery] until you state
23 a claim." *Id.* at 42:13-43:24. Rather than making the requested showing of relevance, however,
24 Kazakhstan withdrew these lines of inquiry. *See* RJN, Ex. 4 (Oct. 29, 2015 letter from
25 Kazakhstan's counsel to Judge Pitman regarding withdrawal of topics 5 and 6 from Rule 30(b)(6)
26 Notice).

1 Judge Pitman’s skepticism is especially relevant to this motion given that the second
2 category of records sought in the subpoena similarly seeks information regarding Respublika’s
3 removal of its own posts prior to Judge Ramos’s ruling that the Preliminary Injunction could not
4 constitutionally be applied to it.

5
6 **III. ARGUMENT**

7 **A. The Motion to Compel Should Be Denied Because the Information Kazakhstan**
8 **Seeks is Unpublished Journalistic Information Protected From Disclosure By**
9 **the Reporters’ Privilege**

10 Respublika, like other news entities, enjoys qualified, but robust, protection against the
11 compelled disclosure of its unpublished journalistic information. *See Shoen v. Shoen*, 5 F.3d 1289
(9th Cir. 1993) (“*Shoen I*”); *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995) (“*Shoen II*”).

12 It is well established in the Ninth Circuit that the press enjoys a qualified privilege, rooted
13 in the First Amendment, against the compelled disclosure of information gathered and created in
14 the course of reporting the news. *See Shoen I*, 5 F.3d 1289; *Shoen II*, 48 F.3d 412. This privilege is
15 necessary to ensure the free flow of information to the public, and as such, “is an interest ‘of
16 sufficient social importance to justify some incidental sacrifice of sources of facts needed in the
17 administration of justice.’” *Shoen I*, 5 F.3d at 1292 (quoting *Herbert v. Lando*, 441 U.S. 153, 183
18 (1979) (Brennan, J. dissenting)).

19 This interest is especially important in this case, where the government of Kazakhstan—
20 which has a history of actively working to suppress the free flow of information critical of it—is
21 attempting to use the U.S. court system as a weapon in its war against a free press. Were
22 Kazakhstan to obtain the information it seeks through this subpoena, it would not only seriously
23 hinder Respublika’s ability to gather and report the news, but it would also subject Respublika’s
24 staff to persecution, physical and online harassment, and cyber attacks.

1 **1. The Reporters’ Privilege Protects Journalists’ Information Held By**
2 **Third Parties**

3 Respublika may assert its reporters’ privilege even though the subpoena seeks records from
4 a third party entity—here, Facebook. *See New York Times v. Gonzales*, 459 F.3d 160, 167-68 (2d
5 Cir. 2006) (permitting newspaper to assert journalist’s privilege against request for records from
6 telephone provider); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 6:92CV00592, 1996 WL
7 575946, 24 Med. L. Rptr. 2431 (M.D.N.C., September 6, 1996); *Philip Morris v. ABC*, No. LX-
8 816-3, 1995 WL 1055921, 23 Med. L. Rptr. 2438 (Va. Cir. Ct. 1995). *See generally* Bradley S.
9 Miller, *The Big Chill: Third-Party Documents and the Reporters Privilege*, 29 U. Mich. J. L. Ref
10 613 (1995-96).

11 **2. The Reporters’ Privilege Protects Identifying Information of Journalists**

12 The identifying information sought by the subpoena—names, email addresses, IP
13 addresses, and MAC addresses—is among the type of information protected by the reporters’
14 privilege. *United States v. Bursey*, 466 F.2d 1059, 1084-85 (9th Cir. 1972). As the Ninth Circuit
15 explained in applying the privilege to a subpoena seeking, in part, the identity of the authors of
16 several articles: “Questions about the identity of persons who were responsible for the editorial
17 content and distribution of a newspaper and pamphlets cut deeply into press freedom.” *Id.* at 1084.
18 “If [the editors] can be required to disclose the identity of all persons who worked on the paper and
19 the pamphlets, to describe each of their jobs, to give the details of financing the newspaper, any
20 editor, reporter, typesetter, or cameraman could be compelled to reveal the same information about
21 his paper or television station, if his paper or station carried the story. The First Amendment
22 forbids that result.” *Id.* at 1088. This is especially true when a government is seeking the identities
23 of its political dissidents: “Political dissidents who criticize the Government may well have more
24 fear about disclosure to the Government than to anyone else.” *Id.* at 1086.

