No. 73391-5-I

COURT OF APPEALS FOR THE STATE OF WASHINGTON,
DIVISION I

THE REPUBLIC OF KAZAKHSTAN,

Respondent/Plaintiff

v.

DOES 1-100 inclusive,

Defendants

v.

LLC MEDIA-CONSULT,

Appellant/Third Party.

BRIEF OF APPELLANT LLC MEDIA-CONSULT

Andrew J. Kinstler, WSBA No. 12703
HELSELL FETTERMAN LLP
1001 Fourth Avenue, Suite 4200
Seattle, Washington 98154
(206) 292-1144
akinstler@helsell.com
Attorneys for Appellant LLC Media-Consult

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Rules

Other

I. INTRODUCTION

Respondent The Republic of Kazakhstan is widely considered to be one of the world's most repressive countries. It was the last of the Soviet republics to declare independence after the Soviet Union's breakup in 1991. At that time, Kazakhstan's Communist-era leader, Nursultan Nazarbayev, became the country's first president. A quarter-century later, he remains in power. He has been systematically cracking down on his critics, especially those in the press who dare to expose corruption in his government.

Appellant *LLC Media-Consult* (or "*ООО Медиа-Консалт*" in Russian and hereinafter "LMC") is a Russian limited liability company that operates the online version of Respublika, a Russian-language newspaper based in Kazakhstan. Respublika has worked hard to shine a light on public corruption, financial scandals, and human rights violations in Kazakhstan. In response, Respublika's editors and personnel have endured a sustained campaign of violence and death threats to oppress and intimidate them. Some hide their involvement with the newspaper to protect themselves and their families. After years of government crack-downs, other Kazakh opposition newspapers have stopped publishing, and Respublika is now one of only a few remaining in-country sources of such news and information.

Earlier this year, Respublika published an article about a Kazakh politician; the article was critical of the government and contained copies

of email exchanges with government officials that were allegedly attorney-client privileged. These emails had also been posted anonymously on a website unrelated to Respublika. Kazakhstan filed a federal lawsuit in the Southern District of New York against 100 "Doe" defendants who allegedly stole and published those emails. Kazakhstan also filed a lawsuit in California state court against the same 100 "Doe" defendants for the same alleged activities. No actual defendants were named in either case. Kazakhstan also initiated a limited action in King County Superior Court to serve a subpoena duces tecum from the California case on eNom, Inc. That company is an Internet domain registrar in Kirkland, Washington that has worked with Respublika for years to keep its main domain registered. The subpoena duces tecum seeks, among other things, the identities and locations of Respublika individuals and the location of the newspaper's hosting server—the online "printing press." Kazakhstan freely admits that the purpose of that subpoena is to determine who turned over those emails to Respublika.

LMC moved to quash Kazakhstan's subpoena duces tecum. In oral argument on that motion, Kazakhstan revealed that it has served a number of subpoenas duces tecum on other non-news partners of Respublika in America without notice to the newspaper. King County Superior Court Judge Mariane C. Spearman heard oral argument on the motion and entered

an Order Denying Third Party LLC Media-Consult's Motion to Quash ("Order"). The Order affirmatively directed eNom, Inc. to comply with all parts of the subpoena duces tecum that Kazakhstan did not withdraw at oral argument.

The Washington court system is not a tool of oppression. Nor can our courts be misused by the powerful, especially a repressive foreign nation, to chill free speech and stamp out political dissent. This Court should reverse the trial court's Order for four reasons. First, as a threshold matter, Kazakhstan is engaging in improper claim-spitting by suing these same "Doe" defendants in state and federal court, so this Court need not waste judicial resources adjudicating Kazakhstan's discovery request. Second, Kazakhstan's subpoena duces tecum is designed to identify a confidential news source in violation of Washington's Shield Law, RCW 5.68.010 (Appendix A). Third, given Kazakhstan's campaign of violence against Respublika, this type of discovery is fundamentally abusive under our system of justice and should not be tolerated by this Court. Finally, article I, sections 1 and 5 of the Washington Constitution do not permit Washington courts to enforce Kazakhstan's abusive discovery targeting the press.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied LMC's motion to quash Kazakhstan's subpoena duces tecum in its April 30, 2015, order.

2. The trial court erred by ordering third party company eNom, Inc. to comply with Kazakhstan's subpoena duces tecum in its April 30, 2015, order.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Should this Court adjudicate Kazakhstan's discovery request, when Kazakhstan is engaging in improper claim-splitting by litigating this same set of facts in a lawsuit filed in federal court against the same "Doe" defendants? (Assignments of Error 1 - 2.)

2. Whether Washington's Shield Law, RCW 5.68.010, bars the trial court from forcing a Washington domain registrar working with a foreign newspaper to comply with Kazakhstan's subpoena duces tecum, where Kazakhstan seeks to identify a confidential news source, names and contact information about the newspaper's journalists, and the physical location of the newspaper's online server? (Assignments of Error 1 - 2.)

3. Whether the Washington rules of discovery bar Kazakhstan's subpoena duces tecum for a newspaper's information to further oppress journalists and chill political dissent, where (1) there has been a documented campaign of violence to intimidate the newspaper; and

(2) Kazakhstan's counsel says his client believes it already has the information it seeks under the subpoena? (Assignments of Error 1 - 2.)

4. Whether article I, sections 1 and 5 of the Washington Constitution permit Washington courts to enforce Kazakhstan's abusive discovery designed to further oppress journalists and chill political dissent? (Assignments of Error 1 - 2.)

IV. STATEMENT OF THE CASE

A. Since the days of the Soviet Union, one strongman has ruled Kazakhstan, and he deals harshly with his critics.

Kazakhstan is widely considered to be one of the world's most repressive countries. Clerk's Papers (CP) at 117. After the Soviet Union's breakup in 1991, Kazakhstan was the last of the Soviet republics to declare independence. CP at 79 ¶ 7. At that time, Kazakhstan's Communist-era leader, Nursultan Nazarbayev, became the country's first president. *Id.* A quarter-century later, he remains in power. CP at 395. In late April 2015, Mr. Nazarbayev was "re-elected" for yet another five-year term with 97.7 percent of the vote, running against two token opponents. *Id.* He was also recently elevated to the role of "Leader of the Nation," which, among other things, makes him immune from prosecution forever. CP at 79 ¶ 7. It is now a criminal offense to insult him, punishable by years of imprisonment. *Id.*

Beyond the serious irregularities in Kazakhstan's "electoral" process and its unique dictator-shield laws, in the last few years Mr. Nazarbayev's government has also systematically restricted freedom of expression. CP at 113, 116. The government has brazenly cracked down on political critics, especially those in the press who dare to expose corruption. CP at 113-14. Journalists are attacked; newspapers are forced out of business. CP at 80-85 (¶¶ 10-13, 18, 20-22, 24-28, 32); CP at 94, 98-100, 102, 106-07, 113-14, 137. After years of these crack-downs, Respublika is now one of only a few remaining in-country sources of news and information about nepotism, cronyism, and other financial scandals in Kazakhstan's government. CP at 85 ¶ 30; CP at 81-85, 113, 137.

B. Respublika is a widely-acclaimed newspaper in Kazakhstan that exposes public corruption, financial scandals, and human rights violations.

Respublika is a Russian-language newspaper based in Kazakhstan. CP at 77 ¶ 3. The newspaper is published weekly and it principally covers news in the business and political establishment of Kazakhstan. CP at 77 ¶ 3. Its articles are made available on its websites, including its main website www.respublika-kaz.info. *Id.*

Irina A. Petrushova is the founder and editor-in-chief of Respublika, which she founded in 2000. *Id.* She and her brother (Alexander Petrushov) own LMC, which is a Russian limited liability company that operates the

online publication of Respublika. CP at 78 ¶ 4. LMC holds the Russian mass media license for the online version of the newspaper. *Id.* Over the years, Respublika has reported on public corruption, financial scandals, and human rights violations in Kazakhstan and around the world. CP at 78-81, 87, 89 (¶¶ 5, 9, 17, 41, 51-52). In particular, Respublika's investigative journalists have reported on nepotism, cronyism, and other financial scandals in Kazakhstan's government. CP at 79, 81 (¶¶ 9, 17).

Within two years of launching the newspaper, Respublika became a target of an aggressive intimidation campaign. CP at 79-80, 84 (¶¶ 9-11, 28). One of Respublika's printers quit after finding a human skull on his doorstep. CP at 80 ¶ 10. A funeral wreath was anonymously sent to Ms. Petrushova marking her for death. *Id.* A dog's headless body was hung from the newspaper's window-grates. CP at 80 ¶ 11. A screwdriver plunged into the decapitated dog pinned a message: "There will be no next time." *Id.* The next day, that dog's severed head appeared outside Ms. Petrushova's apartment door with a note: "There will be no last time." *Id.* The office of Respublika's editorial board was set on fire with bottles of gasoline thrown into the windows. *Id.* A few days later, the newsroom was firebombed, burning the building to the ground. *Id.* The staff relocated the office and continued publishing. *Id.* On many occasions, government

agents tried to silence Respublika journalists by threatening physical violence against their families and children. CP at 84 ¶ 28.

When the government successfully pressured printing houses to stop publishing Respublika, the newspaper was forced to self-publish on home printers. CP at 82-83 ¶ 22. Ultimately, Ms. Petrushova was forced to flee the country, and she has continued to help run Respublika from afar. CP at 77, 80-82 (¶¶ 3, 13, 17, 19).

In 2014, a server hosting one of the Respublika websites was seized in Russia, apparently at the behest of Kazakhstan's government. CP at 82, 84-85 (¶¶ 19, 29). The government has permanently blocked Respublika's main website, www.respublika-kaz.info. CP at 85-86 (¶¶ 31, 33).

C. For its online news publication, Respublika has used eNom, Inc. and its "ID Protect" privacy service to shield information about Respublika's domain registrant.

