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12 limited liability company

13  
14 SUPERIOR COURT OF CALIFORNIA  
15 COUNTY OF SAN MATEO

16 SIX4THREE, LLC, a Delaware limited  
17 liability company,

18 Plaintiff,

19 v.

20 FACEBOOK, INC., et al.,

21 Defendants.

) Case No. CIV 533328

)  
) **Assigned for all purposes to Hon. V.**  
) **Raymond Swope, Dept. 23**

) **PLAINTIFF'S BRIEF IN RESPONSE**  
) **TO NOVEMBER 20, 2018 ORDER**

) Department: 23

) Judge: Honorable V. Raymond Swope

) Filing Date: April 10, 2015

) Trial Date: April 25, 2019

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1 **INTRODUCTION**

2 Plaintiff Six4Three, LLC (“Plaintiff” or “Six4Three”) files this brief pursuant to the  
3 Court’s November 20, 2018 Order For Briefing and Staying Submission of Unredacted Copies  
4 of Sealed Documents (the “November 20<sup>th</sup> Order”).<sup>1</sup>

5 **BACKGROUND**

6 While Six4Three was operating and since the collapse of its business as a result of the  
7 events that gave rise to this suit, Plaintiff’s Managing Director, Ted Kramer has held multiple  
8 positions at other companies and has pursued business ventures unrelated to Six4Three.  
9 Declaration of Ted Kramer ISO Plaintiff’s Brief in Response to November 20, 2018 Order  
10 (“Kramer Dec.”), ¶ 2. Such business requires that Mr. Kramer periodically travel to London. *Id.*,  
11 ¶ 2.

12 During one such trip in May of this year, Mr. Kramer met with Carole Cadwalladr, a  
13 reporter for *The Guardian*, who was interested in the instant matter. Kramer Dec., ¶ 3. During  
14 that meeting, Mr. Kramer shared with her the public allegations in this case. *Id.* She asked him  
15 frequently during this meeting if he could share any documents with her. *Id.* Each time she  
16 requested this information, Mr. Kramer informed her that Facebook’s confidential documents  
17 were subject to a Protective Order; and that they could not be released without either an order  
18 from this Court or Facebook’s consent. *Id.*

19 On August 28, 2018, Mr. Kramer again met with Ms. Cadwalladr, in California. Kramer  
20 Dec., ¶ 4. She informed him that she would like to raise Six4Three’s case with Damian Collins  
21 MP, the Chairman of the Digital, Culture, Media and Sports Committee (“DCMS”), a  
22 Parliamentary Committee in the United Kingdom investigating Facebook’s management of  
23 third party access to user data. *Id.* Mr. Kramer informed Ms. Cadwalladr that he was willing to  
24 speak with Mr. Collins. *Id.*

25  
26 <sup>1</sup> Plaintiff’s local counsel has a hearing on case dispositive cross-motions for summary  
27 judgment before the Honorable Judge William H. Alsup of the Northern District of California  
28 on November 28, 2018 at 8:00 a.m., in a matter on which he is lead counsel. Declaration of  
Stuart G. Gross ISO Plaintiffs’ Brief in Response to the November 20<sup>th</sup> Order (“Gross Dec.”), ¶  
2. Plaintiff, therefore, respectfully requests that any hearing on the instant matter be scheduled  
by the Court on a date and time other than the morning of November 28, 2018.

1 On October 1, 2018, Mr. Kramer emailed Mr. Collins a summary of the public  
2 allegations and public filings in the case. Kramer Dec., ¶ 5, Ex. 1.

3 On November 3, 2018, Mr. Collins responded, indicating that he had received from Ms.  
4 Cadwalladr information regarding certain categories of documents filed in the case and  
5 requested that Mr. Kramer provide the documents to him. Kramer Dec., ¶ 6, Ex. 2.

6 On November 4, 2018, Mr. Kramer responded to Mr. Collins, notifying him that the  
7 documents were subject to a Protective Order entered in this action and that if Mr. Collins were  
8 to order Mr. Kramer to produce the documents, he would be required to notify Facebook,  
9 pursuant to the Protective Order. Kramer Dec., ¶ 7, Ex. 3.

10 On November 6, 2018, Chloe Challender, the clerk of DCMS, emailed Mr. Kramer a  
11 letter asking that he provide the documents Mr. Collins had requested. Kramer Dec., ¶ 8, Ex. 4.  
12 Mr. Kramer ignored Ms. Challender's email. *Id.*, ¶ 8. She followed up on November 8, 2018,  
13 asking Mr. Kramer to confirm receipt of the letter. *Id.*

14 On November 12, 2018, Mr. Kramer responded to Ms. Challender by email with  
15 confirmation that he received the letter and that, as he had communicated to Mr. Collins  
16 previously, he could not comply with her request to disclose the requested materials as they are  
17 subject to the Protective Order. *Id.*, ¶ 8.