25 The United States has an honored tradition of anonymous and pseudonymous journalism
26 dating to the founding of our nation. *McIntyre*, 514 U.S. at 357 (“[A]nonymous pamphleteering is
27 not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.”). As
28

1 the Supreme Court explained, the preservation of anonymous journalism was one of the key
2 motivating factors behind the adoption of the First Amendment:

3 Anonymous pamphlets, leaflets, brochures and even books have played an
4 important role in the progress of mankind. Persecuted groups and sects from time to
5 time throughout history have been able to criticize oppressive practices and laws
6 either anonymously or not at all. The obnoxious press licensing law of England,
7 which was also enforced on the Colonies was due in part to the knowledge that
8 exposure of the names of printers, writers and distributors would lessen the
9 circulation of literature critical of the government. . . . Before the Revolutionary
10 War colonial patriots frequently had to conceal their authorship or distribution of
11 literature that easily could have brought down on them prosecutions by English-
12 controlled courts. Along about that time the Letters of Junius were written and the
13 identity of their author is unknown to this day. Even the Federalist Papers, written in
14 favor of the adoption of our Constitution, were published under fictitious names. It
15 is plain that anonymity has sometimes been assumed for the most constructive
16 purposes.”).

17 *Talley v. California*, 362 U.S. 60, 64-65 (1960) (footnote omitted). Indeed, the concepts found in
18 the writings of the English journalists who wrote under the pseudonym “Cato” were actively
19 advanced by the founders of the United States. *See Anderson, The Origins of The Press Clause*, 30
20 *UCLA L. Rev.* 455, 525 (1983). As the Ninth Circuit has said, “Protection of the anonymity of
21 publishers, printers, and distributors of newspapers and pamphlets is an integral part of press
22 freedom.” *Burse*, 466 F.2d at 1085.

23 There is no basis for excluding the identifying information of journalists from the types of
24 unpublished information included within the privilege. Indeed, it would be an odd result if the
25 privilege permitted journalists to protect their sources’ identities, but not their own. The compelled
26 disclosure of a journalist’s identifying information would “substantially undercut the public policy
27 favoring the free flow of information that is the foundation for the privilege” at least as much as
28 would the compelled disclosure of a reporter’s sources or resource materials. *See Shoen I*, 5 F.3d at
1294 (quoting *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980)).¹¹

¹¹ None of the cases cited in Kazakhstan’s brief, in which the courts compelled the production of
identifying information, involved either journalists or materials otherwise covered by the reporters’
privilege. *See Chevron Corp. v. Donziger*, No. 12-MC-80237 CRB (NC), 2013 WL 4536808, at *1
(N.D. Cal. Aug. 22, 2013) (addressing request for subscriber and usage information associated with
sixty-eight email addresses with no discussion of the reporters’ privilege); *Obodai v. Indeed, Inc.*,
(footnote continued on following page)

3. Foreign-Based News Entities Are Protected By the Reporters' Privilege

Nor is the fact that Respublika is a foreign-based news entity an obstacle to its assertion of the reporters' privilege. Courts have routinely recognized that foreign news entities that publish using U.S. platforms to both U.S. and international audiences, as Respublika does, enjoy First Amendment rights—including the reporters' privilege. *See, e.g., Estate of Klieman v. Palestinian Authority*, 293 F.R.D. 235, 241 (D.D.C. 2013) (adjudicating assertion of journalists' privilege by BBC when discovery sought documents related to a BBC documentary produced entirely in the United Kingdom); *Times Newspapers Ltd. v. McDonnell Douglas Corp.*, 387 F. Supp. 189, 192 (C.D. Cal. 1974) (holding that the First Amendment protected the free speech rights of an English newspaper published in England for English readers); *United States v. James*, 663 F. Supp. 2d 1018, 1020 (W.D. Wash. 2009) (foreign media organizations have a First Amendment right of access to court documents); *United States v. Ferris*, No. CR-09-0037-LRS, 2009 WL 3672072, 37 Med. L. Rptr. 2564, at *2-*3 (E.D. Wash. Nov. 4, 2009) (rejecting argument that Canadian Broadcasting Corporation, as a "foreign entity," could not assert First Amendment and common law access rights); *Mireskandari v. Daily Mail & General Trust PLC*, C.D. Cal., No. CV-12-02943 MMM (SSx) (Oct. 8, 2013) (summarizing authorities) (attached as Ex. 1 to Respublika's Notice of Lodging of Unreported Authority filed concurrently herewith).

The application of the privilege is especially appropriate where the party seeking the information is the plaintiff who has chosen the U.S. courts as the venue in which to adjudicate its claims. *See Underwager v. Channel 9 Australia*, 69 F.3d 361, 365 (9th Cir. 1995) (applying First Amendment protections to a foreign defamation defendant where the plaintiff sought "to use our

(footnote continued from preceding page)

No. 13-80027-MISC EMC (KAW), 2013 WL 1191267, at *1 (N.D. Cal. Mar. 21, 2013) (addressing subpoena for subscriber and IP address information for the plaintiffs in a copyright infringement action, with no discussion of the reporters' privilege); *Sams v. Yahoo!, Inc.*, No. CV-10-5897-JF HRL, 2011 WL 1884633, at *7 (N.D. Cal. May 18, 2011) *aff'd*, 713 F.3d 1175 (9th Cir. 2013) (addressing whether the disclosure of information by Yahoo! was actionable under the Stored Communications Act, 18 U.S.C. §§ 2701, *et seq.*, with no discussion of the reporters' privilege).

