

03/30/2020

RE#1(Revised): Facebook, Inc.(Facebook)seeks a stay pending appeal of a Superior Court order compelling production of certain documents in response to a civil investigative demand (CID) from the Attorney General. After consideration of Facebook's motion, the Attorney General's response, and the amicus brief of the United States Chamber of Commerce, and for the reasons that follow, the motion is denied.

In 2018, the Attorney General issued multiple CIDs in connection with her investigation of the misuse of Facebook users' data by third-party application (app) developers. Facebook provided many of the requested documents; however, it also withheld a substantial number of documents requested in the third CID claiming that the documents were privileged attorney-client communications, or were not subject to disclosure pursuant to the attorney work product doctrine. Facebook did not file a motion to modify or set aside the demand pursuant to G.L. c. 93A, § 6 (7). In August 2019, the Attorney General filed a petition to compel production of the withheld documents, which Facebook opposed. After a hearing, a Superior Court judge issued a comprehensive written decision concluding that Facebook could withhold attorney-client communications, but could not withhold documents related to certain apps and app developers that Facebook's internal investigation identified as requiring additional scrutiny. Facebook appealed from that order and sought a stay in the Superior Court. The Superior Court judge denied the motion for a stay, and Facebook filed the instant motion for a stay pursuant to Mass. R. A. P. 6 (a).

I may order a stay if the moving party demonstrates: "(1) the likelihood of appellant's success on the merits; (2) the likelihood of irreparable harm to appellant if the court denies the stay; (3) the absence of substantial harm to other parties if the stay issues; and (4) the absence of harm to the public interest from granting the stay." C.E. v. J.E., 472 Mass. 1016, 1017 (2015), quoting J.W. Smith & H.B. Zobel, Rules Practice § 62.3, at 409 (2d ed. 2007). "What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits." Packaging Indus. Group, Inc. v. Cheney, 308 Mass. 609, 617 (1980).

As an initial matter, failure to bring a timely motion to modify or set aside the demand pursuant to G.L. c. 93A, § 6 (7) constitutes a waiver of Facebook's objections to the CID. Attorney Gen. v. Bodimetric Profiles, 404 Mass. 152, 154-155 (1988). Although the Superior Court judge concluded that he had the discretion to reject this waiver argument advanced by the Attorney General, and did so based on the "intensive discussions and negotiations" between the parties, Facebook's failure to comply with the statutory procedure for seeking modification of a CID reduces its likelihood of success on appeal. See id. at 155. ("We note that [the respondent] did promptly send a letter to the Attorney General stating its objections to the C.I.D. However, [the respondent] also should have filed in court a motion to modify or set aside the C.I.D.").

Even if Facebook did not waive its objections, the defendant faces an uphill battle on appeal. "The Supreme Judicial Court has stated that 'the statute should be construed liberally in favor of the government.'" Harmon Law Offices, P.C. v. Attorney Gen., 83 Mass. 830, 835 (2013) quoting Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc., 372 Mass. 353, 364 (1977) (Yankee Milk). The recipient of a CID has the "heavy burden" to show good cause why it should not be compelled to respond. Harmon Law Offices, P.C., 83 Mass. App. Ct. at 834 quoting CUNA Mut. Ins. Soc. v. Attorney Gen., 380 Mass. 539, 544 (1980). A judge's decision that a respondent has failed to meet this heavy burden will only be overturned if the judge abused his or her discretion. Yankee Milk, 372 Mass. at 357.

Based on the record before me, including the judge's thoughtful, detailed decision, it does not appear that he abused his discretion. Ordering Facebook to produce to the Attorney General the records responsive to requests 1-5 and the non-privileged documents responsive to request 6, was well within the range of reasonable alternatives. See L.L. v. Commonwealth, 470 Mass. 169, 185 n. 27 (2014). Therefore, I conclude that Facebook has failed to establish a likelihood of success on the merits of its appeal.

In light of this conclusion, a stay would only be appropriate if Facebook's risk of irreparable harm in the absence of a stay was extreme, the harm of a stay to the Attorney General was slight, and the public interest was unharmed. In my judgment, Facebook's filings fail to demonstrate an extreme risk of irreparable harm in the absence of stay. Whereas, the Attorney General and the public interest in protecting user's data would undoubtedly be harmed by further delay in investigating purportedly large-scale misuse.

For these reasons, the respondent's motion is denied. (Kinder, J.). *Notice/Attest/Davis, J.

As of 03/30/2020 10:15am