18 On November 13, 2018, Mr. Collins again emailed Mr. Kramer asking if he could  
19 publish the public allegations and public filings and further seeking any other unrestricted  
20 documents. Kramer Dec., ¶ 9, Ex. 5. Mr. Kramer did not respond to Mr. Collins. *Id.*, ¶ 9.

21 On November 17, 2018, Ms. Cadwalladr called Mr. Kramer. Kramer Dec., ¶ 10. Mr.  
22 Kramer informed her that he had a business trip to London, and she suggested they meet for her  
23 to receive another update on the case. *Id.* Mr. Kramer agreed to meet with her at his hotel and  
24 sent her a calendar invitation with the address of the hotel. *Id.*, ¶ 10, Ex. 6.

25 On November 19, 2018, Mr. Kramer arrived in London to attend business meetings  
26 unrelated to Six4Three. *Id.*, ¶ 11.

27 Upon arriving, Mr. Kramer received an email from DCMS, which attached an Order to  
28 Produce Documents ("DCMS Order #1"), demanding his compliance no later than 5pm local

1 time on the next day, November 20, 2018. Kramer Dec., ¶ 11, Ex. 7. Mr. Kramer emailed  
2 DCMS Order #1 to Plaintiff’s counsel. *Id.*

3 On November 19, 2018, in compliance with Section 16(b) of the Protective Order,  
4 Plaintiff’s counsel sent a letter to Mr. Collins and DCMS notifying DCMS that some of the  
5 information demanded by DCMS Order #1 was subject to the Protective Order, and notified  
6 DCMS that due to the Protective Order’s restrictions Mr. Kramer could not comply with DCMS  
7 Order #1. Declaration of David S. Godkin ISO Plaintiff’s Brief in Response to November 20,  
8 2018 Order (“Godkin Dec.”), ¶ 2, Ex. 1.

9 In further compliance with Section 16(b) of the Protective Order, on November 19,  
10 2018, Plaintiff’s counsel sent a letter to Defendants’ counsel notifying them of the DCMS Order  
11 #1 and further referring them to the procedure specified under Section 16(c) of the Protective  
12 Order, which provides that Defendants shall seek timely relief in the jurisdiction “from which  
13 the subpoena or order issued.” Godkin Dec., ¶ 3, Ex. 2.

14 Plaintiff’s counsel’s administrative assistant sent a copy of both letters to Mr. Kramer,  
15 via email, almost immediately after they were sent to Mr. Collins and Defendants’ counsel.  
16 Godkin Dec., ¶ 4. Mr. Kramer received this letter. Kramer Dec., ¶ 11. Mr. Kramer understood  
17 that he was not permitted to comply with DCMS Order #1 and, more generally, he was not  
18 permitted to provide any documents designated confidential or highly confidential by  
19 Defendants to DCMS or any other person. *Id.*

20 The evening of November 19, 2018, Defendants’ counsel sent a letter to Plaintiff’s  
21 counsel that stated *inter alia* “[u]nder the plain terms of the protective order, Mr. Kramer should  
22 not have access to Facebook’s Highly Confidential Information, including Six4Three’s  
23 unredacted opposition to Facebook’s anti-SLAPP briefing.” Godkin Dec. ¶ 5, Ex. 3. Plaintiff’s  
24 counsel did not believe, at the time of their receipt of that letter, that Mr. Kramer had access to  
25 any documents or information designated highly confidential by Facebook; thus, both Mr.  
26 Godkin and Mr. Gross immediately took actions to determine what, if any, basis there was for  
27 the suggestion by Defendants’ counsel that Mr. Kramer had such access. Godkin Dec. ¶ 6;  
28 Gross Dec., ¶ 6. It was determined that a shared location had been created on a dropbox account

1 into which documents designated as highly confidential and summaries of those documents had  
2 been stored, and that because this dropbox account was owned by Six4Three, Mr. Kramer  
3 technically had access to it as the administrator of the account. Godkin Dec. ¶ 7; Gross Dec., ¶  
4 7. In reaction, Counsel for Plaintiff confirmed that Mr. Kramer had never reviewed any such  
5 documents or summaries and immediately took actions to have all such documents and  
6 summaries moved to a location on the system of Mr. Gross to which only members of the legal  
7 team had access, and have the documents deleted from any location to which Mr. Kramer had  
8 access. Godkin Dec. ¶ 8; Gross Dec., ¶ 8. At the time, Counsel for Plaintiff was not aware that  
9 the dropbox account in question was set up to sync (i.e. save local copies of) the documents in  
10 question to the laptop that Mr. Kramer had in his possession. Godkin Dec. ¶ 9; Gross Dec., ¶ 8.