1 courts to deny the privilege of free speech to a visitor to the United States, legally within the
2 country”).

3 Foreign entities must have access to the privilege because the privilege protects not only
4 their right to publish, but also the right of U.S. audiences to receive their content. *Shoen I*, 5 F.3d at
5 1292 (explaining that the purpose of the privilege is “in ensuring the free flow of information to the
6 public”). *See also United States v. 18 Packages of Magazines*, 238 F. Supp. 846, 847-48 (N.D. Cal.
7 1964) (“The [First Amendment] rights of readers are not to be curtailed because of the
8 geographical origin of printed materials”). As the Ninth Circuit explained in *Burse*: “The First
9 Amendment interests in this case are not confined to the personal rights of [the journalists].
10 Although their rights do not rest lightly in the balance, far weightier than they are the public
11 interests in First Amendment freedoms that stand or fall with the rights that these witnesses
12 advance for themselves. Freedom of the press was not guaranteed solely to shield persons engaged
13 in newspaper work from unwarranted governmental harassment. The larger purpose was to protect
14 public access to information.” *Burse*, 466 F.2d at 1083-84.

15 **4. The Motion to Compel Must be Denied Because Kazakhstan Cannot**
16 **Meet its Burden of Demonstrating a Sufficiently Compelling Need For**
17 **the Information Sought in the Subpoena**

18 “Once the privilege is properly invoked, the burden shifts to the requesting party to
19 demonstrate a sufficiently compelling need for the journalist’s materials to overcome the
20 privilege.” *Shoen I*, 5 F.3d at 1296.

21 In *Shoen II*, the Ninth Circuit set forth a three-part analysis for determining whether a civil
22 litigant seeking *non-confidential* information from a journalist could overcome the privilege. In
23 such non-confidential situations, the litigant must prove that the requested material is: (1)
24 unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3)
25 clearly relevant to an important issue in the case. 48 F.3d at 416. This test “ensure[s] that
26 compelled disclosure is the exception, not the rule” and that privilege will prevail ““in all but the
27 most exceptional cases.”” *Id.* (quoting *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981)). *See*
28 *also Harbert v. Priebe*, 466 F. Supp. 2d 1214, 1217 (N.D. Cal. 2006) (“*Shoen II* imposes a high

1 hurdle against compelled discovery from third party journalists.”).

2 The relevance factor is demanding. A showing of actual relevance is required; “potential
3 relevance will not suffice.” *Shoen II*, 48 F.3d at 416. Moreover, the evidence sought must be
4 relevant to a central issue in the litigation; relevance to a collateral issue will not suffice. *See id.* at
5 418. Thus, in *Shoen II*, the privilege was not overcome where the information was sought for
6 impeachment purposes that, although arguably relevant to the parties’ claims, were not centrally so.
7 *Id.*

8 The Ninth Circuit has not yet had the opportunity to set forth a test for the compelled
9 disclosure of unpublished, *confidential* information, like the kind Kazakhstan seeks here. In *Shoen*
10 *II*, however, the court cited with approval the conjunctive test adopted by the Second Circuit
11 requiring “a clear and specific showing that the information is: [(1)] highly material and relevant,
12 necessary or critical to the maintenance of the claim, and [(2)] not obtainable from other available
13 sources.” *Shoen II*, 48 F.3d at 416 (citing *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5, 7
14 (2d Cir. 1982), *cert denied*, 459 U.S. 909 (1982)). *Accord Condit v. Nat’l Enquirer, Inc.*, 289 F.
15 Supp. 2d 1175, 1177 (E.D. Cal. 2003). The Ninth Circuit also cited with approval the D.C.
16 Circuit’s requirement that the information sought be “critical to” the requesting party’s case. *Shoen*
17 *II*, 48 F.3d at 416 (citing and quoting *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981)).

18 Under any test, the party seeking the information must try to get it from the journalist last—
19 after all other methods of obtaining the information have failed. “[C]ompelled disclosure from a
20 journalist must be a ‘last resort after pursuit of other opportunities has failed.’” *Shoen I*, 5 F.3d at
21 1297 (quoting *Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir. 1974)).

22 **a. The Information Sought By Kazakhstan is Not Highly Material**
23 **and Relevant, Necessary or Critical to the Maintenance of its**
24 **CFAA Claim**

25 Kazakhstan’s subpoena fails the relevance test. Kazakhstan has not carried its burden of
26 demonstrating that the information it seeks is “highly material and relevant, necessary or critical to
27 the maintenance of its claim.” The subpoena does not seek the identifying information of persons
28 who violated the CFAA. Rather, Kazakhstan seeks the identifying information of persons who,

1 exercising their First Amendment rights, simply republished information that was already publicly
2 available. Kazakhstan’s relevance argument is based on its simple speculation that Respublika,
3 because of its publishing activity, must have somehow been involved in the alleged hacking. But
4 that is a guess without any evidence to support it. A more plausible explanation (and one supported
5 by the evidence) is that Respublika obtained the records through the public kazaword website, on
6 which the records were indexed for over five months before the “Initial Facebook Posts” that are
7 the subject of this subpoena were published.

