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18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**
20 **OAKLAND DIVISION**

21 WANG XIAONING, YU LING, SHI TAO,
22 and ADDITIONAL PRESENTLY
23 UNNAMED AND TO BE IDENTIFIED
24 INDIVIDUALS,

25 Plaintiffs,

26 v.

27 YAHOO, INC., a Delaware Corporation,
28 YAHOO! HOLDINGS (HONG KONG),
LTD., a Foreign Subsidiary of Yahoo!, AND
OTHER PRESENTLY UNNAMED AND
TO BE IDENTIFIED CORPORATE
DEFENDANTS AND UNNAMED AND
TO BE IDENTIFIED INDIVIDUAL
EMPLOYEES OF SAID
CORPORATIONS,

Defendants.

Case No. C07-02151 CW/JCS

TORT DAMAGES CLAIM

**PLAINTIFFS' MOTION TO INITIATE
INITIAL AND JURISDICTIONAL
DISCOVERY**

Date: November 1, 2007

Time: 2 P.M.

Location: Courtroom 2

Judge: Hon. Claudia Wilken

TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT ON November 1, 2007, at 2:00 p.m., Plaintiffs Wang
Xiaoning, Yu Ling, and Shi Tao will and hereby do move to initiate limited initial and

1 jurisdictional discovery in order to respond to Defendants' Motions to Dismiss, Motion for a
2 More Definite Statement, and Motion to Strike, which Defendants filed on August 27, 2007.
3 Plaintiffs bring this motion pursuant to Rules 12(b)(1), (6), and (7) of the Federal Rules of Civil
4 Procedure. This motion is based on this notice of motion and motion, the following
5 Memorandum of Points and Authorities, the pleadings on file in this matter, and any further
6 argument the Court might allow.
7

8 Dated: September 14, 2007

MORTON H. SKLAR
WORLD ORGANIZATION FOR HUMAN
RIGHTS USA

10 By: /s/ Morton H. Sklar
11 Morton H. Sklar
12 Attorney for Wang Xiaoning, Yu
13 Ling, and Shi Tao
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1 **I. INTRODUCTION**

2 Plaintiffs, separate and apart from submitting their response to the Defendants' Motions to
3 Dismiss and associated motions filed on August 27, 2007, and without prejudice to their
4 submitting their Responses to those motions at a subsequent time pursuant to the associated
5 motion to expand time being submitted with the Motion, hereby submit this Motion to Initiate
6 Initial and Jurisdictional Discovery. This Motion is made necessary by the extensive number,
7 scope, and content of the allegations contained in the Defendants' motions, that make it necessary
8 to obtain additional information from the Defendants in order for a fair and reasonable response
9 to be provided by the Plaintiffs.

10 In no way should this request for limited discovery be taken as an admission of any of the
11 Defendants' allegations or arguments presented in their Motions to Dismiss and associated
12 motions, nor should the Plaintiffs' discovery motions be taken as a waiver of Plaintiff's right and
13 intention to respond on the merits to the Defendants' Motions.

14 In their motions, Defendants have raised a wide variety of complex and detailed
15 arguments as to why this court should not exercise jurisdiction over these proceedings, and have
16 supplemented their motions with an especially large number of factual presentations and
17 documents. Both the allegations and the supporting documentation go well beyond challenging
18 the legal sufficiency of the claims and legal theories set out by the Plaintiffs in their complaint, in
19 that they challenge the factual accuracy of the Plaintiffs' claims, raise additional facts and legal
20 arguments, and offer extraneous evidence in support of the Defendants' positions. In these
21 circumstances, the Federal Rules of Civil Procedure and court decisions applying and interpreting
22 these Rules recognize the right of the non-moving party to obtain the facts that they need to
23 properly and fairly counter the moving party's claims through initial or jurisdictional discovery,
24 and to place in abeyance the court's consideration and resolution of the Defendants' motions,
25 including submission of the non-moving party's substantive response to the Motions to Dismiss,
26 until the initial and jurisdictional discovery process is completed. This Motion to Initiate Initial
27 and Jurisdictional Discovery, and the accompanying Motion to Expand the Time for the
28 Plaintiffs' Response, would accomplish that purpose, and provide the means recognized in the

1 Federal Rules and by the courts to provide the Plaintiffs with the facts and information they need
2 to respond to the Defendants' Motions on a fair and effective basis.

3 This proposed initial and jurisdictional discovery approach is particularly necessary and
4 appropriate given the fact that the Defendants have supplemented their various Motions to
5 Dismiss and associated motions, and arguments in support of dismissal, with a substantial body of
6 supporting documentation that, pursuant to Rule 12(b)(6) standards, effectively requires the
7 conversion of their Motion to Dismiss for Failure to State a Claim into a Rule 56 Motion for
8 Summary Judgment (see section II(B) below beginning on page 7).