11 When Mr. Kramer awoke on November 20, 2018, he was personally served a hard copy  
12 of DCMS Order #1 to his hotel room. Kramer Dec., ¶ 11, Ex. 7. Mr. Kramer does not know how  
13 the DCMS learned where he was staying in London. *Id.*, ¶ 11. Consistent with the statements  
14 made by Plaintiff's counsel in the above-referenced letters that Mr. Kramer was barred by the  
15 Protective Order from providing the requested documents, Mr. Kramer refused to comply with  
16 DCMS Order #1 and proceeded to conduct his business. *Id.*, ¶ 12.

17 On November 20, 2018, Plaintiff's counsel sent a second letter to Mr. Collins and  
18 DCMS informing DCMS: that Defendants had sought relief in San Mateo County Superior  
19 Court; that Mr. Kramer was unable to comply with DCMS Order #1; that DCMS should seek to  
20 obtain the documents directly from Defendants; and that Defendants were copied on the letter.  
21 Godkin Dec., ¶ 10, Ex. 4.

22 A copy of this letter was provided to Mr. Kramer by Plaintiff's counsel's administrative  
23 assistant, via email, almost immediately thereafter. *Id.*, ¶ 11. Mr. Kramer received this letter.  
24 Kramer Dec., ¶ 12. Mr. Kramer continued to understand that he was not permitted to comply  
25 with DCMS Order #1 and, more generally, he was not permitted to provide any documents  
26 designated confidential or highly confidential by Defendants to DCMS or any other person. *Id.*

27 For the remainder of November 20, 2018, Mr. Kramer engaged in pre-planned meetings  
28 and other work unrelated to Six4Three. *Id.*

1 On November 20, 2018, the Court issued the November 20<sup>th</sup> Order. Godkin Dec., ¶ 12,  
2 Ex. 5. Upon receipt of the November 20<sup>th</sup> Order, on November 21, 2018, Plaintiff's counsel sent  
3 a copy of the Court's order issued on November 20, 2018 to Mr. Kramer, via email, almost  
4 immediately after receiving it. *Id.*, ¶ 13. Mr. Kramer received this Order. Kramer Dec., ¶ 12.  
5 Mr. Kramer understood that the Order barred him providing any documents designated  
6 confidential or highly confidential by Defendants to DCMS or any other person. *Id.*

7 Plaintiff's counsel also promptly sent Mr. Collins and DCMS a third letter notifying  
8 DCMS, and attaching a copy, of the November 20<sup>th</sup> Order. Godkin Dec., ¶ 14, Ex. 6. Plaintiff's  
9 counsel again reiterated that Mr. Kramer could not comply with DCMS Order #1 and that  
10 DCMS should seek to obtain the documents from Defendants directly. Further, Plaintiff's  
11 counsel urged DCMS to provide its own response to the Superior Court as many of the  
12 questions raised by the November 20<sup>th</sup> Order implicate DCMS. *Id.*

13 Plaintiff's counsel's administrative assistant sent a copy of the letter to Mr. Kramer,  
14 almost immediately after it was sent to Mr. Collins. Kramer Dec., ¶ 12. Mr. Kramer received the  
15 letter. *Id.* Mr. Kramer continued to understand that he was barred him providing any documents  
16 designated confidential or highly confidential by Defendants to DCMS or any other person. *Id.*

17 On November 21, 2018, Mr. Kramer had a breakfast business meeting unrelated to  
18 Six4Three. Kramer Dec., ¶ 13. Upon returning to his hotel, the Serjeant-at-Arms of the House  
19 of Commons, who followed him into the lobby, served him with another Order to Produce  
20 Documents ("DCMS Order #2"). Kramer Dec., ¶ 13, Ex. 8. Consistent with the statements made  
21 by Plaintiff's counsel in the above-referenced letters that Mr. Kramer was barred by the  
22 Protective Order from providing the requested documents, Mr. Kramer again refused to comply  
23 with DCMS Order #2 and proceeded to conduct his business in London. Kramer Dec., ¶ 14.

24 At 11am London local time on November 21, 2018, Mr. Kramer received via email a  
25 third Order to Produce Documents ("DCMS Order #3"), which stated:

26 On Monday 19 November, the Committee made the following Order:  
27  
28



1                    *Ordered*, That Mr Theodore Kramer submit the following documents to  
2 the DCMS Committee in relation to its inquiry into Disinformation and  
3 ‘fake news’, by 5pm on 20<sup>th</sup> November 2018:

4                    Unredacted copies of Six4Three’s opposition to the anti-SLAPP  
5 (strategic lawsuits against public participation) motion, filed in  
6 the California courts, relating to the company’s dispute with  
7 Facebook, along with any documents or notes relating  
8 Six4Three’s opposition to the anti-SLAPP motion.