8 The subpoena thus seeks information that has only a remote potential of being relevant.
9 Indeed, it is far more likely that most of the information will not be relevant at all. As Kazakhstan
10 explains, it hopes that it will find a match between the IP addresses that it guesses might possibly
11 identify those who allegedly “hacked” into its email accounts and those who posted articles to
12 Facebook. But if there is no match, Kazakhstan will have obtained highly sensitive information that
13 is of no relevance to its claim and that it can use as a tool for oppression.

14 A party’s speculation that the press might have obtained information illegally is not, and
15 cannot be, sufficient to surmount the protections of the reporters’ privilege. This is exactly the kind
16 of “potentially” relevant evidence the Ninth Circuit cautioned against in *Shoen I*. This is especially
17 true, as here, where that information was publicly available for months before the journalist
18 republished it. Heeding this caution, the court in *Harbert v. Priebe*, 466 F. Supp. 2d 1214 (N.D.
19 Cal. 2006), denied a plaintiff’s motion to compel. In *Harbert*, an arrestee sued the police claiming
20 that they disclosed his confidential criminal history, which was then published in a newspaper. The
21 plaintiff’s expert surmised that the only way the newspaper could have obtained the information
22 was from the police and asserted that a subpoena seeking the newspaper’s notes was necessary to
23 confirm his suspicion. *Id.* at 1216. The court ruled that “Plaintiffs’ mere belief that Defendants
24 released Plaintiffs’ street address and other information to the media is not sufficient to show that
25 the journalists’ records are ‘clearly relevant’ to an important issue in the case.” *Id.* This was
26 especially true because, just as here, there was an alternative that was at least as plausible—*i.e.*, the
27

1 newspaper could have obtained the plaintiffs’ records from court files even though the records had
2 supposedly been expunged. *Id.*

3 The second category of documents requested is especially suspect. That category seeks the
4 account registration information of the users of the Facebook accounts “who removed the Initial
5 Facebook Posts.” This request is strikingly similar to the one Judge Pitman found to carry only a
6 slim chance of obtaining useful information.

7 Moreover, Kazakhstan only explains why IP addresses will be useful. It does not explain
8 the relevance of the other information it seeks—names, email addresses, and MAC addresses—
9 based on its current evidentiary needs. It also does not explain why it needs the account
10 information for Respublika’s Facebook page as a whole (category 1), rather than only account
11 information for those who created the suspect posts (category 3). Thus, it is seeking the identities
12 of its chief critics on the prospect that, in the future, it will connect those persons to the
13 wrongdoing it has alleged.

14 Even so, Kazakhstan’s focus on IP addresses is unavailing for two more reasons.

15 First, Kazakhstan has not even attempted to show that it has the IP addresses of those who
16 committed the alleged “hacking.” Its only evidence in this respect is a single, carefully worded
17 sentence in its memorandum citing the identical sentence in an attorney declaration: “Plaintiff has
18 obtained from Internet Service Providers the IP addresses of computers that were *used*, without
19 authorization, to access various hacked accounts during the relevant time periods.” Plaintiff’s
20 Memorandum of Points and Authorities in Support of Mot. to Compel Compliance with Subpoena
21 (“Kazakhstan’s MPA”), ECF No. 7, at 2:9-11 (citing Semmelman Decl., ¶ 3.) (emphasis added).
22 But as set forth above, unauthorized *use* does not give rise to a CFAA violation.¹² *See Nosal*, 676
23 F.3d at 863; *Valle*, 807 F.3d at 527. As such, proof that some unauthorized use occurred is not
24 relevant to establish a CFAA claim.

25 _____
26 ¹² As stated above, Kazakhstan must prove more than “unauthorized use” of a computer to prove a
27 CFAA violation. It must prove unauthorized *access*. Kazakhstan’s single sentence of proof thus
28 does not even properly track the legal requirements of its claim. *See supra*, note 7.

1 But even so, Kazakhstan presents no forensic evidence to prove, or even suggest, that the IP
2 addresses it has obtained are associated with the computers that were used for the alleged
3 “hacking.” Kazakhstan does not explain how it has linked these IP addresses with the alleged hack,
4 or how—or even *if*—it determined that they are associated with computers that were used “without
5 authorization.” Even the single sentence of proof, taken at face value, says only that those IP
6 addresses were used to access the hacked accounts “during the relevant time periods.”
7 Kazakhstan’s summary assertion is not nearly enough to carry its burden of proving that
8 Respublika’s identifying information is highly material and relevant, necessary, or critical to the
9 maintenance of its claim.