9 Several very practical reasons also point in favor of the initial and jurisdictional discovery
10 approach the Plaintiffs are proposing, relating to serious deficiencies and irregularities in the way
11 the Defendants have chosen to present their several Motions. By submitting three separate Rule
12 12 motions dealing with individual grounds for dismissal, along with other associated motions,
13 Defendants may well have violated not only the spirit and letter of the "consolidation of defenses"
14 requirement of Rule 12(g), but the terms of the Court's August 23rd Order that placed a forty-
15 page limit on their Motion to Dismiss submission. Indeed, it may well be the case that the
16 separate motions approach was taken specifically because the court rejected the Defendants'
17 request for an expanded page limit for their submission beyond the 40-page limit that was
18 eventually provided. Breaking down the motion into its separate parts and submitting them as
19 individual motions may have been seen by the Defendants as the only way for them to get all of
20 their challenges before the court in the comprehensive form that they sought.

21 Plaintiffs will address these deficiencies and Rule violations in the way that the
22 Defendants' Motions have been submitted to the court in their upcoming Response to these
23 motions. At a minimum the Defendants' practices add further weight to the need and importance
24 of initiating initial and jurisdictional discovery, as one means that would help even the playing
25 field and make it possible for the Plaintiffs to respond to the numerous motions and documentary
26 materials that the Defendants have filed on a fairer and more realistic basis. These problems with
27 the Defendants' Motions also speak in support of the accompanying Motion to Expand Time for
28 the filing of Plaintiffs' response to the Defendants' Motions. Even if the court chooses to deny the

1 Plaintiffs' request to hold the Motions to Dismiss proceedings in abeyance until initial and
2 jurisdictional discovery can be completed, additional time will be needed to properly respond to
3 the Defendants' numerous and extensive motions.

4 Plaintiffs are referring their present Motions to Judge Wilken in recognition that, while
5 they deal with a combination of motion to dismiss, case management, and discovery-related
6 issues, the core decisions that will be required here focus on management of the pending Motion
7 to Dismiss proceedings which come under Judge Wilken's jurisdiction. If, as Plaintiffs request,
8 the Defendants' Motions to Dismiss are placed on hold pending completion of a jurisdictional
9 discovery process, it is Plaintiffs' understanding that, pursuant to Judge Wilken's August 17,
10 2007 order, the initial and jurisdictional discovery process will then come under Magistrate Judge
11 Spero's authority. Plaintiffs' obtained advice from both Judge Wilken's and Judge Spero's
12 chambers that this Motion was appropriately within Judge Wilken's jurisdiction.

13 In terms of the timing of the hearing on the Plaintiffs' Motions relating to initial and
14 jurisdictional discovery, Plaintiffs propose that a joint hearing on these matters be held
15 concurrently with an initial case management conference. The Court previously indicated that this
16 approach should be taken in its July 31 Order. The date being proposed for this consolidated
17 hearing is November 1, 2007, to coincide with the date proposed by the Defendants for
18 consideration of their motions.

19 **II. NUMEROUS ELEMENTS OF THE DEFENDANTS' MOTIONS TO DISMISS**
20 **REQUIRE AND JUSTIFY ADDITIONAL FACT-GATHERING THROUGH**
21 **INITIAL AND JURISDICTIONAL DISCOVERY.**

22 There are several elements of the Defendants' Motions to Dismiss and accompanying
23 documentation that go beyond challenging on their face the legal sufficiency of the Plaintiffs'
24 allegations, and raise factual issues that require initial and jurisdictional discovery to rebut,
25 whether simply as a matter of fair play in responding to the motions under the jurisdictional
26 discovery standards applied under each of the Rule 12 (b) subsections, or through the more
27 formal conversion of the Rule 12 (b)(6) Motion for Failure to State a Claim into the more
28 factually-oriented Rule 56 Motion for Summary Judgment. Substantial case precedent supports

1 the necessity of initiating initial and jurisdictional discovery where access to additional facts and
2 documentation are required in order to make a fair and reasoned response to the type of motions
3 to dismiss that have been filed by Defendants and to the types of allegations and factual materials
4 contained in these motions. Prevailing case law applying Rule 12 supports the position that, in
5 general, challenges to jurisdiction justify the initiation of initial or jurisdictional discovery. The
6 Supreme Court has held that “[i]t is now clear that federal courts have the power to order, at their
7 discretion, the discovery of facts necessary to ascertain their competency to entertain the merits.”
8 *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