9                    You did not comply with this order by the 5pm deadline, and failed to supply us  
10 with a satisfactory reason for not doing so.

11                    I re-issued the Order on 20 November, with a deadline of 11am today. In the  
12 accompanying letter, I warned you that, should you fail to respond by the 11am  
13 deadline today, it would be my duty to ask the Committee immediately to report  
14 this matter to the House of Commons, and request that it take action against you.  
15 As a result of failing to comply with an Order of the Committee you could be  
16 considered to be acting in contempt and face investigation and sanction by the  
17 House.

18                    The letter was delivered to you in person at 9am this morning by the Serjeant at  
19 Arms, as warrant officer of the House.

20                    You again failed to comply.

21                    As a result, the Committee met at 11am and formally ordered that I report your  
22 non-compliance to the House. I have taken this action, and reported your failure  
23 to comply to the House. This will appear on today’s formal record, and the  
24 process of investigation will commence.

25 Kramer Dec., ¶ 14, Ex. 9.

26                    In light of DCMS’ continued pressure and his inability to conduct business peacefully,  
27 Mr. Kramer concluded on his own that he needed to address the matter directly with Mr. Collins  
28 and further determine what DCMS intended when it wrote that “the process of investigation will  
commence.” Kramer Dec., ¶ 15. Mr. Kramer did not feel comfortable continuing his scheduled  
meetings while under an active investigation by Parliament. *Id.* Mr. Kramer believed it was  
highly likely that if he continued to ignore DCMS, the Serjeant-at-Arms or other Parliamentary  
staff may have placed him under contempt or sanction during one of his business meetings,  
which he believed would have greatly tarnished his reputation, placed him in significant legal  
jeopardy in the United Kingdom, and made it impossible for him to conduct business in the

1 United Kingdom in the future. *Id.* Mr. Kramer was further concerned that he might be barred  
2 from leaving the country and/or returning to the country if the matter was not resolved. *Id.* Mr.  
3 Kramer also attempted to research the issue on Google and concluded that any decision to  
4 ignore an active investigation by a national government could result in serious, potentially  
5 criminal, consequences. *Id.* However, Mr. Kramer did not seek further advice from counsel. *Id.*;  
6 Godkin Dec., ¶ 15.

7 Mr. Kramer attempted to delay his next meeting and went to Parliament, without  
8 representation, and asked Parliamentary staff to contact Mr. Collins to advise him that  
9 Mr. Kramer was outside and prepared to discuss Mr. Collins' investigation. Kramer Dec.,  
10 ¶ 16. Prior to doing so, Mr. Kramer did not seek advice from any attorney. *Id.* This  
11 includes the attorneys representing Six4Three in this matter. *Id.* Mr. Kramer did not at  
12 that time indicate a willingness to comply with the DCMS Orders, and he did not intend  
13 to comply with the DCMS Orders; rather, he continued to understand that he was not  
14 allowed to comply with the DCMS Orders, in light of the Protective Order and the  
15 November 20<sup>th</sup> Order of this Court. *Id.* Mr. Kramer intended to understand fully the  
16 procedures, risks and penalties associated with Parliament's notice to him that Parliament  
17 had begun an active investigation into him. *Id.* He intended to convince Mr. Collins that  
18 Mr. Collins could not force him to turn over documents subject to the Protective Order,  
19 and further that Mr. Collins could not prevent him from peacefully conducting business  
20 in the United Kingdom. *Id.*

21 Parliamentary staff then brought Mr. Kramer into Mr. Collins' office, where Mr. Collins  
22 and his staff kept Mr. Kramer for two hours, without representation, explaining in significant  
23 detail the procedures of the investigation into Mr. Kramer and the penalties associated with his  
24 continued non-compliance. Kramer Dec., ¶ 17. Mr. Collins communicated that he had received  
25 no communication from Facebook since his issuance of DCMS Order #1. *Id.*, ¶ 17. Mr. Collins  
26 and his staff communicated to Mr. Kramer that he was under an active investigation, that he was  
27 now in contempt of Parliament, and that the penalty could include fines and potential  
28 imprisonment. *Id.*, ¶ 18. Mr. Kramer did not know whether he was free to leave the location, nor

1 did he know whether, if allowed to leave, he would be allowed to fly home to the United States.  
2 *Id.*, ¶ 18.