10 Second, IP addresses are of limited use in identifying a particular individual. Kazakhstan’s
11 statement that IP addresses identify an individual computer is incorrect. Rather, they at most
12 identify a connection point to the Internet and will be shared by any computer that uses the same
13 connection point at a particular time. Thus, Internet users accessing the Internet from the same
14 library, café, or university might have the same IP address at that point in time. And a particular
15 computer will be assigned a different, non-unique IP address each time it connects to the Internet
16 using a different Internet connection or from a different location. Moreover, IP addresses for a
17 single connection point can—and do—change frequently, transparently, and without any notice to
18 the user. A user may thus connect to the Internet and be assigned a certain IP address one day and
19 then connect to the Internet again the next day and be assigned a different IP address, even if they
20 used the same Wi-Fi connection on both day. Declaration of Nicholas Weaver, Ph.D., in Support of
21 Opp. to Mot. to Compel (“Weaver Decl.”), ¶¶ 6-15.

22 Therefore, Kazakhstan’s statement that “[a] match between any of those IP addresses and
23 an IP address produced in response to the Subpoena would constitute forensic evidence that the
24 computer with that IP address was used in the hacking” is simply incorrect. That two users
25 accessed the Internet through the same router *may possibly* prove relevant. It also may yield a false
26 positive if the IP address is one shared by numerous people, such as a large university or an open
27 Wi-Fi connection in a public place. Either way, the potential for an IP address match does not
28

1 provide the level of certainty of relevance required here.

2 Although IP addresses are not particularly useful in identifying individual computers—
3 especially if Kazakhstan has not also obtained the corresponding timestamps¹³—they are
4 unfortunately useful in launching cyber attacks and other harassment. For example, if a person’s IP
5 address doesn’t change, then the IP address can be used to target that individual with malware.
6 Weaver Decl., ¶ 17. In addition, an IP address may reveal the connection point’s geographic
7 location, thus endangering a person who for their own safety must keep their location unknown to
8 Kazakhstan. Weaver Decl., ¶ 8. Moreover, Kazakhstan’s largest telecommunications provider—
9 which is government-controlled and which provides all of Kazakhstan’s Internet service—recently
10 announced that under a new Kazakhstan law, all in-country Internet users will be required to install
11 a state-issued root certificate. This certificate will allow the Kazakhstan government to easily
12 manipulate the network traffic of all Internet users in Kazakhstan, eavesdrop on what would
13 otherwise be secure communications, and deliver malware in the guise of legitimate software.
14 Weaver Decl., ¶¶ 24-27 & Ex. D.

15 Even if IP addresses were a sufficiently accurate matching tool, the subpoena seeks far
16 more than just *matching* IP addresses. It seeks information related to *all* of the IP addresses
17 associated with Respublika’s Facebook page, not merely the IP addresses that match the ones it has
18 already purportedly identified as being used by the wrongdoers. Every other IP address, and the
19 registration information related to it, will in Kazakhstan’s own reasoning, be irrelevant. And not
20 only is this information irrelevant, but it is highly sensitive: the overbroad requested discovery will
21 provide Kazakhstan with the IP addresses and identifying information of individuals who were
22 exercising their fundamental civil liberties. Correspondingly, it will provide Kazakhstan with a
23 means to chill its critics.

24 Lastly, to the extent Kazakhstan seeks information not to identify defendants but to instead
25 resume enforcing the Preliminary Injunction against Respublika, a non-party, the subpoena relates

26 ¹³ Kazakhstan’s single sentence of proof gives no indication that Kazakhstan obtained the relevant
27 timestamps. *See* Kazakhstan’s MPA, ECF No. 7, at 2:9-11.

1 only to collateral matters and not centrally to “the maintenance of the claim.”

2 Kazakhstan thus cannot demonstrate that the subpoena seeks information that is “highly
3 material and relevant, necessary or critical to the maintenance of the claim.”

4 **b. Kazakhstan Has Failed To Establish That it Exhausted**
5 **Alternative Sources for the Information Sought**

6 Kazakhstan has also presented no evidence to carry its burden of proving that it has made
7 efforts to obtain identifying information of the alleged hackers from others sources. It is known that
8 Kazakhstan is in the process of conducting discovery against other persons. But the reporters’
9 privilege requires that those efforts be completed before the information is sought from journalists.
10 Journalists should be the last resort for the information—only if, and after, it cannot be obtained
11 from other sources. *See Shoen I*, 5 F.3d at 1297.

12 **B. The Subpoena Must Be Quashed To Protect Respublika and Others From**
13 **Oppression, Undue Burden, Intimidation, and Harassment By Kazakhstan**

14 **1. This Court Has a Duty to Protect Respublika From Undue Burden and**
15 **Has the Authority to Stay or Narrow the Scope of the Deposition**

16 The subpoena issued to Facebook by Kazakhstan seeks highly sensitive confidential
17 information about the identities and locations (obtainable through IP addresses) of the Respublika
18 staff and associates who edit the Respublika Facebook page. The disclosure of this information will
19 subject these persons—many of whose associations with Respublika are unknown to Kazakhstan—
20 to abuse and harassment.