9 **A. Jurisdictional Discovery on the Basis of the Defendants’ 12(b)(2) Motion is**
10 **Necessary.**

11 When a case presents questions of the appropriateness of jurisdiction or venue, early
12 discovery is available to ascertain facts on those questions. *See, Oppenheimer*, 437 U.S. at 351
13 n.13. This case presents a clear situation where jurisdictional discovery would be appropriate.
14 The Ninth Circuit has held that “[d]iscovery should ordinarily be granted where pertinent facts
15 bearing on the question of jurisdiction are controverted or where a more satisfactory showing of
16 the facts is necessary.” *Butcher’s Union Local No. 498 v. SDC Investment, Inc.*, 788 F.2d 535,
17 540 (9th Cir. 1986); *see also, Wells Fargo & Co. V. Wells Fargo Express Co.*, 556 F.2d 406, 431
18 n. 24 (9th Cir. 1977). Here, Yahoo! Hong Kong’s Motion to Dismiss raises and asserts a number
19 of facts that the Plaintiffs need to contest, and that are uniquely within the Defendants’ custody,
20 and as such, initial jurisdictional discovery should be allowed.

21 Yahoo! Hong Kong’s Motion to Dismiss for Lack of Personal Jurisdiction and its
22 accompanying Memorandum in Support raise a number of factual allegations regarding Yahoo!
23 Hong Kong, its organizational relationships with Yahoo! Inc. and its business activities as they
24 relate to the U.S. and California. These allegations were supported by several documents,
25 including a detailed Declaration by Yahoo! Hong Kong’s current General Manager discussing
26 several matters including the nature of Yahoo! Hong Kong’s connections with California, its
27 advertising revenue sources, the services it provides, the sources of its income, and its methods of
28 operation. Many of the points set out in the Motion and in the accompanying Memorandum and

1 attached documentary evidence involve a factual challenge to the Plaintiffs' allegations in the
2 complaint, making jurisdictional discovery, and deferral of consideration of the Defendants'
3 Motion until a more complete factual inquiry can be conducted, a necessity. To rule on these
4 jurisdictional issues based only upon the Defendants' claims and factual offerings would amount
5 to a ruling on the merits without providing the non-moving party with the means to respond to the
6 moving parties' claims and proffered evidence. *See, e.g., Data Disc, Inc. v. Systems Tech*
7 *Assocs., Inc.*, 557 F. 2d 1280 (9th Cir. 1977). For this reason, courts normally grant limited
8 jurisdictional discovery before ruling on a Rule 12(b)(2) motion to dismiss. *See U.S. v. Swiss*
9 *American Bank*, 274 F. 3d 610, 625 (1st Cir. 2001). This is especially true where, as in this case,
10 one of the issues in question is whether a corporate defendant is adequately "doing business"
11 within the court's jurisdiction, and the evidence regarding these issues is completely within the
12 control of the defendant. *See, e.g., Mass. School of Law v. ABA*, 107 F. 3d 1026, 1042 (3rd Cir.
13 1997), *cert. denied*, 522 U.S. 907, 118 S.Ct. 264, 139 L. Ed 2d 191 (1997). To rule solely on the
14 very limited, self-serving and highly selective material provided by the Defendants on these
15 matters would not serve the interests of justice or meet due process standards.

16 For example, Yahoo! Hong Kong's General Manager attests to the fact that 1% of Yahoo!
17 Hong Kong's revenue and customers derive from California residents, but maintains that these
18 contacts are not sufficient to establish "doing business" in California. These and other critical
19 matters require jurisdictional discovery because the full range of facts associated with these issues
20 are uniquely within the knowledge and control of the Defendants, and only selected portions of
21 the facts most favorable to the Defendants have been offered by the Defendants in their Motions
22 and supporting documentation. More information is needed, for example, on the nature and
23 sources of Yahoo! Hong Kong's revenue and income and the nature of their corporate ties and
24 relationships, not only at the present time, but during earlier periods when the arrests of the
25 named plaintiffs took place, and before changes were made in Yahoo!'s corporate structure to try
26 to insulate them from responsibility for what occurred in China. These matters are not fully and
27 fairly reflected in the General Manager's highly limited and self-serving conclusions.