When someone registers an Internet domain name, he or she must post information, including a name, physical address, telephone number, and an email address, to a global Internet database called "WHOIS." CP at 34-35 (¶¶ 4, 9). If that person wishes to keep private his or her information (and other people involved in the website's maintenance, billing, and technical operations) from anyone running a simple web search on the WHOIS database, he or she can use a domain privacy service offered by

domain registrars, which replaces that information with the information of a forwarding service. CP at 34 ¶ 4.

Washington is the home of at least one company that protects privacy on the Internet. CP at 1, 6, 12; CP at 34 ¶ 4; CP at 86 ¶ 35. eNom, Inc. is a domain registration company in Kirkland, Washington, that has kept Respublika's main domain, www.respublika-kaz.info, registered for years. CP at 86, 88 (¶¶ 35, 45). Respublika used eNom's privacy service called "ID Protect" to shield personal, identifying information about Respublika's registrant from disclosure. CP at 4, 10, 16; CP at 34 ¶ 4; CP at 88-89 (¶¶ 45-50). Respublika's registrant is a person, not a corporation. CP at 88 ¶ 46.

D. Kazakhstan filed suit in California exclusively against "Doe" defendants and issued an out-of-state subpoena in Washington to eNom, Inc. about Respublika.

Earlier this year, Respublika published an article about a Kazakh politician; the article was critical of the government and contained copies of email exchanges with government officials that were allegedly attorney-client privileged.[1] Report of Proceedings (RP) at 6:25 – 7:15, 12:24 – 13:5.

[1] In addition to filing suit in California state court against 100 "Doe" defendants for allegedly stealing and disseminating Kazakhstan's government emails, CP at 50-57, Kazakhstan has also filed a federal lawsuit in the Southern District of New York against 100 "Doe" defendants for allegedly stealing and disseminating government emails, on or about January 21, 2015, in violation of 18 U.S.C. § 1030. *Compare* CP at 50-57, 202, *with* CP at 192-93, 196, *and* Appendix B (federal complaint). That case is captioned *The Republic of Kazakhstan v. Does 1-100 Inclusive*, Case No. 1:15-cv-01900-ER. CP at 192; Appendix B (federal complaint).

Those emails had also been posted on the website https://kazaword.wordpress.com, which neither LMC nor Respublika own or operate. RP at 7:1-15, 12:24 – 13:5; CP at 86 ¶ 36; CP at 203 ¶ 4.

On February 20, 2015, Kazakhstan filed a lawsuit in the Superior Court of Santa Clara County, California. CP at 50-57. In just five conclusory factual paragraphs, Kazakhstan alleges that there was a theft of emails from its government computers in violation of California and U.S. federal law involving 100 "Doe" defendants. CP at 51-52 (¶¶ 6-10). The alleged theft occurred on or about January 21, 2015. CP at 202 ¶ 4. That lawsuit is unopposed, in the sense that Kazakhstan did not name any actual defendants. CP at 50-51 ¶ 3. The complaint specifically alleges that one or more "Doe" defendants posted the subject emails on the website

---

At Kazakhstan's request, U.S. District Judge Edgardo Ramos issued an order that enjoins several broad, undefined classes of individuals with any connection to the unknown "Doe" defendants from "using, disclosing, disseminating, posting, displaying, sharing, distributing, hosting, copying, viewing, accessing, providing access to or making available to anyone, in any matter whatsoever" the emails allegedly taken from the Kazakh government and published. CP at 192-93, 200-01.

It is unclear exactly whom that order enjoins from republishing (or even viewing or accessing) those emails. *See* CP at 200. If that order were to apply to LMC or Respublika, then it would likely constitute an unconstitutional prior restraint under the First Amendment and article I, section 5 of the Washington Constitution. *See New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S. Ct. 2140, 29 L Ed. 2d 822 (1973); *State v. Coe*, 101 Wn.2d 364, 374-75, 679 P.2d 353 (1984). Nevertheless, out of an abundance of caution, no copies of the newspaper article containing those emails are included in the record of this appeal. To be clear, Kazakhstan is the reason why this Court is not permitted even to view the newspaper article at issue. *See* CP at 192-93. At oral argument below, both counsel discussed the fact that Respublika published an article containing copies of government emails, RP at 6:25 – 7:15, 12:24 – 13:5, but this Court can also take judicial notice of that fact. RCW 5.68.010(4).

https://kazaword.wordpress.com, RP at 12:24 – 13:1, CP at 51-52 (¶¶ 3, 7), which, again, neither LMC nor Respublika own or operate. CP at 86 ¶ 36.

On March 4, 2015, Kazakhstan initiated this action in King County Superior Court in order to serve an out-of-state subpoena duces tecum on eNom, Inc., effectively requesting all information known to eNom about Respublika and its journalists. CP at 1, 5-6, 12; CP at 86 ¶ 35. The text of the subpoena duces tecum is quoted below. CP at 3-4, 10, 16. Though Kazakhstan's counsel withdrew certain parts of the subpoena (indicated with the strike-through font), CP at 412, the records requested (and ultimately ordered to be produced) are extensive:

> 1. Documents sufficient to show all details of all current and former registrants, including any underlying registrants using a privacy or proxy service, of the Domain Name including, but not limited to, his or her email address, physical address, phone number, ~~and billing information,~~ including any updated or revised details since registration.
>
> 2. Documents sufficient to show the dates, times and corresponding IP Addresses and/or Mac [*sic*] Addresses from which the Domain Name was registered, created or modified.
>
> ~~3. All personally identifying information Related to any Person who purchased, used, or implemented Your "ID Protect" program in connection with the registration, purchase, or use of the Domain Name.~~
>
> ~~4. All personally identifying information Related to any Person who purchased, used or implemented the Whois Privacy Protection Service in connection with the registration, purchase, or use of the Domain Name.~~

> ~~5. Documents sufficient to show all contact information for Whois Privacy Protection Service and all employees of Whois Privacy Protection Service including, but not limited to, Your contact person at Whois Privacy Protection Service.~~

Compare CP at 3-4, 10, 16 (Subpoena Text), *with* CP at 411-12 (Trial Court Order).

The subpoena defines the term "Domain Name" as Respublika's main website, www.respublika-kaz.info. CP at 3, 9, 15; CP at 85 ¶ 31. (That is *not* the website that Kazakhstan named in its complaint. CP at 52 ¶ 7.) The records requested are for documents showing all details regarding individuals connected to Respublika's website, including, but not limited to, their names, addresses, telephone numbers, email addresses, Internet Protocol (IP) addresses, and Media Access Control (MAC) addresses. CP at 3-4, 10, 16. Once an IP address is determined, it can be used to discover either a server's specific geographical location or its hosting provider, which also has a specific geographical location. CP at 34 ¶ 5. Kazakhstan also specifically sought information on Respublika's journalists that eNom's "ID Protect" service kept confidential. CP at 4, 10, 16 (requesting "[a]ll personally identifying information Related to any Person who purchased, used, or implemented Your "ID Protect" program in connection with the registration, purchase, or use of the Domain Name").

E. Kazakhstan filed a virtually-identical lawsuit in federal court in the Southern District of New York.

In addition to filing suit in California, CP at 50-57, Kazakhstan has also filed a federal lawsuit in the Southern District of New York, also against 100 "Doe" defendants for allegedly stealing and disseminating Kazakh government emails on or about January 21, 2015, and also in violation of 18 U.S.C. § 1030. *Compare* CP at 50-57, 202, *with* CP at 192-93, 196, *and* Appendix B ¶¶ 3-4, 8-16 (federal complaint). That federal case is captioned *The Republic of Kazakhstan v. Does 1-100 Inclusive*, Case No. 1:15-cv-01900-ER. CP at 192; Appendix B (federal complaint).

Kazakhstan did not file a copy of its federal complaint in these proceedings, but it is appended to this brief as Appendix B.[2] When Kazakhstan filed its opposition to the motion to quash, Kazakhstan revealed the existence of that federal suit by filing in this action a federal order that enjoins several broad, undefined classes of individuals with any connection to the unknown "Doe" defendants from "using, disclosing, disseminating, posting, displaying, sharing, distributing, hosting, copying, viewing, accessing, providing access to or making available to anyone, in any matter

[2] The copy of the federal complaint appended to this brief was downloaded from PACER. The complaint can also be obtained, among other places, for free at the website http://www.plainsite.org/dockets/2knl0efaf/new-york-southern-district-court/the-republic-of-kazakhstan-v-does-1100/. Neither LMC nor Respublika are defendants in the federal case. LMC has ordered a certified copy of that federal complaint and can formally supplement the appellate record at the Court's request.

whatsoever" the emails allegedly taken from the Kazakh government and disseminated and published. CP at 188, 192-93, 200-01.

F. Without notice to Respublika, Kazakhstan issued a number of subpoenas duces tecum to try to identify the confidential source of Respublika's newspaper article.

LMC's motion to quash was heard by the trial court on April 30, 2015. RP at 1. At that hearing, Kazakhstan's counsel Robert Phillips told the trial court that his client already has a list of IP addresses that accessed government servers at the time of the alleged hacking, and he wants the IP addresses for Respublika that eNom, Inc. has on file to determine if they match (and thus were involved in the alleged hacking). RP at 15:7 – 16:12, 17:3-5.

He also stated that this subpoena is one of several that Kazakhstan has issued to third parties in an effort *to identify the alleged hackers who turned over the government emails to Respublika*:

> The complaint in California -- the purpose of the complaint in California is very clear, very simple. **We're trying to identify the people responsible for this breach.**
>
> ....
>
> As part of that [California state] case, this is not the only subpoena that's been issued. **We have issued several subpoenas as part of an overall investigation to see if we can't uncover who the hackers are.** And that's difficult, because computer hackers are very sophisticated, and there's only so much information available, but we have subpoenaed **Google** for what are called IP addresses. Those

> are the codes that are associated with the computers that accessed the email accounts, so we have that.
>
> We have also done that to **Microsoft**, because Microsoft owns and controls hotmail [*sic*], which was also breached.
>
> We have subpoenaed **Facebook** and we have subpoenaed Respublika. **We have subpoenaed Black Lotus, which is the company that hosts the Respublika website**, and we were able to get the contact information from [for] Respublika from Black Lotus, which included Ms. Petrushova, which included --
>
> THE COURT: **So did Ms. Petrushova object to those subpoenas, the others -- from Google, Microsoft --**
>
> MR. PHILLIPS: Not that we are aware of, no.
>
> MR. KINSTLER: **Ms. Petrushova was not provided notice of any of those subpoenas.**
>
> THE COURT: I see.
>
> MR. KINSTLER: **And the Shield Law**[3] **requires notice to the news media party.**

RP at 13:6-8, 13:22 – 14:20 (emphasis added).