21 The Court must exercise its power under FRCP 26(c) to issue “an order to protect a party or
22 person from annoyance, embarrassment, oppression, or undue burden or expense,” and its duty
23 under FRCP 45(d)(1) to protect a person to whom discovery is targeted from undue burden. Under
24 FRCP 45(d)(3)(A)(iv), the Court is *required* to quash or modify a subpoena that subjects a person
25 to undue burden. The alternative to quashing or modifying a burdensome subpoena is the
26 imposition of specific conditions on the ordered production. But this alternative is not available
27 unless the serving party “shows a substantial need for the testimony or material that cannot be
28 otherwise met without undue hardship.” FRCP 45(d)(3)(C)(i). A court must utilize its power to

1 balance the interests of the litigants and the judicial system with the privacy and other interests of
2 litigants and third parties. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984); *Zwack v.*
3 *Kraus Bros. & Co.*, 237 F.2d 255, 260 (2d Cir. 1956).¹⁴

4 **2. The Prospect That the Requested Discovery Will Be Both Oppressive**
5 **and Unduly Burdensome To Respublika is High Given Kazakhstan’s**
6 **History of Harassing Respublika and its Other Critics**

7 In this case, this Court must act to ensure that the U.S. federal court system—and this
8 subpoena in particular—is not used as a further tool of abuse and intimidation by Kazakhstan’s
9 ruling regime, which has been long-known for its brutal and systemic repression of press freedoms
10 and its dedication to destroying Respublika in particular. Given Kazakhstan’s history of
11 persecution of the independent press, and Respublika in particular, the subpoena must be quashed
12 in order to protect Respublika, a non-party, from oppression and undue burden.

13 The Second Circuit has previously found that the concern for retribution by a foreign
14 government justified limitations even on party discovery to ensure that the discovery was not used
15 for oppressive purposes. In *Zwack*, the court considered the propriety of a party deposition
16 conducted as part of a trademark dispute between the owners of a liqueur distributor that had been
17 nationalized by the Hungarian government in 1948 and the U.S. distributor of the confiscated
18 firm’s products. 237 F.2d at 257-58, 260. The defendants believed that the plaintiff, John Zwack,
19 and his brother, Bela, had bribed Hungarian Communist officials and sought to depose John in this
20 regard. *Id.* at 260. The deposition was conducted, but the trial court ruled that the five questions
21 and answers on this topic could not be forwarded to the Hungarian government, “presumably
22 because of the resultant consequences to Bela Zwack who at the time was still in Hungary.” *Id.* The

23 ¹⁴ The recent amendments to Rule 26 make explicit the court’s duty to actively scrutinize and,
24 where appropriate, limit the overall scope of discovery, requiring in *all* circumstances that the
25 subjects of the requested discovery be not only relevant but also “proportional to the needs of the
26 case, considering the importance of the issues at stake in the action, the amount in controversy, the
27 parties’ relative access to relevant information, the parties’ resources, the importance of the
28 discovery in resolving the issues, and whether the burden or expense of the proposed discovery
outweighs its likely benefit.” FRCP 26(b)(1), as amended April 29, 2015, effective December 1,
2015.

1 defendant was, however, “left free to carry on investigations in Hungary as to the acts or
2 transactions to which John Zwack’s participation therein was not revealed.” *Id.* The Second
3 Circuit, in affirming, explained that the trial court could have gone even further because “the
4 interest of the witness John Zwack in the safety of his brother, Bela Zwack, in the extraordinary
5 circumstances of this case would have been sufficient to justify an order *precluding the defendant*
6 from examining John as to Bela’s participation in the alleged bribery transactions on the grounds of
7 oppression.” *Id.* (emphasis added). The Second Circuit further found that any prejudice resulting
8 from the restrictions was sufficiently mitigated by the ability of the defendant to conduct discovery
9 on that topic in Hungary. *Id.*¹⁵

10 This case presents similar “extraordinary circumstances”: the subpoena, while unlikely to
11 produce information relevant in the Main Action, will likely lead to persecution by an oppressive
12 foreign regime and endanger the safety of both Respublika personnel and their confidential,
13 journalistic sources in Kazakhstan and elsewhere. This Court must ensure that Kazakhstan does not
14 use the subpoena for the purposes of an unconstitutional and intentionally speech-chilling general
15 investigation into Respublika’s protected newsgathering and reporting activities.