28

1 There are many other factual matters in the Defendants' possession that are not reflected
2 in the Defendant's highly selective and self-serving presentation of the facts. This includes the
3 specifics of the operational control Yahoo! Inc. exercises over Yahoo! Hong Kong and other
4 Yahoo! Chinese affiliates not just at the present time, but during the 2001-2004 period when
5 many of the abuses alleged in the Complaint took place. For example, the Yahoo! Hong Kong
6 General Manager claims that while most of Yahoo! Hong Kong is subject to his supervision and
7 control, he concedes that employees in some departments such as "legal, finance, and engineering
8 report to Yahoo! Inc." (General Manager Declaration page 4.) This is significant, as it indicates
9 control by Yahoo! Inc. over Yahoo! Hong Kong operations, although the full nature and extent of
10 that control remains to be determined. Only jurisdictional discovery can obtain the full facts on
11 these relationships and the extent of control actually exercised by Yahoo! Inc. over Yahoo! Hong
12 Kong operations, since these matters are exclusively within the Defendants' knowledge and
13 control. Contractual relationships between Yahoo! Inc. and its China and Hong Kong affiliates
14 also need to be examined in this regard, as well as contracts and relations with other companies
15 that may affect Yahoo! Inc.'s and Yahoo! Hong Kong's operations and responsibilities. Moreover
16 there are indications that the corporate controls exercised by Yahoo! Inc over China operations
17 were substantially greater in past years before recent restructuring took place. Information on
18 these past arrangements must be obtained in order for the plaintiffs to be able to respond
19 accurately and on an informed basis to the Defendants' allegations in these matters.

20 The Plaintiffs' jurisdictional discovery requests related to the 12(b)(2) motion are
21 narrowly tailored to determine whether the court has personal jurisdiction over Yahoo! Hong
22 Kong. They are narrowly tailored to determine the extent of Yahoo! Hong Kong's contacts with
23 California, their relations with Yahoo! Inc., and their mutual powers and responsibilities. We
24 also seek information about Yahoo! Hong Kong's corporate structure for the period of its entire
25 existence to be better able to determine the extent of its contacts with California and its business
26 relationship with the U.S. office during those earlier periods of time. The Proposed Discovery
27 Plan also seeks information regarding Yahoo! Inc's decision to establish a Hong Kong subsidiary.
28 Plaintiffs also seek information regarding how legal decisions were made and what discussions

1 and communications took place between Yahoo! Hong Kong and Yahoo! Inc. regarding the
2 internet user information requests of the Chinese Government. This information is vital in
3 establishing the Plaintiffs' theory that Yahoo! Inc. exercised, and continues to exercise,
4 substantial direct control over Yahoo! Hong Kong on these matters. Information also is needed
5 on Yahoo's motivation for establishing more recent corporate structures involving its China and
6 Hong Kong affiliates, to determine whether a corporate veil was established in bad faith in an
7 attempt to protect them from repercussions of doing business with a totalitarian government.
8 Documentary material including licensing agreements, contracts and other operational standards
9 and understandings between and among Yahoo! Inc. and its China and Hong Kong affiliates are
10 required to obtain a full and complete picture of the nature and extent of these relationships and
11 how they relate to the court's exercise of jurisdiction over the Defendants.

12 **B. Conversion Of The Defendants' 12(b)(6) Motion to a Motion for Summary**
13 **Judgment is Necessary.**

14 When a claim is challenged under Fed. R. Civ. Proc. 12(b)(6), pursuant to a motion to
15 dismiss for failure to state a claim, the court takes all factual allegations in the complaint to be
16 true and construes them in the light most favorable to the pleader. *Berkovitz v. United States*, 486
17 U.S. 531, 540 (1988); *Cervantes v. United States*, 330 F.3d 1186, 1187 (2003). Should the
18 moving party introduce matters outside the complaint in the 12(b)(6) motion, and should the court
19 not exclude them, then the motion to dismiss will automatically convert to a motion for summary
20 judgment pursuant to the requirements of Rule 56. Fed. R. Civ. Proc. 12(b)(6). *Carter v. Stanton*,
21 405 US 669, 671 (1972); *Garoux v. Pulley*, 739 F.2d 437, 438 (9th Cir. 1984). Once the 12(b)(6)
22 motion is converted into a motion for summary judgment, then the court must authorize initial
23 discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). See also *Parrino v. FHP, Inc.*, 146
24 F.3d 699, 706 (9th Cir. 1998)("[I]f a district court considers evidence outside the pleadings, it
25 must normally convert the 12(b)(6) motion into a Rule 56 motion for summary judgment, and it
26 must give the nonmoving party an opportunity to respond.").

27 Plaintiffs recognize and understand that not all material outside of the complaint will
28 automatically convert a 12(b)(6) motion into a motion for summary judgment, since courts have

1 developed exceptions to the conversion rule based on Federal Rule of Evidence 201 referring to
2 judicially-noticed facts “generally known within the territorial jurisdiction of the trial court or
3 capable of accurate and ready determination by resort to sources whose accuracy cannot
4 reasonably be questioned.” There also is a public records exception to the conversion rule. But
5 those exceptions do not apply to many of the extraneous and additional documents included by
6 the Defendants in their Motions.