Kazakhstan has repeatedly confirmed that the subpoena at issue has no purpose other than identifying the hackers who turned over the government emails to Respublika—information that "would implicate the Shield Law":

> MR. PHILLIPS: And then on the identity issue, either this individual, whoever it is, **it's either one of the people from Respublika who we already know.** It could

[3] RCW 5.68.010.

> be Ms. Petrushova. It could be her brother, Alexander Petrushova [*sic*] who she mentions in her declaration is the co-owner. It could be Ketebayev, who is her husband, who's in Poland. It could be this Valerie that showed up on the Black Lotus document.
>
> If it's any of those people -- and they don't say one way or the other in the declaration, of course -- but **if it's any of those people, then we're going to find out something that we already know.** And it's not going to add to the alleged burden or oppression or confidentiality. **If it's somebody completely different, then we want to find out who that is, just as another piece of evidence that we may or may not use.** But the important thing here is we're not asking for a source. We're not asking eNom -- and eNom wouldn't even know, but assume they did, we're not asking eNom: Tell us who was the source of an article that was published on Respublika; or tell us where the stolen emails were obtained from.
>
> We're not asking those questions. And that's why I say we're somewhat putting the cart before the horse here. **All we're asking is to identify an individual. If and when we were to take the next step and subpoena them** if we could, if they were even in the United States, which we don't know and it's probably likely that they're not -- but if they were and we were then to do some kind of compulsory process exercising the laws of the state of Washington, **saying we want to ask you questions, we want to know, "What did you publish, did it involve the stolen emails, where did you get it from," *then those questions would implicate the Shield Law*, but those questions aren't being asked *right now*.**

RP at 17:7 – 18:14 (emphasis added).

LMC's counsel explained to the trial court that it was improperly balancing the interests of the parties, especially given the extremely weak assertions by Kazakhstan's counsel's that the requested IP and MAC

address information would only reveal the country where Respublika's server is located (which LMC's expert disputes, CP at 34 ¶ 5), and the admission that Kazakhstan believes it already knows the names of journalists associated with Respublika's host server based on the results of a subpoena to Black Lotus:

> When we take the balancing -- **they say they already know, they're telling us, we already know from the Black Lotus matter** -- which I don't know anything about and I'm not a party to -- we already know the domain name, we have already been given this information.
>
> And so there is no -- when you balance the dangers and the risks and the rights here, there is no reason to put my client to the risks and dangers that are set forth in the exchange for information that they either already have or **they're saying, well, it's just going to tell us what country the [Respublika] computer was located in.**
>
> Well, then, let's not go there. Let's not give that risk. There well could be names of people who provide the financing to my client to run the newspaper that are in eNom's possession because that's who they bill. That is risky information to be provided.
>
> THE COURT: Well, I'm not going to let them. They're not going to get billing information, so that's out.
>
> MR. KINSTLER: But if the domain is registered under the name of the person who provides the financing, then it's still there. There is no good reason for this information to be provided.
>
> THE COURT: They're trying to find out who hacked the person's gmail [*sic*] account and they have the IP address, so they're trying -- **I mean, this is the reason. I mean, this is where they're going with this. It's not to, you know, persecute a news source.**

> MR. KINSTLER: **Well, that's what they're telling you.**
>
> THE COURT: **Yes, that's what they're telling me.**
>
> MR. KINSTLER: Okay. My client is telling you it's to persecute a news source, because this information was published on many other computers, out of New Zealand, other places. We're not seeing these subpoenas to independent news organizations that aren't focused on Kazakhstan. They're focused on my client and only my client; not these other sources. Why aren't they in New Zealand subpoenaing that newspaper that ran these articles? They're after my client.
>
> So that's the critical distinction. They're telling you they're just after that information, but if in fact my client has the information, then it's a confidential source.
>
> THE COURT: If your client has the information?
>
> MR. KINSTLER: Who hacked the computers.

RP at 28:11 – 30:3 (emphasis added). Without inquiry, the trial court accepted Kazakhstan's denial that it was targeting Respublika and its confidential sources. RP at 17:7 – 18:14.

G. The trial court overlooked subsection (3) of the Shield Law, which explicitly bars the trial court from enforcing a subpoena of this type against a *non-news entity* working with news media.

LMC's counsel carefully explained how the Shield Law applied not only to news media under subsection (1), but also to non-news entities that work with news media under subsection (3). RP at 27:18 – 28:2, 30:4-12. Unfortunately, the trial court eviscerated the statute's protections:

> THE COURT: **Because you're -- eNom is not a news media organization, right? So the subpoena is directed to eNom; it's not directed to Respublika.**
>
> MR. KINSTLER: Correct. And under -- and if we only had subsection (1), then the Shield Law would do us no good, but we have subsection (3) which says that you can't get through a detour what you could -- what you can't get from a direct subpoena to the news organization. You cannot get it --
>
> THE COURT: Okay. I know. **You have made an argument. I disagree with you on that.**

RP at 27:18 – 28:2 (emphasis added).

A few minutes later, the trial court engaged in the following colloquy with LMC's counsel:

> THE COURT: Okay. Again, they're not asking your client for any information. **That's the whole crux of the issue. They're not asking your client for any information. Your client is not eNom.**
>
> MR. KINSTLER: But they're trying to get the information they want from my client through eNom.
>
> THE COURT: Which is how we do discovery, right?
>
> MR. KINSTLER: Not when we have a statute that says you can't do it that way.

RP at 30:4-12 (emphasis added).

H. The trial court's Order will give Kazakhstan all of the records that it seeks under the subpoena duces tecum.

At oral argument below, Kazakhstan's counsel voluntarily withdrew several requests for records stated in the subpoena duces tecum. CP at 412;

RP at 18:17 – 19:14. He also offered to have the records produced be for "attorneys' eyes only." RP at 20:19-23. LMC's counsel responded by pointing out that making the records "attorneys' eyes only" was no protection at all because Kazakhstan could voluntarily dismiss its suit and thereby deprive the trial court of any jurisdiction to adjudicate violations of the Order.[4] RP at 28:2-10.

At the close of the April 30 hearing, the trial court signed Kazakhstan's proposed order, which included the following language interlineated by Kazakhstan's counsel:

> Enom [*sic*] shall produce the documents in categories 1 and 2 of the subpoena, with the exception of "billing information," by Monday May 4, 2015. Categories 3, 4, and 5 are withdrawn by plaintiff. The produced records shall be for attorneys' eyes only.

CP at 412.

On May 1, 2015, the day after the trial court entered its Order, LMC successfully moved for an emergency stay of the trial court's Order from Commissioner Neel in order to allow time for this Court to hear LMC's appeal. LMC filed both a notice of discretionary review and a notice of

[4] Further, Kazakhstan might simply direct its counsel to convey that information orally without ever disclosing any "attorneys' eyes only" records, thereby adhering to the letter, if not spirit, of the Order.

appeal. CP at 414-22. On May 26, 2015, Commissioner Neel ruled that the Order was appealable under RAP 2.2(a)(3).[5]

This appeal follows.

V. ARGUMENT

Freedom of the press is one of the cornerstones of a democracy. It is inextricably tied to the freedom of speech and other basic freedoms. When people lose the freedom of the press, they lose both the ability to know what is happening and the ability to act on that knowledge. Some news would simply not be reported without iron-clad protections in place for a confidential news source. This is especially true when a newspaper article is critical of a nation's leaders and those leaders go to great lengths to try to track down that confidential source.

"Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification [under the First Amendment]." *Branzburg v. Hayes*, 408 U.S. 665, 707-08, 92 S. Ct. 2646, 33 L. Ed. 2d (1972). After all, in America,

> [t]he press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the

[5] Under RAP 2.2(a)(3), a party may appeal from certain superior court decisions, including "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." *See also Ferguson Firm, PLLC v. Teller & Assocs., PLLC*, 178 Wn. App. 622, 628-29, 316 P.3d 509 (2013).

> Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

New York Times Co. v. United States, 403 U.S. 713, 717, 91 S. Ct. 2140, (1971) (Black, J., concurring).

This is a case of first impression. Not only is this case the first occasion to apply Washington's Shield Law—at least in our appellate courts—but it is also the first occasion to examine whether a foreign country can misuse our courts to further oppress its people, quash dissent, and chill what remains of that country's Fourth Estate. As explained herein, the facts of this case demonstrate without a doubt that the trial court erred in its decision not to quash Kazakhstan's subpoena duces tecum.

A. This Court should not waste judicial resources adjudicating Kazakhstan's discovery request because Kazakhstan is engaging in improper claim-splitting.