16 This concern is not hypothetical. An email address obtained by Kazakhstan during this
17 litigation has been the subject of numerous phishing attempts since the disclosure to Kazakhstan
18 was made. Kazakhstan obtained the nicprivat4@gmail.com email address from Black Lotus,
19 Respublika’s website host. The email address was created by Alexander Petrushov—the brother of
20 Respublika’s founder and the co-owner and director of LLC Media-Consult—solely for the
21 purpose of communicating with Black Lotus and was not used for any other purpose or otherwise
22 disclosed. In short, no one else had this email address. Declaration of Alexander Petrushova in
23 Support of Opp. to Mot. to Compel (“A. Petrushova Decl.”), ¶¶ 3-4, 6-7, 11. After Black Lotus

24 ¹⁵ In a slightly different context, the U.S. Supreme Court has ruled that a fear of retribution founded
25 on a history of abuse was grounds for denying discovery. *NAACP v. Alabama*, 357 U.S. 449, 462-
26 63 (1958) (denying discovery upon a showing of past harassment that to prevent infringement on
27 the NAACP’s freedom of association). *See also Brock v. Local 375, Plumbers International Union*
28 *of America, AFL-CIO*, 860 F.2d 346, 350 (9th Cir. 1988); *Dole v. Service Employees Union, AFL-*
CIO, Local 280, 950 F.2d 1456, 1460-61 (9th Cir. 1991) (each applying *NAACP v. Alabama*).

1 disclosed the email address to Kazakhstan, Mr. Petrushov received several suspicious emails and
2 email attachments. The account had never before received any email. One of the emails was
3 addressed “Dear Mr. Muratbek”—apparently the sender thought they had obtained Muratbek
4 Ketebaev’s email—with an attachment that was detected as virus-infected by Mr. Petrushov’s anti-
5 virus software. A. Petrushova Decl., ¶¶ 8-10.

6 As no one other than Kazakhstan or Black Lotus had that email address, these emails were
7 likely phishing attacks by Kazakhstan. And indeed, Kazakhstan is a known client of Hacking
8 Team, an information technology company that develops and sells malware with surveillance
9 capabilities that could be sent via email attachments.¹⁶ See Weaver Decl., ¶¶ 18, 21, & Ex. C.

10 This was just the latest effort by Kazakhstan to persecute Respublika. Kazakhstan’s efforts
11 to silence Respublika and other independent news outlets are well known to the U.S. State
12 Department¹⁷ and the international human rights community.¹⁸ Since 2002, Kazakhstan has
13 engaged in a campaign to harass and intimidate individual Respublika journalists, or those who it

14 _____
15 ¹⁶ Hacking Team also sells malicious code that allows a country to target certain IP addresses with
malware. Weaver Decl., ¶ 18.

16 ¹⁷ See RJN, Ex. 18 (2014 State Department Human Rights Report for Kazakhstan) (listing
17 “restrictions on freedom of speech, press, assembly, religion, and association” as one of the “most
18 significant human rights problems” in the country and documenting the pervasive harassment and
19 intimidation campaigns waged by the Kazakhstan government against the press: “the government
20 limited freedom of expression and exerted influence on the media through a variety of means,
including laws, harassment, licensing regulations, internet restrictions, and criminal and
administrative charges”); see generally *id.*, Exs. 6-18 (2003-2014 State Department Human Rights
Reports for Kazakhstan).

21 ¹⁸ See, e.g., RJN, Ex. 19 (European Parliament, 13 February 2003 Resolution on the Human Rights
22 in Kazakhstan and Central Asia); *id.*, Ex. 20 (European Parliament, Resolution of 15 March 2012
23 on Kazakhstan); *id.*, Ex. 21 (European Parliament, 17 April 2013 Resolution on the Human Rights
24 Situation in Kazakhstan); *id.*, Ex. 22 (European Parliament Report, “Kazakhstan: human rights
25 situation” (Feb. 2015)); *id.*, Ex. 23 (European Union, OSCE Permanent Council Nr 901, Vienna,
26 “statement on opposition activities in Kazakhstan” (Feb. 9, 2012)). See also Greene Decl., Ex. 16
27 (Joanna Lillis, “Kazakhstan: Libel Trial Rekindles Fears of Media Muzzling” *EurasiaNet* (Jul. 1,
2015)) (“Respublika’s demise occurred amid a sweeping, internationally-condemned media
28 crackdown that left only a handful of independent outlets in business.”); *id.*, Ex. 12 (Joanna Lillis,
“Kazakhstan: More Media Silenced As High-Stakes Feud Continues,” *EurasiaNet* (Nov. 9, 2007));
id., Ex. 13 (Joanna Lillis, “Kazakhstan: Are OSCE Duties Exerting Positive Influence on Astana?,”
EurasiaNet (Feb. 10, 2010)); *id.*, Ex. 6 (Human Rights Watch, “World Report 2015: Kazakhstan”).

1 believes to be Respublika journalists.¹⁹ Kazakhstan has also harassed Respublika's printers,²⁰
2 leaving printing houses wary to print Respublika's newspaper for fear of retribution from
3 authorities.²¹ I. Petrushova Decl., ¶ 29.

4 Respublika's website has also been subject to cyber attacks following the publication of
5 comments critical of the government.²² These distributed denial-of-service attacks ("DDoS")—
6 which are aimed at shutting down the website and thereby preventing Respublika from distributing
7 news—began in March 2009 and continue to this day. I. Petrushova Decl., ¶¶ 53-54. As a result,
8 Respublika has had to seek out the services of a web hosting company that specializes in protecting
9 websites against these attacks. A. Petrushova Decl., ¶¶ 4-5.