7 Moreover, even where materials fit within the exceptions to the conversion requirement, it
8 is important to keep in mind that it is not just the nature of the document, but how it is used in the
9 motion to dismiss that can render it inappropriate for a 12(b)(6) motion, and justify conversion of
10 the motion to a Rule 56 summary judgment motion, making initial discovery necessary before
11 resolving the issues raised by the motion. Material that is used to develop or support the
12 Defendants’ defenses, and to challenge the factual and legal elements of the Plaintiffs’ Complaint,
13 rather than being restricted to addressing the legal sufficiency of the allegations made in the
14 complaint, cannot be properly considered as being limited to a Rule 12(b)(6) claim and justifying
15 its conversion to a Rule 56 motion.

16 **1. *Defendants’ Inclusion of Chinese Laws And Administrative Regulations***
17 ***Convert Their 12(b)(6) Claim Into A Motion For Summary Judgment***
18 ***Even Though Some (But Not All) Of These Materials May Be Public***
Documents.

19 Defendants have attached to their Motions a wide variety of Chinese laws and
20 administrative standards in an effort to bolster their argument that Yahoo! was following legal
21 requirements when it delivered internet user identifying information to Chinese authorities.
22 These documents convey only a very small part of the story. It is well known that the laws of
23 China, and the way these laws are interpreted and applied, are often vastly different in practice
24 than their text indicates under the Communist system. The U.S. Department of State has
25 frequently noted this fact in its annual Country Reports on Human Rights, indicating that the legal
26 standards as written often are not observed, and that it is necessary to look beyond the texts of the
27 law to examine how they are applied in practice to understand what official policy is.¹ When

28 ¹ See Country Reports on Human Rights Practices - 2006. Released by the Bureau of Democracy, Human Rights, and
Plaintiffs’ Motion to Initiate Initial and Jurisdictional Discovery - 8 - Case No. C07-02151 CW

1 referring to freedom of speech, for example, the State Department reported specifically, “The law
2 provides for freedom of speech and of the press, although the government generally did not
3 respect these rights in practice.” In a section on the denial of fair public trials, the State
4 Department remarks that though “the law states that the courts shall exercise judicial power
5 independently, without interference from administrative organs, social organizations, and
6 individuals[,] in practice the judiciary [i]s not independent.”²

7 Given this reality, a realistic understanding of the actual legal standards that are applied in
8 China, and that were applied in this case to Yahoo!, and to the Plaintiffs, cannot be obtained only
9 by looking at the texts of the statutes or regulations themselves, as referenced in Defs’ Mot. To
10 Dismiss, Appendix B. In order to ascertain what legal standards actually were applied to the
11 Plaintiffs and to the Defendants in the present case it is necessary to go beyond the documents
12 that the Defendants have provided, and to obtain more information from the Defendants on how
13 these laws were applied to Yahoo! and the Plaintiffs.

14 The Defendants assert that their disclosure of information to the Chinese Government was
15 compelled. Mot. Dis. page 34. To prove this point, they cite to numerous Chinese statutes and
16 regulations, provisions from Criminal Procedure Law, Criminal Law, State Security Law, PRC
17 Regulations of Telecommunications, Measures for the Administration of Internet E-mail
18 Services, and Administrative Measures on Internet Bulletin Services. *Id.* at n.39. However, in
19 order to truly determine whether these laws compelled the disclosure of the information, and
20 whether Yahoo!’s claim that they would be subject to legal sanctions if the requests were denied
21 is accurate, in light of the special nature of the Chinese legal system that the U.S. Dept. of State in
22 its Country Reports on Human Rights has recognized, more specific facts are needed relating to
23 the communications between the Defendants and the Chinese Government. These documents and
24 this information are exclusively in the control of the Defendants. They include copies of the
25 actual requests for Internet user identifying information that Yahoo! received from Chinese
26 officials, the responses they made, and all accompanying communications that may help to

27
28 Labor, March 6, 2007, <http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm>, found on 09/11/07.

² *Id.*

1 indicate why these requests were being made, how they were being used, who were the targets of
2 these requests and responses, and what specific sanctions Yahoo! was threatened with if they
3 failed to comply. Only the Defendants (and the Chinese Government) have access to this
4 information and these documents.

5 For example, by including a long list of Chinese statutes and regulations with their
6 Motions, Defendants have introduced factual matters and claims that go beyond the material set
7 out in Plaintiffs' Complaint, and address factual and legal defenses that do a great deal more than
8 simply allege a failure to state a claim under Rule 12(b)(6). They seek to establish and support
9 Defendants' defenses, going to the merits of the Complaint, and therefore convert the Defendants'
10 12(b)(6) motion into a motion for summary judgment, pursuant to the Federal Rules and the
11 standards set out in *Celotex*, 477 U.S. at 322, mandating initiation of initial discovery to provide
12 the Plaintiffs with a reasonable and fair opportunity to respond to these merits claimed.