3 At this point, Mr. Kramer panicked. *Id.*, ¶ 18. He opened his computer, took out a USB  
4 drive, and went onto the local dropbox folder containing Six4Three's documents. *Id.* He  
5 searched that folder using keywords and found files whose titles appeared to relate to the anti-  
6 SLAPP opposition papers that DCMS had ordered him to produce. *Id.* Mr. Kramer did not  
7 expect to find the precise documents Mr. Collins had requested. *Id.* Mr. Kramer had not  
8 previously attempted to open the folder where these documents were located, and did not  
9 previously know that he had access to them. *Id.* Mr. Collins had two staff members present with  
10 him, one of whom was directly viewing Mr. Kramer's screen. *Id.* Mr. Kramer then transferred  
11 to the USB drive files he believed, based on the filenames, to be subject to Mr. Collins' request.  
12 *Id.* Mr. Collins watched Mr. Kramer as he did this, and Mr. Kramer turned the USB drive over  
13 to Mr. Collins immediately. *Id.* Mr. Kramer does not recall the names of the files he transferred  
14 but he was looking for any files he could access with names that seemed relevant to the anti-  
15 SLAPP opposition papers, since that was the subject of the DCMS Orders. *Id.* He did not open  
16 any of the files. *Id.* Mr. Kramer has not reviewed any documents designated highly confidential  
17 by Facebook at any time and was aware that his decision to turn over the documents to Mr.  
18 Collins went against the explicit statements by counsel in the above referenced  
19 communications. *Id.*, ¶ 19.

20 Mr. Kramer was so shaken by this experience that he failed to attend his remaining  
21 meetings on November 21, 2018 and went straight to the airport. *Id.*, ¶ 20. Mr. Kramer did not  
22 contact counsel for Six4Three or any member of the legal team to inform them that he had  
23 provided the documents to DCMS in spite of the Protective Order, the November 20<sup>th</sup> Order,  
24 and the letters sent by Plaintiff's counsel to DCMS and Defendants referencing the Protective  
25 Order and making clear that Mr. Kramer was barred from complying with the DCMS Orders.  
26 *Id.*

27 On the morning of November 22, 2018, Mr. Kramer received a letter from DCMS  
28 confirming his compliance with its Orders and stating that DCMS had no further plans to

1 proceed with its investigation or to continue its contempt proceeding against Mr. Kramer.  
2 Kramer Dec., ¶ 21, Ex. 10. Mr. Kramer did not, at the time, provide the letter to Six4Three’s  
3 counsel or any other member of the legal team. *Id.*

4 Mr. Kramer spent November 22, 2018 with his family in New York for the  
5 Thanksgiving holiday. Kramer Dec., ¶ 22.

6 On November 23, 2018, Plaintiff’s counsel received a letter from DCMS outlining  
7 DCMS’ position on various questions raised by the November 20<sup>th</sup> Order. Godkin Dec., ¶ 16,  
8 Ex. 7. Counsel for Plaintiff subsequently learned that Mr. Kramer had in fact provided the  
9 documents to DCMS and that the transfer of highly confidential documents and summaries  
10 thereof from Six4Three’s dropbox to Mr. Gross’s system had not yet been completed. Godkin  
11 Dec., ¶ 17; Kramer Dec., ¶ 23.

12 In response to this revelation, Plaintiff’s counsel promptly sent emails to Defendants and  
13 to DCMS. Godkin Dec., ¶¶ 18-19, Exs. 8-9. Plaintiff’s counsel’s email to DCMS urged DCMS  
14 not to review any materials Mr. Kramer provided and to return them immediately to  
15 Six4Three’s counsel or Facebook’s counsel, who was copied on the email. Godkin Dec., ¶ 19,  
16 Ex. 9. Mr. Collins responded to counsel’s email that he had “already viewed the contents of  
17 these documents” and they “are clearly of significant interest to the Committee’s inquiry.”  
18 Godkin Dec., ¶ 20, Ex. 10. Further, Mr. Collins stated that the Committee “will discuss next  
19 week how it intends to proceed.” *Id.*

20 Plaintiff’s counsel took further actions to ensure that their previous efforts to eliminate  
21 any access that Mr. Kramer had to any documents designated highly confidential by Defendants  
22 or any summaries thereof was, in fact, achieved. Gross Dec., ¶ 11. Mr. Kramer, consistent with  
23 these actions, deleted from his computer and from Six4Three’s dropbox account any documents  
24 that could contain information designated highly confidential by Defendants. Kramer Dec., ¶  
25 24. In doing so, Mr. Kramer did not open or review any such documents. *Id.*

1 **ARGUMENT**

2 **1. Response to Order Par. 3(a)**

3 The Court requests Plaintiff address: “What authority does DCMS have to overrule the  
4 Court’s orders without first seeking relief from the Court?” November 20<sup>th</sup> Order, at 2.  
5 Plaintiff’s counsel is not admitted to practice in the United Kingdom and is not qualified to offer  
6 a legal opinion on this matter. Godkin Dec., ¶ 22; Gross Dec., ¶ 12. Plaintiff respectfully refers  
7 the Court to DCMS’s response on this issue. Godkin Dec., ¶ 16, Ex. 7.