As a threshold matter, Kazakhstan filed virtually-identical actions in both California state court and New York federal court. *Compare* CP at 50-57 (California complaint), *with* CP at 192-193 (federal order) *and* Appendix B (federal complaint). "'Filing two separate lawsuits based on the same event—claim splitting—is precluded in Washington.'" *Ensley v. Pitcher*, 152 Wn. App. 891, 898, 222 P.3d 99 (2009) (quoting *Landry v. Luscher*, 95 Wn. App. 779, 780, 976 P.2d 1274 (1999)). It is precluded because "there is a risk of the two courts arriving at inconsistent results." *Bunch v.*

Nationwide Mut. Ins. Co., 180 Wn. App. 37, 50, 321 P.3d 266 (2014). It "would also be a waste of judicial resources." *Id.* Res judicata bars such claim splitting when the claims are based on the same cause of action. *Ensley*, 152 Wn. App. at 899. This issue is reviewed de novo. *Id.*

Like the California state lawsuit, from which this action derives, the federal lawsuit that Kazakhstan initiated is also against 100 "Doe" defendants who allegedly stole government emails on or about January 21, 2015, in violation of 18 U.S.C. § 1030. *Compare* CP at 50-57, 202 (California complaint) *and* CP at 202 (date of alleged theft), *with* CP at 192-93, 196 (federal order) *and* Appendix B ¶¶ 3-4, 8-16 (federal complaint).[6] Kazakhstan's action in Washington (not to mention California) represents an impermissible waste of our courts' judicial resources, and this Court should not tolerate it. Kazakhstan has discovery tools available in its federal lawsuit, where the federal district court has already granted Kazakhstan various measures of injunctive relief. CP at 192. Kazakhstan should not also be litigating in Washington under the guise of its California lawsuit. On the basis of res judicata alone, this Court should reverse the trial court's discovery Order and remand for dismissal of the limited Washington action.

---

[6] Though a copy of Kazakhstan's federal complaint is not in the appellate record, the highly-detailed nature of the federal court's (unopposed) preliminary injunction provides this Court with all of the information necessary to see identical allegations being made in both cases. CP at 192-93. In any event, the federal complaint is appended to this brief.

B. The trial court erred in its interpretation of Washington's Shield Law.

The U.S. Supreme Court left it to the individual states to determine how broadly to recognize a reporter's privilege. *Branzburg*, 408 U.S. at 706. Over the years, Washington courts developed a robust common-law qualified privilege. *State v. Rinaldo*, 102 Wn.2d 749, 755, 689 P.2d 392 (1984) (criminal case); *Senear v. Daily Journal-Am.*, 97 Wn.2d 148, 157, 641 P.2d 1180 (1982) (civil case). The main problem with a common-law privilege, however, was that journalists, their sources, and their non-news partners needed more predictability about which information the courts would and would not protect.[7]

Washington's Shield Law, RCW 5.68.010, solved that problem by adding to and clarifying the protection already available in this state. Now, by statute, no judge may compel the news media or their non-news partners to disclose, among other things:

---

[7] *See generally Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981) ("Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters."); *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979) ("The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis. This in turn will seriously erode the essential role played by the press in the dissemination of information and matters of interest and concern to the public."); *Reporters & Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L. J. 316, 335 (1970) ("Unless reporters and informers can predict with some certainty the likelihood that newsmen will be required to disclose names or information obtained in confidential relationships, there is a substantial possibility that many reporters and informers will be reluctant to engage in such relationships.").

(1) "[t]he identity of the source of any news or information," or

(2) "any information that would tend to identify the source where such source has a reasonable expectation of confidentiality."

RCW 5.68.010(1)(a), (3) (Appendix A). This statute provides an important bulwark to article I, section 5 of the Washington Constitution, which guarantees that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

This Court reviews de novo the application of a statute to the facts of a case. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The court's fundamental objective is to carry out the Legislature's intent. *Darkenwald v. Emp't Sec. Dep't*, ___ Wn.2d ___, ___ P.3d ___, 2015 WL 2418923, at *3 (Wash. May 21, 2015). If the meaning of a statute is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Id.* "When determining a statute's plain meaning, we consider 'the ordinary meaning of words, basic rules of grammar, and the statutory text to conclude what the legislature has provided for in the statute and related statutes.'" *Id.* (quoting *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 839, 215 P.3d 166 (2009)). The court will consider other matters like legislative history if the statute is ambiguous, that is, it remains susceptible to more than one reasonable meaning. *Darkenwald*, 2015 WL 2418923, at *3.

De novo review is proper here. The Shield Law's meaning is plain on its face and prohibits the enforcement of Kazakhstan's subpoena duces tecum.

1. The Shield Law applies to LMC, Respublika, and their journalists.

The Shield Law protects all manner of news media, including a newspaper, its journalists, and its parent company. RCW 5.68.010(5) broadly defines "news media" to mean:

> (a) **Any newspaper**, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, **or any entity that is in the regular business of news gathering and disseminating news or information to the public** by any means, including, but not limited to, **print**, broadcast, photographic, mechanical, **internet, or electronic distribution**;
>
> (b) **Any person who is or has been an employee, agent, or independent contractor** of any entity listed in (a) of this subsection, who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity; or
>
> (c) **Any parent**, subsidiary, or affiliate **of the entities** listed in (a) or (b) of this subsection to the extent that the subpoena or other compulsory process seeks news or information described in subsection (1) of this section.

RCW 5.68.010(5) (emphasis added). The Legislature placed no geographical limitations on the definition of "news media" or otherwise on the statute's application. *See* RCW 5.68.010.

LMC has a Russian news license and is the parent company of the Respublika newspaper, which publishes online and in print. CP at 77-78 (¶¶ 3-4). There can be no serious dispute that LMC, Respublika, and their journalists are all "news media" subject to this statute's protection. *See* RCW 5.68.010(5). Accordingly, they could not be compelled in Washington to disclose, for example, the identity of the source of any news or information, or any information that would even "tend to identify" the source of any news or information where there is a reasonable expectation of confidentiality. RCW 5.68.010(1)(a).

2. The Shield Law also applies to eNom, Inc., a non-news media party that has worked with the newspaper for years to keep its news website up and running.

Kazakhstan issued this subpoena dues tecum to eNom, Inc., not LMC or Respublika. But our Legislature had the foresight to stop a party from trying to circumvent the Shield Law by issuing a subpoena to non-news media (like eNom) working with news media. In pertinent part, subsection (3) of the Shield Law reads:

> (3) **The protection from compelled disclosure contained in subsection (1) of this section also applies to any**

> **subpoena issued to, or other compulsory process against, a nonnews media party** where such subpoena or process seeks records, information, or other communications relating to business transactions between such nonnews media party and the news media for the purpose of discovering the identity of a source or obtaining news or information described in subsection (1) of this section.

RCW 5.68.010(3) (emphasis added). This statutory protection afforded to non-news media fits neatly with other court decisions that extend a reporter's privilege to cover requests to third parties. *See New York Times Co. v. Gonzales*, 459 F.3d 160, 163 (2d Cir. 2006) (although refusing to find a common-law reporter's privilege in the federal criminal context, the court held that "whatever right a newspaper or reporter has to refuse disclosure in response to a subpoena extends to the newspaper's or reporter's telephone records in the possession of a third party provider").

3. The Shield Law covers the records sought by Kazakhstan.

The next clause of subsection (3) requires protection when the subpoena seeks business records between the news media and non-news media:

> (3) The protection from compelled disclosure contained in subsection (1) of this section also applies to any subpoena issued to, or other compulsory process against, a nonnews media party **where such subpoena or process seeks records, information, or other communications relating to business transactions between such nonnews media party and the news media** for the purpose of discovering the identity of a source or obtaining news or information described in subsection (1) of this section.

RCW 5.68.010(3) (emphasis added).

Kazakhstan's subpoena duces tecum clearly seeks such records, information, or communications from eNom:

> 1. Documents sufficient to show all details of all current and former registrants, including any underlying registrants using a privacy or proxy service, of the Domain Name including, but not limited to, his or her email address, physical address, phone number, ~~and billing information,~~[8] including any updated or revised details since registration.
>
> 2. Documents sufficient to show the dates, times and corresponding IP Addresses and/or Mac [*sic*] Addresses from which the Domain Name was registered, created or modified.

CP at 3-4, 10, 16. The business that eNom transacted with Respublika involved registering Respublika's domain name and providing the privacy service called "ID Protect," which replaces Respublika's domain registrant's information on the WHOIS database with the information of a forwarding service. CP at 34 ¶ 4; CP at 86, 88 (¶¶ 35, 45-47). Kazakhstan's subpoena seeks "all details" of those records and information. CP at 3-4, 10, 16. Kazakhstan also seeks records showing the dates, times, and locations from which the newspaper's domain was registered, created, or modified. *Id.* Kazakhstan seeks records under the Order that fall squarely within the Shield Law.

---

[8] The "billing information" requested in the subpoena is crossed out here because Kazakhstan withdrew that request at oral argument on the motion. CP at 411-12.

4. Kazakhstan seeks these records either to (1) identify the source of news and information, or (2) obtain news and information that tends to identify that source.

The next clause of subsection (3) deals with a party's "purpose" for issuing a subpoena:

> (3) The protection from compelled disclosure contained in subsection (1) of this section also applies to any subpoena issued to, or other compulsory process against, a nonnews media party where such subpoena or process seeks records, information, or other communications relating to business transactions between such nonnews media party and the news media **for the purpose of discovering the identity of a source or obtaining news or information described in subsection (1) of this section**.

RCW 5.68.010(3) (emphasis added). The "news or information described in subsection (1)" includes, among other topics:

(1) "[t]he identity of the source of any news or information," or

(2) "any information that would tend to identify the source where such source has a reasonable expectation of confidentiality."

RCW 5.68.010(1)(a). Accordingly, a party's purpose in issuing a subpoena to a non-news entity is unlawful if that purpose is to (1) identify the source of news or information, or (2) obtain news or information that tends to identify a confidential source. RCW 5.68.010(1)(a), (3).

The purpose of this subpoena is to identify Respublika's confidential source or to obtain information that would tend to identify the source. CP at 50-52 (¶¶ 3, 7, 9); CP at 192-93, 195, 200; RP at 18:5-

14. This is not a case involving a subpoena to an online hacker chat forum where someone anonymously posted comments bragging about the alleged theft of Kazakh government emails. No matter what other creative *post hoc* purposes now Kazakhstan proposes to this Court, a subpoena for a newspaper's records targets that newspaper, even if such records are in the hands of a third party. *See Gonzales*, 459 F.3d at 163.