13 When the Defendants claim that their disclosure of information to the Chinese
14 Government was compelled, *see* Mot. Dis. page 34, they are asserting a factual defense rather
15 than questioning the legal sufficiency of the complaint itself. A factual defense has no place in a
16 Rule 12(b)(6) motion to dismiss. The way that the Defendants are using the Report of the Hong
17 Kong Privacy Commission and some of the statutes and administrative regulations of China
18 attached to its Motions, *see* Mot. Dis. page 34 and note 39, challenges not the sufficiency of the
19 legal basis of the Plaintiffs' claim, but introduces new factual matters outside of the Complaint by
20 way of defense. In order to adequately respond to these claims being made by the Defendants in
21 their Motions, the Plaintiffs need additional actual details of the communications between the
22 Defendants and the Chinese Government regarding the request for Internet user information,
23 materials that are in the exclusive control of the Defendants. Because extraneous materials were
24 used to support factual allegations that can only be adequately clarified through discovery of
25 material in the sole possession of the Defendants, there is a need for the Court to convert the
26 Defendants' 12(b)(6) motion into a motion for summary judgment, and to order the initiation of
27 limited initial discovery as requested by the Plaintiffs.
28

1 **C. Jurisdictional and Limited Initial Discovery on the Basis of the Defendants’**
2 **12(b)(1) and 12(b)(7) Motions is Necessary.**

3 Defendants rely on 12(b)(1) as one of the bases for its Motion to Dismiss, see Motion to
4 Dismiss, cover page (“Yahoo! brings this motion pursuant to Rules 12(b)(1)...”), and supports
5 their 12(b)(1) claim of lack of subject matter jurisdiction on pages 4 to 15 of their Motion,
6 claiming that this case is not justiciable under the Act of State Doctrine, under the principles of
7 international comity, and under the Political Question Doctrine. Plaintiffs must obtain
8 jurisdictional discovery to properly respond to the Defendants’ 12(b)(1) claims because the
9 Defendants, in their Motion, raise a number of issues not addressed in the Plaintiffs’ Complaint
10 that need additional factual material in order to be addressed.
11

12 Similar problems arise in connection with the 12(b)(7) claims included in the Defendants’
13 submission. Defendants include a special motion seeking to establish that China is an
14 indispensable party and that since they cannot be joined that the Complaint be dismissed. The
15 question of the necessity of including the Government of China as a party involves some factual
16 information that only the Defendants (and China, of course) possess, including whether Yahoo!
17 has taken any action to protest the abuses committed against the Plaintiffs, and whether it has
18 sought to secure their release from detention or otherwise assist them and their families once the
19 abuses took place. When a defendant moves to dismiss for lack of subject matter jurisdiction,
20 their challenge to the complaint may be both legal and factual, and if their challenge is on the
21 facts, then the court may allow for discovery on the basis of the factual issues implicated. *Wells*
22 *Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n. 24 (9th Cir, 1977); *see also*
23 *Butcher's Union Local No. 498 v. SDC Invest., Inc.*, 788 F.2d 535, 541 (9th Cir. 1986) (discovery
24 should ordinarily be granted where "pertinent facts bearing on the question of jurisdiction are
25 controverted or where a more satisfactory showing of the facts is necessary.")(quoting *Data Disc,*
26 *Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977)).
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1 **1. The Defendants Make Factual Claims the Veracity of which can only be**
2 **Determined by Documents in the Exclusive Control of the Defendants**
3 **Therefore Entitling the Plaintiffs to Jurisdictional Discovery.**

4 In the 12(b)(1) portions of their motion raising the “act of state” and other political
5 concerns, the Defendants state that they were compelled by law to disclose the Plaintiffs’
6 information to the Chinese Government, and that they should not held responsible for a sovereign
7 government’s actions. “Plaintiffs seek an order that would require Defendants to selectively
8 violate China’s laws, including orders compelling the disclosure of evidence.” Mot. Dis. page 7.
9 The Defendants invoke act-of-state and violation-of-sovereignty arguments to seek to justify their
10 actions, thereby raising a number of issues that are extraneous to the Plaintiffs’ Complaint and
11 that require discovery in order to be responded to on an effective basis.