10 Moreover, as discussed above and in the Declaration of Nicholas Weaver, Ph.D.,
11 Kazakhstan's extraordinary plan to require a root certificate on all Internet connected computers in
12

13 ¹⁹ The Declaration of Irina Petrushova details a more than a decade-long history of intimidation
14 campaigns and physical and legal persecution by Kazakhstan against Respublika and those
15 associated with it. *See* I. Petrushova Decl., ¶¶ 21-52. Kazakhstan's persecution of Respublika has
16 also been documented by governmental agencies, non-profits, and the mainstream news. *See, e.g.*,
17 RJN, Exs. 6–18 (2003-2014 State Department Human Rights Reports for Kazakhstan); Greene
18 Decl., Ex. 4 (CPJ Alert, "Kazakh court shuts down another critical newspaper" (Feb. 25, 2014))
19 ("In late 2012, Kazakh courts ordered dozens of news outlets and several broadcasters to shut down
20 on accusations of extremism, and in early 2013 banned reporters of the shuttered *Respublika*
21 newspaper from practicing journalism altogether."); *id.*, Ex. 3, (CPJ Alert, "Embattled Respublika
22 journalists targeted in Kazakhstan" (Feb. 6, 2013)); *id.*, Ex. 17 (Michael Wines, "THE
23 SATURDAY PROFILE; Bruised, but Still Jabbing Kazakh Heavyweights," *New York Times* (July
24 13, 2002)); *id.*, Ex. 18 (Luke Harding, "Kazakhstan cracks down on press freedom on eve of
25 leading OSCE," *Guardian* (Dec. 29, 2009)). *See also id.*, Ex. 11 (World Association of
26 Newspapers and News Publishers, Press Release, "WAN-IFRA Condemns Press Crackdown in
27 Kazakhstan" (Mar. 23, 2010)).

28 ²⁰ *See, e.g.*, Greene Decl., Ex. 14 (Joanna Lillis, "Kazakhstan: The News Weekly That Won't Be
Silenced," *EurasiaNet* (Mar. 9, 2011)) ("For the last 18 months Respublika has been unable to find
a printer to take on the job of publishing it."); *id.*, Ex. 2 (CPJ Report, "After attack, Kazakhstan
publisher goes missing" (Apr. 1, 2011)) (reporting on the disappearance of Respublika's
publisher).

²¹ *See, e.g.*, RJN, Ex. 13 (2009 State Department Human Rights Report for Kazakhstan)
("According to the newspaper's management, other printing houses refused to print the newspaper
for fear of retribution from authorities. At year's end the newspaper's staff was publishing the
paper on high-speed copy machines.").

²² RJN, Ex. 13 (2009 State Department Human Rights Report for Kazakhstan).

1 the country will allow it to spy on, track, impersonate, and alter online communications in
2 Kazakhstan. Weaver Decl., ¶¶ 24-27.

3 **3. Should This Court Compel Compliance With the Subpoena, it Must**
4 **Restrict the Subpoena and Employ a Procedure To Ensure That**
5 **Kazakhstan Receives Only Information for Which it Can Prove it Has a**
6 **Substantial Need**

7 Should this court find that Kazakhstan is entitled to this discovery, it must take steps to
8 ensure that Kazakhstan receives only the information for which it has a “substantial need,” that is,
9 the account information associated with only those IP addresses that match those Kazakhstan can
10 prove were used to illegally “hack” into its computer systems.

11 As such, should the Court compel compliance with the subpoena, Respublika respectfully
12 suggest the following procedure:

13 Kazakhstan submits to the Court the IP addresses it has obtained that it associates with the
14 alleged CFAA violation along with forensic evidence that demonstrates why each IP address
15 identifies an unnamed defendant. Respublika may respond to oppose the assertion that the IP
16 addresses identify an unnamed defendant. The Court then determines which IP addresses are
17 associated with a CFAA violation. Facebook then submits to the Court the IP addresses requested
18 by the subpoena. The Court then indicates whether there are any matches between the two sets of
19 IP addresses and provides the information regarding only those matches to Kazakhstan’s attorneys,
20 with the condition that the information remain “for attorneys-eyes only.” A magistrate judge may
21 be appointed for this purpose.

22 This procedure will ensure that Kazakhstan will get only the information that is truly
23 relevant to its CFAA claims, and that Kazakhstan will not get irrelevant information associated
24 with the exercise of fundamental First Amendment rights that it could use to further chill and
25 repress its chief critics.

1 **IV. CONCLUSION**

2 For the foregoing reasons, Respublika respectfully requests that this Court deny
3 Kazakhstan's motion to compel.

4 DATED: January 15, 2016

Respectfully submitted,

5 ELECTRONIC FRONTIER FOUNDATION

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