Kazakhstan's purpose is clear in light of its recent actions. To date, Kazakhstan has filed at least two lawsuits in the United States about the unlawful theft and *dissemination* of these government emails. CP at 50-52 (¶¶ 7, 9); CP at 192-193. In the California state lawsuit, from which this Washington action derives, Kazakhstan sued "Doe" defendants who "have stolen and published" government emails. CP at 50. In the New York federal lawsuit, Kazakhstan obtained an (unopposed) preliminary injunction to stop "Doe" defendants from "disclosing, disseminating, posting, displaying, sharing, distributing, hosting, copying, viewing, accessing, providing access to or making available to anyone, in any matter whatsoever" those emails. CP at 200. In those suits, Kazakhstan has not named any defendants who allegedly stole or disseminated government emails *because it claims that it does not know who they are*.[9] CP at 51 ¶ 3;

[9] On the other hand, if Kazakhstan in fact does know any of the "Doe" defendants or has subsequently discovered their identities, then Kazakhstan's failure to amend its complaints

see CP at 195 ¶ 9. Make no mistake: Kazakhstan is investigating *whoever provided those documents to Respublika*, be it a hacker or someone else.[10]

For its own part, Kazakhstan has insisted that its subpoena was just about investigating alleged hackers, not confidential sources.[11] RP at 13:22-25. But that is a distinction without a difference. There are only a few types of person that might be Respublika's confidential "source." First, as Kazakhstan's counsel himself suggested, it is possible, though unlikely, that someone at Respublika may *be* the hacker. RP at 15:7 – 16:12, 17:3-5. Kazakhstan's counsel admitted that his client wants Respublika's IP and MAC addresses to see if they match the list of addresses that accessed Kazakh government servers at the time of the alleged hacking—the digital "fingerprints" of the alleged theft. RP at 15:7 – 16:12, 17:3-5. Second,

---

would strongly suggest that Kazakhstan is improperly conducting third-party discovery unimpeded by opposing counsel in what should be an adversarial system of justice.

[10] Further, the Shield Law explicitly requires notice and an opportunity to be heard, underscoring the important due process rights afforded to LMC. RCW 5.68.010(3). Kazakhstan has issued several other subpoenas to third parties targeting Respublika's information, for which Kazakhstan gave no notice to LMC. RP at 13:22 – 14:18; CP at 203 (¶¶ 8, 10).

[11] Kazakhstan's counsel went so far as to suggest that this subpoena should be enforced because it touched on "criminal" matters of stolen documents. RP at 25:4-20. First, this is a civil case, and there is nothing in the record that any criminal charges have been brought against anyone related to this alleged theft. More importantly, his assertion makes no difference to the analysis; the First Amendment provides a shield to those who republish materials that are a matter of public interest, even if a source illegally obtained them, and even if the republisher knew that they were obtained illegally. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 534-35, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001) ("[A] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.").

Respublika may have received those emails from a hacker, in which case that hacker is still Respublika's confidential source. Third, Respublika may have received those emails from intermediaries who received them from a hacker, in which case the intermediary (not the hacker) is the confidential source. **But under all of these scenarios, the purpose of Kazakhstan's subpoena is to identify that confidential source**. The Shield Law would shield nothing if Respublika had to name its confidential source in order to prove that the statute applies, especially in these circumstances.

Kazakhstan has repeatedly confirmed that the subpoena at issue has one purpose: To identify the hacker who turned over the emails to Respublika—information that "would implicate the Shield Law":

> **All we're asking is to identify an individual.** If and when we were to take the next step and subpoena them if we could, if they were even in the United States, which we don't know and it's probably likely that they're not -- but if they were and we were then to do some kind of compulsory process exercising the laws of the state of Washington, saying we want to ask you questions, **we want to know, "What did you publish, did it involve the stolen emails, where did you get it from," then those questions would implicate the Shield Law, but those questions aren't being asked *right now*.**

RP at 18:5-14 (emphasis added). Kazakhstan believes that Respublika's domain registrant has information to identify "where" the stolen emails came from, RP at 18:5-14, and if true, this subpoena would bring Kazakhstan one step closer to Respublika's confidential source and would

"tend to identify" the source. RCW 5.68.010(1)(a); *see Gonzales*, 459 F.3d at 168 (emphasis added) ("Although a record of a phone call does not disclose anything about the reason for the call, the topics discussed, or other meetings between the parties to the calls, *it is a first step of any inquiry* into the identity of the reporter's source(s) of information regarding the [allegations in the case]."). At a minimum, Kazakhstan's purpose is to obtain information that "tends to identify" the source of those emails, which violates the Shield Law. RCW 5.68.010(1)(a).

The word "source" is not defined in the Shield Law. *See* RCW 5.68.010. However, "source" is broadly defined as:

> (1) : a point of origin or procurement : FOUNTAIN, SUPPLIER ....
>
> (3) : one that supplies information <[*source*]*s* close to the chief executive report he is planning to request the Legislature to approve state purchase—E.M.Mills>

Webster's Third International Dictionary 2177.

With this definition of "source," *Respublika's journalists themselves* are also confidential "sources" of news under the facts of this case. Not only for people in Kazakhstan, but for much of the world, Respublika and its journalists are effectively *the source* of uncensored news and information about current events in Kazakhstan. CP at 85-86 (¶¶ 30, 37); CP at 81-85, 113, 137. Unlike in the United States, the political environment in Kazakhstan forces most opposition journalists to remain

anonymous and to hide their political and journalistic activities. CP at 79-84 (¶¶ 9-13, 18, 22, 25, 28). Ms. Petrushova, the editor-in-chief, has long been persecuted by the Kazakh government, so she can speak freely at this time about the campaign of threats and violence that Respublika has endured. CP at 77, 90 (¶¶ 3, 53). The newspaper has taken important steps to protect the information about its domain registrant by, among other steps, using eNom's "ID Protect" service. CP at 4, 10, 16; CP at 88-89 (¶¶ 45-50). The subpoena seeks names, addresses, telephone numbers, and email addresses of that individual and his or her predecessors. CP at 4, 10, 16. This key data is "information that would tend to identify the source where such source has a reasonable expectation of confidentiality." RCW 5.68.010(1)(a).

5. Washington's common-law privilege supports a broad application of the Shield Law.

Finally, Washington courts should be reluctant to order disclosure of a newspaper's private information in civil proceedings like this, given that neither Respublika, nor LMC, nor eNom are defendants in the lawsuit. The Washington Supreme Court has repeatedly warned courts considering the analogous reporter's privilege to be mindful that compelling interests are at stake. *Clampitt v. Thurston Cnty.*, 98 Wn.2d 641, 643, 658 P.2d 641 (1983); *Senear*, 97 Wn.2d at 154. In Washington, "[t]he courts should do

their utmost to avoid the need for reporter disclosure, *ordering it only as a last resort*." *Clampitt*, 98 Wn.2d at 643 (emphasis added) (citing *Riley v. City of Chester*, 612 F.2d 708, 718 (3d Cir. 1979)). "In some instances, this may require deferral of discovery until the court is *absolutely convinced* that the three conditions necessary to overcome the privilege are satisfied." *Clampitt*, 98 Wn.2d at 643 (emphasis added); *see Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981) ("[I]n the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished.").

In sum, the trial court erroneously ordered eNom to disclose critical, sensitive information about Respublika. In doing so, the trial court erred by eviscerating the Shield Law's scope of coverage for non-news entities and thus incorrectly disregarded Kazakhstan's purpose of discovering the identity of Respublika's confidential news source. A decision upholding the trial court's Order here will necessarily have a profound chilling effect on the free press in Washington and on those non-news entities in Washington that enable and protect free speech and free press—wherever they are. While courts in other states and other countries may ignore the protections provided to a free press in Washington, a Washington court should not (indeed cannot, see *infra* Part V.D) serve as a tool for those who

attack the free press and Washington companies that facilitate press freedom.

C. The trial court erred by improperly weighing the oppression to LMC against the much weaker interests of Kazakhstan to conduct discovery.

This Court generally reviews a trial court's order on a motion to quash for an abuse of discretion. *See Eugster v. City of Spokane*, 121 Wn. App. 799, 807, 91 P.3d 117 (2004). A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasoning. *Id.* However, when the appellate record consists only of affidavits, legal memoranda, and other documentary evidence, as is true here, de novo review is appropriate. *See, e.g.*, *Saldin Secs., Inc. v. Snohomish Cnty.*, 80 Wn. App. 522, 527, 910 P.2d 513 (1996).

In Washington, a court "shall quash or modify" a subpoena if it "requires disclosure of privileged or other protected matter and no exception or waiver applies," or "subjects a person to undue burden." CR 45(c)(3)(A)(iii)-(iv). Further, on a showing of good cause, a court "may make any order which justice requires to protect a party or person from . . . oppression[] or undue burden or expense," including making an order that "the discovery not be had." CR 26(c). "While parties to a law suit must accept [their] burdens as a natural part of litigation, [n]on-parties have a different set of expectations. Accordingly, concern for the unwanted burden

thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs." *Eugster*, 121 Wn. App. at 813.

Washington case law discusses "oppression" in a variety of contexts. *See, e.g.*, *Brown v. MHN Gov't. Servs., Inc.*, 178 Wn.2d 258, 269, 306 P.3d 948 (2013) (forum selection clauses in contracts); *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 710-11, 64 P.3d 1 (2003) (dissolution of business by majority shareholders without concern for the reasonable expectations of minority shareholders); *Oil Heat Inst. of Wash. v. Town of Mukilteo*, 81 Wn.2d 7, 9-10, 498 P.2d 864 (1972) (tax burdens); *Cradduck v. Yakima Cnty.*, 166 Wn. App. 435, 447, 271 P.3d 289 (2012) (land use regulations).

The facts of this case are much, much worse. Here, a sovereign nation has taken to hunting down and threatening opposition journalists. This Court cannot ignore Kazakhstan's documented intimidation campaign against Respublika and its journalists, which includes threats of physical violence against journalists and their families; the deliveries of a human skull, funeral wreath, and decapitated dog's head; the hanging of that headless dog at the newspaper's office; and the firebombing of the newspaper's office building. CP at 79-80, 84 (¶¶ 9-11, 28).