12 For example, the Defendants make the claim that the Plaintiffs’ Complaint should be
13 dismissed because it directly challenges the sovereignty of China because the Defendants would
14 be compelled to break Chinese law; a more thorough examination of what these laws actually
15 require, and how they were applied to the Defendants is necessary. The way the Defendants are
16 using the claim of being compelled to disclose the information in reference to their
17 12(b)(1),12(b)(6) and 12(b)(7) claims, including the material provided in the Report of the Hong
18 Kong Commissioner and some of the statutes and administrative regulations of China attached to
19 its Motions, *see* Mot. Dis. page 34 and note 39, does not provide a complete picture of the legal
20 mandates that are applied in this case. In order to adequately respond to these claims made by the
21 Defendants, the Plaintiffs need the details of the communications between the Defendants and the
22 Chinese Government on these matters, materials that are in the exclusive control of the
23 Defendants (and Chinese officials). This supports the need for the Court to order the initiation of
24 jurisdictional discovery as requested by the Plaintiffs.

25 **2. The Defendants’ Attempt to Use the Statements of Interest of the U.S.**
26 **Government in Other Cases In Support Of Their 12(b)(1) Motion**
27 **Indicates the Need for Discovery.**

28 In support of their 12(b)(1) claim, the Defendants repeatedly cite Statements of Interest of
the U.S. filed in other cases to indicate that the Executive Branch would not want this case to go

1 to trial. Mot. Dis. pages 9 and 11. Plaintiffs note, at the outset, that many of these cases involved
2 high level officials of the Chinese Government and may not be relevant to the present case. In
3 addition Statements of Interest are not laws or administrative regulations, they are opinion letters
4 geared to specific defendants and factual circumstances. Defendants seek to use the Statements
5 in the same way as case law, drawing analogies to the present case in order to challenge legal and
6 factual allegations in the Complaint, even though the circumstances of those other cases are very
7 different. It is hardly appropriate to analogize previous Statements of Interest to the facts of this
8 case to try to suggest what opinion the Executive Branch might provide in the present
9 circumstances, and whether the sovereign interests of China are implicated. Using extraneous
10 material in this way is not appropriate for 12(b)(1) or 12(b)(6) motions, and justifies the need for
11 discovery to counter these arguments, on such matters, for example as to what communications
12 may have taken place on these issues between Yahoo! officials and officials of the Government of
13 China.

14 **3. *Discovery is Needed to Counter Defendants' 12(b)(7) Indispensable Party***
15 ***Claims.***

16 Plaintiffs must obtain limited initial discovery in order to adequately respond to
17 Defendants' Fed. R. Civ. Proc. 12(b)(7) allegation that the People's Republic of China ("PRC") is
18 a "necessary" and indispensable party pursuant to Fed. R. Civ. Proc. 19 and that the case cannot
19 proceed without it. While it is highly unlikely that the PRC can be joined in this action, this does
20 not mean they are a necessary party for the claims to proceed. Defendants' main arguments that
21 the PRC is a necessary party are that the relief sought would subject them to inconsistent
22 obligations, and that full relief cannot be obtained without their presence in the case. *See* Mot. to
23 Dis. page 37. These matters require more factual information on a number of key points to be
24 properly assessed.

25 Defendants' claim that they are bound by Chinese law to produce information about their
26 Internet customers, and that an injunction ending this practice would subject them to inconsistent
27 obligations and to possible legal action in China. Through discovery, the Plaintiffs are seeking all
28 information regarding China's requests for user information and all communications regarding

1 discussions of possible sanctions for noncompliance. This is exclusively within the control to the
2 Defendants, and it is therefore necessary to initiate discovery to be able to fully respond to this
3 defense regarding whether the obligations would truly be inconsistent.

4 Defendants also claim that the PRC is a necessary party because full relief cannot be
5 afforded without their presence. This claim is in response to the Plaintiffs' request that
6 Defendants work to obtain the release of the Plaintiffs from prison. The proposed Discovery Plan
7 seeks all communications and documents pertaining to any attempts made by the Defendants to
8 obtain the Plaintiffs' release from prison. This information is relevant to assessing whether the
9 Defendants have taken any action in this regard, and whether they can help secure the detainees'
10 release.