8 **2. Response to Order Par. 3(b)**

9 The Court requests Plaintiff address: “What is the legal effect, under both United States  
10 and United Kingdom law, of the DCMS letter to Mr. Kramer?” November 20<sup>th</sup> Order, at 3.  
11 Plaintiff’s counsel is not admitted to practice in the United Kingdom and is not qualified to offer  
12 a legal opinion on the legal effect of the DCMS Order under United Kingdom law. Godkin  
13 Dec., ¶ 22; Gross Dec., ¶ 12. Plaintiff respectfully refers the Court to DCMS’s response on this  
14 issue. Godkin Dec., ¶ 16, Ex. 7.

15 As for the legal effect of the DCMS Order under United States law, it appears that when  
16 a discovery order conflicts with foreign law, courts look to the judicial principle of international  
17 comity – respect for the sovereign power of other countries – and also apply the law of the state  
18 where recognition and/or enforcement is sought. *Société Nationale Industrielle Aerospatiale v.*  
19 *U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 522 (1987) (“*Aerospatiale*”) at 543–44; *see*  
20 *also, e.g., De la Mata v. American Life Insurance Company*, 771 F. Supp. 1375, 1381 (D. Del.  
21 1991); *but see Yahoo! Inc. v. La Ligue Centre Le Racisme et L’Antisemitisme*, 433 F.3d 1199  
22 (9th Cir. 2006) (“There is very little case law in California dealing with enforceability of foreign  
23 country injunctions under general principles of comity...”). Another primary source of guidance  
24 for U.S. courts is the Hague Evidence Convention (“Hague Convention”), an international  
25 assistance agreement that governs the collection of evidence abroad. *Aerospatiale*, at 522.

26 Comity involves the balancing of international and domestic interests to gauge if, and to  
27 what extent, one nation will allow the law of another nation to apply within its jurisdiction.  
28 *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). In other words, even if a court has jurisdiction over a

1 case and its parties, the doctrine of international comity obligates judges to contemplate how the  
2 outcome will affect the concerned foreign nations. Diego Zambrano, *A Comity of Errors: The*  
3 *Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 Berkeley J. Int'l  
4 L. 157, 173–75 (2016), note 103, at 161–62.

5 The Supreme Court has provided a multi-factor balancing test for determining when  
6 U.S. courts should exercise their authority to compel production of evidence constrained by  
7 foreign law, the inverse of the situation here. *See Aerospatiale*, 482 U.S. at 544 n.28, as follows:  
8 (1) the significance of the requested discovery in regard to the litigation; (2) the precision of the  
9 request; (3) whether the requested information was generated in the United States; (4) the  
10 availability of an alternate method for acquiring the discovery materials; and (5) the damage to  
11 the United States' or foreign nation's concerns if the discovery is not executed. *See*  
12 *Aerospatiale*, 482 U.S. at 544 n.28 (citing Rest. (Third) of Foreign Relations Law of the United  
13 States § 442 (Am. Law Inst. 1987)).

14 *Aerospatiale* is the controlling U.S. Supreme Court case on the international comity  
15 analysis. There, the plaintiffs sought discovery information physically located in France. The  
16 defendants, French aircraft companies, filed a motion for a protective order asserting that a  
17 French penal statute prevented them from complying with the discovery request and that  
18 complying could subject them to criminal liability. *Id.* at 525-526. The Court dismissed the  
19 French blocking statute, noting well-established precedent that such laws did not prevent U.S.  
20 courts from compelling discovery that might defy them. *Id.* at 544 n.29.

21 The international comity analysis demands a detailed evaluation of the interests of both  
22 the nation requesting discovery and the foreign nation. *Id.* at 543–44. To weigh those competing  
23 interests, the Court adopted the approach in the Restatement of Foreign Relations Law of the  
24 United States. *Id.* at 544 n.28. U.S. courts must be mindful of unique difficulties facing foreign  
25 parties, as well as the sovereign state's demonstrated interests. *Id.*

26 In *Pilkington Brothers P.L.C. v. AFG Industries Inc.* 581 F. Supp. 1039 (D. Del. 1984),  
27 the plaintiff sought a preliminary injunction that tracked an English interim injunction  
28 protecting certain trade secrets. The plaintiff and the defendant were in arbitration proceedings

1 in England, but due to concerns over the disclosure of its technology, the plaintiff sought an  
2 interim injunction from the High Court of Justice, Queens Bench Division, Commercial Court,  
3 in accordance with England’s Arbitration Act. The English court entered an *ex parte* injunction  
4 precluding certain disclosures of technical information. The plaintiff sought parallel declaratory  
5 and injunctive relief in the U.S. action.