In Washington, protection from oppression can include denial of discovery into a person's identity. *See Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 628-30, 818 P.2d 1056 (1991). In *Howell*, the

recipient of an allegedly HIV-infected blood transfusion who became infected with the HIV virus sued the hospital, treating doctor, and infected donor, alleging various causes of action. *Id.* at 621. Not knowing the donor's identity, the plaintiff sued a Doe defendant. *Id.* After a few months of discovery, the trial court initially ruled that the hospital must disclose Doe's identity, but the court reversed that order after Doe appeared and sought reconsideration. *Id.* at 622. The trial court then ordered under CR 26(c) that the anonymous donor's information be kept confidential until the plaintiff could demonstrate a "greater need." *Id.* at 621-22, 629. The trial court ultimately allowed a deposition of Doe to occur, but only with protections in place like obscuring the deponent's face. *Id.* at 623. Doe successfully moved for summary judgment on all of the plaintiff's various claims against him. *Id.*

On appeal, the plaintiff argued, among other things, that the trial court abused its discretion in refusing to disclose the anonymous donor's identity to the plaintiff because of its relevance to his case. *Id.* at 627-28. The Washington Supreme Court rejected this argument, explaining:

> **Donor John Doe X has a significant interest in avoiding intrusion into his private life.** Because the HIV virus is known to be transmitted through sexual contact, intravenous drug use, and blood transfusions, [plaintiff] would undoubtedly wish to ask highly personal questions of John Doe X's relatives, friends, co-workers, and others. In addition, persons associated with AIDS are known to suffer

> discrimination in employment, education, housing, and even medical treatment.

Id. at 628-29 (emphasis added). Given these compelling reasons why Doe needed to remain anonymous, the Supreme Court viewed the plaintiff's request as nothing more than a "fishing expedition" and upheld the trial court's discovery order to shield the identity. *Id.* at 629-30.

Howell is particularly instructive here. There, the anonymous defendant was a blood donor with HIV who faced discrimination and social ostracism if he were identified, as plaintiff sought to do. *Id.* at 629. The only reason some limited discovery was permitted to proceed against the Doe in *Howell* is that he was an identifiable defendant. *Id.* at 628-29. Unlike *Howell*, neither LMC nor Respublika are implicated in the complaint, either as a named defendant or in any allegations. CP at 50-57. They are non-parties to this suit "entitled to special weight in evaluating the balance of competing needs," *Eugster*, 121 Wn. App. at 813, beyond the anonymity for an actual defendant in *Howell*.

Though not using the word "oppression," this Court considered whether to extend the common-law reporter's privilege to third-party discovery in a criminal case that shares important similarities with this one. *State v. Rinaldo*, 36 Wn. App. 86, 87-88, 673 P.2d 614 (1983), *aff'd*, 102 Wn.2d 749, 689 P.2d 392 (1984). In *Rinaldo*, a convicted criminal was

charged with, among other things, intimidating witnesses and witness tampering. *Id.* at 88. He issued a subpoena duces tecum to a newspaper to produce information about a reporter's confidential sources cited in news articles about the defendant's wrongdoing. *Id.* The newspaper moved to quash the subpoena, but the trial court refused, instead ordering that the newspaper produce those materials for an *in camera* review. *Id.*

On appeal, this Court quashed the trial court's order. *Id.* at 101. Conducting what was effectively a *Gunwall*[12] analysis (see *infra* Part V.D), this Court found that the Washington Constitution had greater protections against compelled disclosure of this type of information than the federal Constitution and held that the common-law privilege applied to criminal cases. *Id.* at 91-94. As a matter of policy, this Court explained:

> A news reporter is no better than his or her sources of information. It seems to be conceded in all quarters, and is not denied here, that in order to gather news it is often necessary for a reporter to agree not to identify the source of information published or to publish only a part of the facts obtained. It is hard to perceive anything that would be more invidiously destructive of a reporter's ability to gather and report the news (particularly in an investigative reporting context as here), than for the reporter's potential informants to know that despite a sincere pledge of confidentiality the reporter may still be forced by a court to divulge the informant's statements and identity to the person under investigation.

[12] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

> It should be fairly obvious that **without some meaningful assurance of complete confidentiality, only a very naive person would be apt to come to the news media with information which some potentially dangerous or powerful person wants to keep concealed.**

Id. at 96 (emphasis added).

This Court also correctly decided that handing over the names and contact information to the party accused of threatening people defeated the entire point of a confidential news source in such circumstances:

> The only practical way in which the witnesses' statements to [the newspaper] which are sought by the defendant could be used by the defendant would be for him to ultimately obtain the complete statements, **including names and addresses of informants**. . . . Against this factual backdrop, it would be a denial of reality to believe that the reporter's sources, who insisted on a pledge of confidentiality before they would talk to him, would have given the reporter any information had they known he could not provide them the confidentiality promised.

Id. at 97 (emphasis added).[13]

eNom, Inc. has been Respublika's domain registrar for years and therefore has years' worth of identifying information about Respublika's journalists, including names, addresses, telephone numbers, email addresses, and all other available information. CP at 86, 88-89 (¶¶ 35, 45-50). It would be nothing short of a disaster if Kazakhstan were to discover this information. *Id.* These facts are as dire as any Washington courts have

[13] On further appeal, the Washington Supreme Court affirmed this Court but did not reach the constitutional issue. *Rinaldo*, 102 Wn.2d at 755.

encountered, and this situation is the *raison d'etre* for a prohibition on oppressive and unduly burdensome discovery—when the stakes very well may be life or death. In stark contrast to LMC's concerns, Kazakhstan's counsel stated that his client merely wanted those records as "just as another piece of evidence that we may or may not use." RP at 17:19-22.

Kazakhstan's counsel said his client needed Respublika's IP address to check against a list to determine if one of Respublika's journalists did the alleged hacking. RP at 15:7 – 16:12, 17:3-5. But Kazakhstan's subpoena requested much more than an IP address. CP at 3-4, 10, 16. It sought all details of all current and former registrants, including their names, physical addresses, email addresses, telephone numbers, and billing information. *Id.* It further sought "all personally identifying information" about who at Respublika used eNom's "ID Protect" program and Whois Privacy Protection Service. *Id.* Though Kazakhstan's efforts to identify the alleged hacker who transmitted the government emails to Respublika is itself an unlawful purpose under the Shield Law, Kazakhstan also took the opportunity with this subpoena to request all of the information that eNom likely had about the newspaper.

In sum, under the facts of this case, the trial court erroneously weighed the overwhelming oppression demonstrated by the newspaper against Kazakhstan's weak showing of need. Accordingly, the trial court

erred by ordering eNom, Inc. to comply with Kazakhstan's subpoena duces tecum.

D. The trial court's decision to order eNom, Inc. to comply with Kazakhstan's subpoena was error under the Washington Constitution.

Finally, Washington's Constitution does not tolerate opening our courts to a repressive foreign country conducting discovery to quash political dissent and to chill speech and the press either here or abroad.[14] Our state's founding document provides that "[a]ll political power is inherent in the people, and *governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights*." WASH. CONST. art. I, § 1 (emphasis added). Like other branches of government, the courts are established to protect and maintain, among other rights, the freedom of the press: "Every person may freely

[14] LMC argued to the trial court the constitutional error in forcing eNom to comply with Kazakhstan's subpoena duces tecum. *See, e.g.*, CP at 24 ("permitting an oppressive foreign government to hunt down journalists using discovery backed by American courts runs contrary to core constitutional values"); CP at 24-25 ("These reasons to quash are grounded in bedrock constitutional values, like the freedom of the press and the right to privacy, which, though brutally suppressed in other parts of the world, continue to guide our courts."); CP at 27 ("This Court should quash Kazakhstan's attempt to use a lawsuit in which it is the only party in order to uncover critical information about the free press operating in opposition to the current regime."); RP at 8:3-4 ("this is an attack on the free press"); RP at 11:9-13 ("Does the Court subject my client ... to an attack on their free press?"). And any dispute about revealing information tending to identify confidential news sources necessarily involves the constitutional aspect of freedom of the press. In any event, to the extent Kazakhstan may assert that constitutional error is raised for the first time on appeal, it easily constitutes manifest error affecting a constitutional right under RAP 2.5(a)(3), and should be considered at this time along with all of the other aspects of this appeal.

speak, write and publish on all subjects, being responsible for the abuse of that right." WASH. CONST. art. I, § 5; *see* WASH. CONST. art. IV, § 1; *State ex rel. Haugland v. Smythe*, 25 Wn.2d 161, 167, 169 P.2d 706 (1946); *see also Spratt v. Toft*, 180 Wn. App. 620, 634, 324 P.3d 707 (2014).

Interpretation of the Constitution begins with the text.[15] *Dress. v. Wash. State Dep't of Corr.*, 168 Wn. App. 319, 331, 279 P.3d 875 (2012). This Court's objective is to "'define the constitutional principle in accordance with the *original understanding of the ratifying public* so as to faithfully apply the principle to each situation which might thereafter arise.'" *Id.* (emphasis added) (quoting *Malyon v. Pierce Cnty.*, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997)). Constitutional matters are reviewed de novo. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 503, 198 P.3d 1021 (2009).

There are several nonexclusive factors governing whether, in a given case, the Washington Constitution differs from the federal constitution, including (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural

[15] "State courts are obliged to determine the scope of their state constitutions due to the structure of our government. . . . When a state court neglects its duty to evaluate and apply its state constitution, it deprives the people of their 'double security.' It also removes from the people the ability to try 'novel social and economic experiments' which is another important justification for the federal system." *Alderwood Assocs. v. Wash. Env't Council*, 96 Wn.2d 230, 237-38, 635 P.2d 108 (1981) (quoting The Federalist No. 51, at 339 (Modern Library ed. 1937) (A. Hamilton or J. Madison)).

differences; and (6) matters of particular state or local concern. *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). Not all of them will be relevant in every case. *Id.* at 62-63.