11 **D. Limited Discovery Based on the Defendants' Anti-SLAPP Motion to Strike is**
12 **Necessary.**

13 Although anti-SLAPP motions do not normally generate the need for discovery, there are
14 two elements in the Defendants' anti-SLAPP allegations that require further factual material that
15 only the Defendants can provide further supporting and justifying the Plaintiffs' request for
16 limited initial and jurisdictional discovery. First, under the principles set out by the Supreme
17 Court of California in *Flatley v. Mauro*, 39 Cal. 4th 299, 46 Cal. Rptr. 3d 606 (2006),
18 communications that otherwise might qualify for protection under the anti-SLAPP statute lose
19 that protection if they are illegal as a matter of law. *Id.* at 317. At issue in this case is whether the
20 nature and content of Yahoo!'s communications involving internet users in China were illegal as
21 a matter of U.S. laws, including statutes criminalizing acts of torture and conspiracy to commit
22 torture and similar prohibitions in international law. To respond to the Defendants' allegations on
23 these matters, Plaintiffs need additional information and documentation regarding the nature and
24 content of Yahoo!'s communications with Chinese officials, the bases on which they were
25 obtained, the number and type of individuals affected, and the nature of their internet
26 communications. These are all matters that are uniquely within Yahoo!'s knowledge, custody and
27 control. It is important to note in this regard that the U.S. government has just filed the first
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1 criminal prosecutions in the U.S. under the anti-torture statutes involving the Charles Taylor
2 regime in Liberia. *U.S. v. Emmanuel*, case 06-20758-CR-ALTONAGA, U.S. Dist. Ct. S.D. Fla.

3 Second, the anti-SLAPP statutes should not be applied extra-territorially to
4 communications taking place in a foreign nation involving a foreign investigation that lacks
5 adequate procedural safeguards. *See Beroiz v. Wahl*, 84 Cal. App. 4th 485, 496 (2000).

6 Information regarding how the Chinese investigation regarding Yahoo! was conducted, including
7 the nature and content of the requests made, the justification provided by Yahoo! as to why the
8 requests were being made, the number and content of the requests and the statements that may
9 have been made to Yahoo! regarding the compulsory or non-compulsory nature of the request, all
10 bear on the “adequate procedural safeguards” determination, and are all exclusively in Yahoo!’s
11 control.

12 Third, in its motion to strike, Yahoo! argues that the lack of adequate procedural
13 safeguards in China might only alter the nature of the privilege asserted from the absolute
14 privilege in §47(c). Motion to Strike MPA at 7 n.3. Yahoo! then makes the self-serving assertion
15 that it acted without the malice necessary to overcome the qualified privilege in §47(c). Setting
16 aside any other infirmities in the argument, Yahoo! overlooks that the malice sufficient to defeat
17 any assertion of the §47(c) privilege includes evidence reflecting that Yahoo! made the
18 communication at issue for a reason other than to protect the interest of the ones to whom the
19 communication was made (*i.e.*, the “interested party”). *Manguso v. Oceanside Unified School*
20 *Dist.*, 153 Cal App. 3d 574, 580-81 (1984). Plaintiffs are therefore entitled to discovery reflecting
21 Yahoo!’s state of mind in making the communications at issue to determine, for example, if the
22 reason they were made were to protect Yahoo!’s commercial interests rather than the interests of
23 those to whom the communications were made (in this case, the Chinese investigators.)

24 **III. PROPOSED DISCOVERY PLAN**

25 Set out in Exhibit A is a proposed plan for limited initial and jurisdictional discovery,
26 carefully tailored to the specific needs and issues presented by each of the Defendants’ Motions,
27 and to the types of information in the Defendants’ custody that are required to address the
28 allegations and documentary material in each motion.

1 **IV. CONCLUSION**

2 As indicated above, the Defendants’ Motions to Dismiss and other associated Motions
3 present the need for initiating initial and jurisdictional discovery, in order to provide the Plaintiffs
4 with the facts and documents they need and that are uniquely within the possession of the
5 Defendants and that Plaintiffs need to properly and fairly respond to the contents of the
6 Defendant’ Motions. Case law interpreting and applying the relevant provisions of the Federal
7 and Local Rules governing each of the Defendants’ Rule 12 Motions, and the California Statutory
8 provisions and case precedent governing anti-SLAPP motions, confirm the necessity of providing
9 the non-moving party with access to initial and/or jurisdictional discovery, especially where the
10 Defendants’ factual and legal challenges and offerings associated with their motions go beyond
11 challenging the simple legal sufficiency of the Plaintiffs’ allegations in the Complaint, and/or are
12 geared towards presenting or supporting Defendants’ defenses.

13 For these reasons Plaintiffs hereby request the Court to issue an order (attached) initiating
14 initial and jurisdictional discovery geared towards permitting the Plaintiffs to make a fair and
15 proper response to the Defendants’ Motions, pursuant to the Proposed Discovery Plan attached as
16 Exhibit A. An accompanying motion to hold proceedings associated with the Defendants’
17 Motions to Dismiss in abeyance pending a decision on the Plaintiffs’ present Motion to initiate
18 limited initial and jurisdictional discovery, and pending completion of that discovery process
19 should it be approved, also is being submitted.

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Respectfully submitted this 14th of September, 2007, by:

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