6 The issue, as framed by the district court, was “whether an American court must  
7 duplicate a foreign interim injunction, without reference to the underlying dispute, where there  
8 are ongoing and continuous violations of that foreign injunction.” *Id.* at 1042. In answering that  
9 question, the court held “that principles of international comity do not require, and in fact  
10 militate against, the issuance of a duplicative order that would interject this Court into the  
11 arbitration dispute now before the English courts and the arbitration panel.” *Id.* at 1043. The  
12 court *refused* to set out a “per se rule against recognition and enforcement of foreign interim  
13 injunctions,” but rather stated that it would “analyze the particular facts of this case under  
14 general principles of international comity. There may be a case, under different circumstances,  
15 in which a foreign nation ‘interim’ injunction could be recognized.” *Id.*

16 Plaintiff has not been able to find cases that more directly address the situation at hand.

17 **3. Response to Order Par. 3(c)**

18 The Court requests Plaintiff address: “Is the DCMS letter different than a summons?”  
19 November 20<sup>th</sup> Order, at 3. Plaintiff’s counsel is not admitted to practice in the United Kingdom  
20 and is not qualified to offer a legal opinion on whether the DCMS Order is different than a  
21 summons. Godkin Dec., ¶ 22; Gross Dec., ¶ 12. Plaintiff respectfully refers the Court to  
22 DCMS’s response on this issue. Godkin Dec., ¶ 16, Ex. 7.

23 **4. Response to Order Par. 3(d)**

24 The Court requests Plaintiff address: “What issues under the United States Constitution  
25 are raised by the DCMS letter?” November 20<sup>th</sup> Order, at 3.

26 The legal whipsaw in which Mr. Kramer was placed by the conflicting demands of the  
27 DCMS Orders that he provide the documents, on the one hand, and the Protective Order’s  
28 prohibition of his provision of the documents, on the other, implicates issues of due process

1 under the United States Constitution. “The fundamental requirement of due process is the  
2 opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v.*  
3 *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)  
4 and citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); *see also id.* (“The ‘right to be heard  
5 before being condemned to suffer grievous loss of any kind, even though it may not involve the  
6 stigma and hardships of a criminal conviction, is a principle basic to our society.’”) (quoting  
7 *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

8 Being placed in a position where he had to make the impossible choice between  
9 violating U.K. law and violating this Court’s order, effectively denied Mr. Kramer that right to  
10 be heard. Neither Six4Three nor its counsel condones or approves of the manner in which Mr.  
11 Kramer resolved that dilemma.

12 **5. Response to Order Par. 3(e)**

13 The Court requests Plaintiff address: “What are the obligations of the Court where a  
14 House of Commons committee orders the release of documents in contravention to the Court’s  
15 orders?” November 20<sup>th</sup> Order, at 3. Plaintiff’s counsel respectfully refers the Court to the  
16 authority regarding the judicial principle of international comity discussed in Section 2, *supra*,  
17 at 9-11.

18 **6. Response to Order Par. 3(f)**

19 The Court requests Plaintiff address: “What are the procedures for Mr. Kramer, who is  
20 visiting the United Kingdom on business, to respond or object to the DCMS letter demand?”  
21 November 20<sup>th</sup> Order, at 3. Plaintiff’s counsel is not qualified to offer a legal opinion on the  
22 procedures for responding to an Order of Parliament. Godkin Dec., ¶ 22; Gross Dec., ¶ 12.  
23 Plaintiff respectfully refers the Court to DCMS’s response on this issue. Godkin Dec., ¶ 16, Ex.  
24 7. (“There is no procedure for an appeal against an order of a committee, or to enable a person  
25 who receives an order to respond to it. Once made, it must be complied with. Mr. Kramer was  
26 placed in a position where he was required to obey the order or risk being found in contempt of  
27 Parliament”). Plaintiff further refers the Court to Section 16 of the Protective Order, which  
28 establishes a mechanism by which the designating party has the obligation to defend against



1 disclosure of designated documents in the event they are demanded under legal compulsion by a  
2 third party. *See* Godkin Dec., ¶ 21, Ex. 11, § 16.