As an initial point, it is well settled that article I, section 5 is subject to an interpretation independent from that of the First Amendment. *See, e.g., Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 493-94, 166 P.3d 1174 (2007); *Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 116-17, 937 P.2d 154, 943 P.2d 1358 (1997); *Bering v. SHARE*, 106 Wn.2d 212, 234, 721 P.2d 918 (1986); *State v. Coe*, 101 Wn.2d 364, 679 P.2d 353 (1984). The first and second *Gunwall* factors strongly support a constitutional limitation on court power to enforce Kazakhstan's discovery targeting the press. This Court held in *Rinaldo* that, unlike the First Amendment,[16] "our state constitution in article 1, section 5 speaks in absolutes when it unequivocally declares that '[*e*]*very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.*'"[17] *Rinaldo*, 36 Wn. App. at 94 (emphasis in original) (quoting WASH. CONST. art. I, § 5). This Court held that the trial court could not

---

[16] The First Amendment to the U.S. Constitution reads, "*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom* of speech, or *of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (Emphasis added.)

[17] This final version of the free press clause was the most liberal of the three versions considered by the state constitutional convention. *Rinaldo*, 36 Wn. App. at 93.

order discovery of confidential sources in *Rinaldo*, in part, because there is "an obvious and substantial difference between the wording of the federal and state constitutions with respect to protections afforded the press." *Id.* at 95.

The third *Gunwall* factor involves state constitutional history. This Court observed in *Rinaldo* that our Constitution's framers sought to prohibit courts from interfering with the free press:

> Those hardy frontier lawyers, newspaper people and their colleagues at the 1889 constitutional convention said it as clearly as they possibly could—**the right to free speech and press in the State of Washington is a privilege guaranteed to all**, and so long as it is not abused is absolute. **Then to insure that this right would not be tampered with by future legislatures or courts, they wrote the privilege into our state constitution**.

Id. at 93-94 (emphasis added). Like any other branch of government, the court system's own ability to act is limited by article I, section 5 of the Constitution. In this context, it makes no difference whether a state or private actor asked the court for discovery designed to trample the free press—it is the court that cannot so act. The framers would never have agreed to open our courts to a foreign nation operating in this manner. The third *Gunwall* factor supports a constitutional limitation on court power to enforce Kazakhstan's discovery targeting the press.

As to the fourth factor, Washington has a long history of extending strong protections to the press.[18] In *State v. Tugwell*, 19 Wash. 238, 250-51, 52 P. 1056 (1898), the Washington Supreme Court, though finding contempt of court for a libelous publication, wrote a strong defense of the press's right to criticize public officials and thereby inform the electorate:

> The constitutional liberty of speech and the press and the guaranties against its abridgment are found in the laws of all the American states and the federal constitution, and undoubtedly primarily grew out of the censorship of articles intended for publication by public authority. **Such a censorship was inconsistent with free institutions, and with that free discussion of all public officers and agents required for the intelligent exercise of the right of suffrage**. . . . "[W]e understand liberty of speech and of the press to imply, not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords."

(Emphasis added.) More recently, beginning with *Senear v. Daily Journal American*, 27 Wn. App. 454, 473, 618 P.2d 536 (1980), *aff'd*, *Senear v. Daily Journal-American*, 97 Wn.2d 148, 641 P.2d 1180 (1982), Washington courts developed a qualified privilege for reporters. Then, nearly a decade ago in 2007, the Legislature passed the broad Shield Law analyzed herein.

---

[18] Washington has also historically protected telephonic and electronic communications, dating back to the Code of 1881, which was adopted before statehood. *Gunwall*, 106 Wn.2d at 66. Article I, section 7 of the Washington Constitution grants a right to privacy for digital communications that is broader than the federal Constitution. *State v. Hinton*, 179 Wn.2d 862, 865, 319 P.3d 9 (2014). LMC operates the online publication of Respublika. CP at 78 ¶ 4.

RCW 5.68.010. This fourth *Gunwall* factor supports a constitutional limitation on court power to enforce Kazakhstan's discovery targeting the press.

Under factor five of the *Gunwall* analysis, the federal constitution is a grant of limited powers, but the state constitution provides an "affirmation of fundamental rights," including the right to a free press. *See Gunwall*, 106 Wn.2d at 62, 66-67. This factor supports a constitutional limitation on court power to enforce Kazakhstan's discovery targeting the press.

The sixth and final *Gunwall* factor addresses matters of particular local concern. Washington State has long been home to a multitude of computer and technology industries. With the advent of the Internet, those companies have found themselves supporting new and increasingly important ways for people to express themselves and publish on topics great and small. One such company is eNom, Inc. in Kirkland. CP at 86. eNom, Inc. plays a vital role in providing individuals and companies a "home" on the Internet. CP at 34 ¶¶ 6-12. eNom, Inc. also offers important privacy safeguards that attract entities halfway around the world to do business here in Washington. CP at 34 ¶ 4. Such protections are vital for an opposition newspaper like Respublika that defiantly publishes opposition news in Kazakhstan, despite years of abuse at the hands of the Kazakh government.

Therefore, the *Gunwall* factors make clear that article I, section 5, in combination with article I, section 1, prohibits the courts from assisting Kazakhstan in its efforts to chill speech and the press with abusive discovery targeting a newspaper.

VI. CONCLUSION

This Court should not serve as a vehicle for abusive discovery by the current Kazakh regime. Kazakhstan is kaengaging in improper claim-splitting between state and federal courts. Kazakhstan issued a subpoena with the clear purpose of identifying a confidential news source, in direct violation of Washington's Shield Law. Kazakhstan is also using this litigation as an excuse to gather detailed information that oppresses and jeopardizes the safety of those at the Respublika newspaper. Article I, sections 1 and 5 prohibit the courts from assisting Kazakhstan in its abusive discovery targeting the press. Accordingly, this Court should reverse the trial court's Order and remand for dismissal of Kazakhstan's limited action in Washington.

Respectfully submitted this 9th day of July, 2015.

HELSELL FETTERMAN LLP

By _____
Andrew J. Kinstler, WSBA No. 12703
Attorneys for Appellant LLC Media-Consult

CERTIFICATE OF SERVICE

I, KYNA GONZALEZ, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.

3. In the appellate matter of Kazakhstan v. Does, et al., I did on the date listed below (1) cause to be filed with this Court LLC Media-Consult's Brief of Appellant; (2) cause it to be delivered via messenger to Abraham Lorber of Lane Powell, 1420 Fifth Avenue, Suite 4200, Seattle, WA 98111 and (3) cause it to be delivered via electronic mail to Robert Phillips of Reed Smith, 101 Second Street 1800, San Francisco, CA 94105 who are counsel of record of Respondent The Republic of Kazakhstan.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: July 9, 2015.

Kyna Gonzalez

KYNA GONZALEZ

INDEX OF APPENDICES

APPENDIX A

West's Revised Code of Washington Annotated
Title 5. Evidence (Refs & Annos)
Chapter 5.68. News Media

West's RCWA 5.68.010

5.68.010. Protection from compelled disclosure--Exceptions--Definition

Effective: July 22, 2007
Currentness

(1) Except as provided in subsection (2) of this section, no judicial, legislative, administrative, or other body with the power to issue a subpoena or other compulsory process may compel the news media to testify, produce, or otherwise disclose:

(a) The identity of a source of any news or information or any information that would tend to identify the source where such source has a reasonable expectation of confidentiality; or

(b) Any news or information obtained or prepared by the news media in its capacity in gathering, receiving, or processing news or information for potential communication to the public, including, but not limited to, any notes, outtakes, photographs, video or sound tapes, film, or other data of whatever sort in any medium now known or hereafter devised. This does not include physical evidence of a crime.

(2) A court may compel disclosure of the news or information described in subsection (1)(b) of this section if the court finds that the party seeking such news or information established by clear and convincing evidence:

(a)(i) In a criminal investigation or prosecution, based on information other than that information being sought, that there are reasonable grounds to believe that a crime has occurred; or

(ii) In a civil action or proceeding, based on information other than that information being sought, that there is a prima facie cause of action; and

(b) In all matters, whether criminal or civil, that:

(i) The news or information is highly material and relevant;

(ii) The news or information is critical or necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto;

(iii) The party seeking such news or information has exhausted all reasonable and available means to obtain it from alternative sources; and

(iv) There is a compelling public interest in the disclosure. A court may consider whether or not the news or information was obtained from a confidential source in evaluating the public interest in disclosure.

(3) The protection from compelled disclosure contained in subsection (1) of this section also applies to any subpoena issued to, or other compulsory process against, a nonnews media party where such subpoena or process seeks records, information, or other communications relating to business transactions between such nonnews media party and the news media for the purpose of discovering the identity of a source or obtaining news or information described in subsection (1) of this section. Whenever a subpoena is issued to, or other compulsory process is initiated against, a nonnews media party where such subpoena or process seeks information or communications on business transactions with the news media, the affected news media shall be given reasonable and timely notice of the subpoena or compulsory process before it is executed or initiated, as the case may be, and an opportunity to be heard. In the event that the subpoena to, or other compulsory process against, the nonnews media party is in connection with a criminal investigation in which the news media is the express target, and advance notice as provided in this section would pose a clear and substantial threat to the integrity of the investigation, the governmental authority shall so certify to such a threat in court and notification of the subpoena or compulsory process shall be given to the affected news media as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation.

(4) Publication or dissemination by the news media of news or information described in subsection (1) of this section, or a portion thereof, shall not constitute a waiver of the protection from compelled disclosure that is contained in subsection (1) of this section. In the event that the fact of publication of news or information must be proved in any proceeding, that fact and the contents of the publication may be established by judicial notice.

(5) The term "news media" means:

(a) Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution;

(b) Any person who is or has been an employee, agent, or independent contractor of any entity listed in (a) of this subsection, who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity; or

(c) Any parent, subsidiary, or affiliate of the entities listed in (a) or (b) of this subsection to the extent that the subpoena or other compulsory process seeks news or information described in subsection (1) of this section.