3 **7. Response to Order Par. 3(g)**

4 The Court requests Plaintiff address: “What are the contempt procedures for DCMS for  
5 non-compliance by Mr. Kramer?” November 20<sup>th</sup> Order, at 3. Plaintiff’s counsel is not qualified  
6 to offer a legal opinion on the contempt procedures for failure to respond to an Order of  
7 Parliament. Godkin Dec., ¶ 22; Gross Dec., ¶ 12. Plaintiff respectfully refers the Court to  
8 DCMS’s response on this issue. Godkin Dec., ¶ 16, Ex. 7. (“If Mr. Kramer had failed to produce  
9 the documents after being ordered to do so by the Committee, the Committee would have  
10 reported that failure to the House of Commons as a matter of potential contempt of Parliament.  
11 ‘Contempt’ is not anywhere defined, but *Erskine May* says (p. 837), ‘Acts or omissions which  
12 obstruct or impede the work of a committee or any of its members or officers, or which tend,  
13 directly or indirectly, to produce such results, may be treated as a contempt of the House and  
14 invested and punished, as appropriate’. May lists disobedience to an order of a committee as a  
15 contempt of the House (p. 839). The House would then have considered a motion to refer Mr.  
16 Kramer’s case to the Committee of Privileges. If the motion were passed the Committee of  
17 Privileges would have considered the matter and would, if it considered it appropriate, have  
18 proposed a sanction on Mr. Kramer for his contempt. The powers of the House of Commons to  
19 punish for contempt are not defined by statute, and have in the past included imprisonment,  
20 fines and admonishment either at the bar of the House or in absentia. In modern times the  
21 powers have been exercised sparingly”).

22 **8. Response to Order Par. 4(a)**

23 The Court requests Plaintiff address: “What events or circumstances have given rise to  
24 the letter dated November 19, 2018 from DCMS to Mr. Kramer?” November 20<sup>th</sup> Order, at 3.  
25 Plaintiff respectfully refers the Court to the comprehensive summary of the events and  
26 circumstances giving rise to DCMS Order #1 discussed in the Background section, *supra*, at 1-  
27 4.

1           **9. Response to Order Par. 4(b)**

2           The Court requests Plaintiff address: “What communications has Plaintiff, its counsel,  
3 Mr. Kramer, or its other agents or representatives had with DCMS or any member of  
4 Parliament, including staff, prior to issuance of the letter?” November 20<sup>th</sup> Order, at 3. Plaintiff  
5 respectfully refers the Court to the comprehensive summary of communications prior to  
6 receiving DCMS Order #1 discussed in the Background section, *supra*, at 1-4.

7           **10. Response to Order Par. 4(c)**

8           The Court requests Plaintiff address: “How was DCMS made aware ‘that Mr. Kramer  
9 and the documents are both in the UK at the present?’” November 20<sup>th</sup> Order, at 3. Plaintiff  
10 respectfully refers the Court to the comprehensive summary of the events and circumstances  
11 giving rise to DCMS Order #1 discussed in the Background section, *supra*, at 1-4. Mr. Kramer  
12 communicated the name of his hotel only to Ms. Cadwalladr. Kramer Dec., ¶ 10. Mr. Kramer  
13 also had previously indicated to Ms. Cadwalladr in a meeting that documents were located in a  
14 cloud-based file storage system. Kramer Dec., ¶ 3.

15           **11. Response to Order Par. 4(d)**

16           The Court requests Plaintiff address: “What method was employed to serve the DCMS  
17 letter on Mr. Kramer?” November 20<sup>th</sup> Order, at 3. Plaintiff respectfully refers the Court to the  
18 discussion of Mr. Kramer’s receipt of the three DCMS Orders in the Background section, *supra*,  
19 at 2-8.

20           **12. Response to Order Par. 4(e)**

21           The Court requests Plaintiff address: “Is Mr. Godkin licensed to practice in the United  
22 Kingdom and does he have authority to represent Mr. Kramer before DCMS?” November 20<sup>th</sup>  
23 Order, at 3. Mr. Godkin is not licensed to practice in the United Kingdom and does not have the  
24 authority to represent Mr. Kramer before DCMS. Godkin Dec., ¶ 22; Gross Dec., ¶ 12. Mr.  
25 Godkin’s letters to DCMS were sent in his capacity as Mr. Kramer’s counsel in the United  
26 States regarding the instant action. Mr. Godkin is duty-bound to notify DCMS of the Protective  
27 Order pursuant to Section 16 of the Protective Order.

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**13. Response to Order Par. 4(f)**

The Court requests Plaintiff address: “Has Mr. Kramer retained counsel in the United Kingdom at any point? If so, identify that counsel.” November 20<sup>th</sup> Order, at 3. Mr. Kramer has not retained counsel in the United Kingdom at any point. Kramer Dec., ¶ 25.

**14. Response to Order Par. 6**

Plaintiff affirms that any factual assertions contained herein are supported by competent evidence. Godkin Dec., ¶ 23; Gross Dec., ¶ 12; Kramer Dec., ¶ 26.

Dated: November 26, 2018

Respectfully Submitted,

GROSS & KLEIN LLP

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