(6) In all matters adjudicated pursuant to this section, a court of competent jurisdiction may exercise its inherent powers to conduct all appropriate proceedings required in order to make necessary findings of fact and enter conclusions of law.

Credits

[2007 c 196 § 1, eff. July 22, 2007.]

West's RCWA 5.68.010, WA ST 5.68.010
Current with legislation effective through May 18, 2015, which includes Chapters 1 through 4, 70 (part), 125, 134, 193, 222, 234 (part), 244 (part), 269 (part), 273, 281, and 289 from the 2015 Regular Session

End of Document

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

15 CV 1900

THE REPUBLIC OF KAZAKHSTAN,

Plaintiff,

JUDGE RAMOS

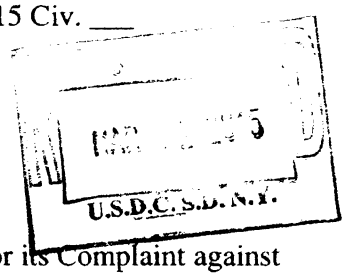
COMPLAINT

-against-

15 Civ. ___

DOES 1-100 INCLUSIVE,

Defendants.



Plaintiff the Republic of Kazakhstan ("Plaintiff"), for its Complaint against fictitiously named defendants Does 1-100 ("Defendants") alleges as follows:

NATURE OF THE ACTION

1. This is a civil action for injunctive relief and damages arising under The Computer Fraud and Abuse Act, 18 U.S.C. § 1030. As alleged more fully below, Defendants hacked into the government computer network of Plaintiff the Republic of Kazakhstan, as well as into the Gmail accounts of officials of the government of the Republic of Kazakhstan, and stole a large number (believed to be in the thousands) of sensitive, proprietary, confidential and privileged government emails and other documents (the "Stolen Materials"). Defendants have already posted on the internet a number of misappropriated emails from among the Stolen Materials that contain privileged and confidential attorney-client communications between Plaintiff and Plaintiff's outside counsel, including U.S.-based counsel. Unless enjoined from further posting, Defendants will likely continue to post Stolen Materials, to the substantial and irreparable harm of the Plaintiff.

THE PARTIES

2. Plaintiff is a sovereign nation in Central Asia.

3. Plaintiff has significant dealings with the United States, and regularly communicates with and does business with the United States, utilizing email platforms such as Gmail and Hotmail, which are based in the United States.

4. Plaintiff is unaware of the true names of the Defendants sued herein as DOES 1-100, inclusive, and therefore sues these Defendants by fictitious names. Plaintiff will amend this Complaint to allege the true names of the Defendants when ascertained.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, as the action arises under the laws of the United States.

6. This Court has personal jurisdiction over Defendants as a result of the Defendants' unauthorized access into, and misappropriation of information from, a "protected computer" as defined in 18 U.S.C. § 1030(e)(2)(B) which is used for commerce and communication with persons and entities in New York, and as a result of Defendants' wrongful conduct causing injurious effect in New York.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b).

FACTS

8. On or about January 21, 2015, Plaintiff learned of unauthorized public postings of certain of its privileged and confidential emails, and thereby became aware that its computer system had been hacked.

9. Without authorization, Defendants hacked into: (a) the computers of the Republic of Kazakhstan, and (b) Gmail accounts used from time to time by officials of the Republic of Kazakhstan to conduct official government business (collectively the "Hacked Computers") and misappropriated what is believed to be thousands of government emails and other documents.

10. Gmail is an email service provided by Google Inc. ("Google"). Google is headquartered in Mountain View, California, and has offices throughout the United States and elsewhere, including New York City.

11. The Hacked Computers are "protected computers" under 18 U.S.C. § 1030(e)(2)(B), which defines a "protected computer" to include a computer "which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States." The Hacked Computers are used for commerce and communication with the United States, including with persons and entities in New York.

12. Plaintiff has launched an investigation to try to determine the identity of the hackers and their confederates, the precise scope of the intrusion, and the extent of the damages caused. That investigation is ongoing.

13. The officials whose emails and other documents have been misappropriated include Marat Beketayev, the Executive Secretary of the Ministry of Justice of the Republic of Kazakhstan, and Andrey Kravchenko, a Deputy General Prosecutor in the General Prosecutor's Office of the Republic of Kazakhstan. The Hacked Computers contain a large number of emails and other documents sent or received by these officials and other officials of the Republic of Kazakhstan. Many of these emails and other documents contain sensitive, proprietary, and highly confidential communications of the Ministry of Justice and/or the General Prosecutor's Office. Of those, some consist of privileged communications between the Republic of Kazakhstan and its outside attorneys in the United States (including some in New York City) and elsewhere.

14. The Hacked Computers are connected to the internet and are used in connection with foreign commerce and communication, including with (among others) the United

States. This communication includes, *inter alia*, correspondence with Plaintiff's outside U.S. counsel at Curtis, Mallet-Prevost, Colt & Mosle LLP ("Curtis"), a global law firm headquartered at 101 Park Avenue, New York, NY 10178-0061.

15. Curtis also has offices in Kazakhstan. Curtis lawyers who represent and provide legal advice and assistance to the Republic of Kazakhstan include, *inter alia*, Askar Moukhidtinov, Esq. (a member of the bar of the State of Connecticut and of the Republic of Kazakhstan), and Jacques Semmelman, Esq. (a member of the bar of the States of New York, New Jersey, and Pennsylvania, and a member of the bar of this Court). Mr. Semmelman maintains his office in Curtis's New York headquarters.

16. Defendants have already posted some of the Stolen Materials to various websites, including https://kazaword.wordpress.com, www.respublika-kaz.info, and https://www.facebook.com. At least fourteen emails from among the Stolen Materials have been posted to these sites. The fourteen posted emails consist of privileged and confidential attorney-client communications sent to officials of the Republic of Kazakhstan by Curtis or by Gomez-Acebo & Pombo, a global law firm headquartered in Spain that has been performing legal services on behalf of, and has been providing legal advice to, the Republic of Kazakhstan. The fourteen emails that have been publicly disclosed by the Defendants are attorney-client privileged communications from the two law firms to their mutual client, the Republic of Kazakhstan. Among the senders or "cc" recipients of these misappropriated and publicly posted emails are Mr. Moukhidtinov and Mr. Semmelman.

17. Plaintiff has already been irreparably harmed by the illegal misappropriation and public dissemination of just a small portion of the Stolen Materials. To date, Plaintiff has spent a substantial sum of money (far in excess of $5,000) to investigate the hacking

and to control and remediate the damage Defendants have already caused and are in a position to further cause.

18. Plaintiff has suffered and continues to suffer damage and loss by reason of Defendants' wrongful conduct.

VIOLATION OF THE COMPUTER FRAUD AND ABUSE ACT (18 U.S.C. § 1030)

19. Plaintiff incorporates by reference as though fully set forth herein the allegations contained in paragraphs 1 through 18 above.

20. 18 U.S.C. § 1030(g) of the Computer Fraud and Abuse Act provides that any "person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief." Pursuant to 18 U.S.C. §§ 1030(g), (a)(2)(C), and (c)(4)(A)(i)(I), a civil action may be brought if the conduct involves a loss during any one-year period aggregating at least $5,000 in value.

21. Defendants violated The Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(2)(C), by intentionally accessing protected computers used for interstate commerce or communication, without authorization or by exceeding authorized access to such computers, and by obtaining the Stolen Materials from such protected computers.

22. Defendants violated The Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5)(B), by intentionally accessing protected computers without authorization, and as a result of such conduct, recklessly causing damage to Plaintiff.

23. Defendants violated The Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5)(C), by intentionally accessing protected computers without authorization, and as a result of such conduct, causing damage and loss to Plaintiff.

24. Upon information and belief, the Defendants acted jointly and in concert with one another.

25. As a proximate result of these violations, Plaintiff has suffered damage and loss in an amount to be proven at trial, and, absent injunctive relief, faces likely irreparable harm.

26. Accordingly, Defendants' activities constitute a violation of the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030(a)(2)(C), (a)(5)(B) and (C), (e)(2)(B), and Plaintiff is entitled to injunctive relief and an award of compensatory damages under that Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff the Republic of Kazakhstan demands judgment against Defendants jointly and severally as follows:

(1) Adjudging that Defendants' actions violated The Computer Fraud and Abuse Act, 18 U.S.C. § 1030;

(2) (a) Enjoining Defendants, their affiliates, employees, agents, and representatives, and all persons acting in concert with or participating with Defendants, from using, disclosing, disseminating, posting, displaying, sharing, distributing, hosting, copying, viewing, accessing, providing access to or making available to anyone, in any manner whatsoever, any of the materials stolen by the Defendants from the computer system of Plaintiff and from the Gmail accounts of Plaintiff's officials (the "Stolen Materials");

(b) Ordering that Defendants, their affiliates, employees, agents, and representatives, and all persons acting in concert with or participating with Defendants, immediately deliver to Plaintiff: (i) all copies of the Stolen

Materials; and (ii) all copies of any materials (in paper, electronic, or any other form) that contain or reflect any information derived from the Stolen Materials; and

(c) Ordering that Defendants, their affiliates, employees, agents, and representatives, and all persons acting in concert with or participating with Defendants, turn over to the Court any proceeds that Defendants have received as a result of their misappropriation and use of the Stolen Materials, such proceeds to be held in constructive trust until the conclusion of this litigation;

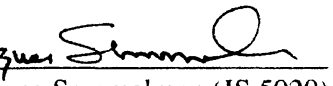
(3) Awarding Plaintiff money damages in an amount to be determined at trial;

(4) Awarding Plaintiff costs and reasonable attorneys' fees; and

(5) Awarding such other and further relief as the Court deems just and proper.

Dated: New York, New York
March 12, 2015

Respectfully submitted,
CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP

By: 

Jacques Semmelman (JS 5020)
jsemmelman@curtis.com
Michael R. Graif (MG 4795)
mgraif@curtis.com

101 Park Avenue
New York, New York 10178
(212) 696-6000

Attorneys for Plaintiff the Republic of Kazakhstan