

TUCKER ELLIS LLP
Chicago ♦ Cleveland ♦ Columbus ♦ Los Angeles ♦ San Francisco ♦ St. Louis

1 TUCKER ELLIS LLP
David J. Steele SBN 209797
2 david.steele@tuckerellis.com
Howard A. Kroll SBN 100981
3 howard.kroll@tuckerellis.com
Steven E. Lauridsen SBN 246364
4 steven.lauridsen@tuckerellis.com
515 South Flower Street
5 Forty-Second Floor
Los Angeles, CA 90071
6 Telephone: 213.430.3400
Facsimile: 213.430.3409

7
8 DAVIS POLK & WARDWELL LLP
Ashok Ramani SBN 200020
ashok.ramani@davispolk.com
9 Micah G. Block SBN 270712
micah.block@davispolk.com
10 Cristina M. Rincon (*Pro Hac Vice*)
cristina.rincon@davispolk.com
11 1600 El Camino Real
Menlo Park, CA 94025
12 Telephone: 650.752.2000
Facsimile: 650.752.2111

13 Attorneys for Plaintiffs,
14 META PLATFORMS, INC. (fka FACEBOOK, INC.) and
INSTAGRAM, LLC

15
16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

18 FACEBOOK, INC., et al.,

19 Plaintiffs,

20 v.

21 ONLINENIC INC., et al.,

22 Defendants.

Case No. 3:19-cv-07071-SI

**DECLARATION OF LEGAL EXPERT
JONATHAN (YONG) LIANG REGARDING
ISSUES OF CHINESE LAW RAISED BY
DEFENDANT XIAMEN 35.COM INTERNET
TECHNOLOGY CO., LTD.**

**Related Dkt. 237 Order of Reference to
Magistrate Judge for Discovery**

Hon. Alex G. Tse

1 I, Jonathan (Yong) LIANG, declare and state as follows:

2 1. I am a People’s Republic of China (“PRC”)-licensed lawyer at Fujian Fidelity (Shanghai) Law
3 Firm (address: 22nd Floor, Hang Seng Bank Tower, 1000 Lujiazui Ring Road, Pudong New Area,
4 Shanghai 200120, P.R. China). I started to practice law in the year 2004, and my license number is
5 13101200410556309.

6 2. I graduated from Tianjin Science and Technology University in 1996 and obtained my
7 bachelor’s degree in engineering. I qualified at the PRC Bar in the year 1998 and at the PRC Patent Bar
8 in the year 2007. I also graduated from Louisiana State University and obtained a Master of Laws (LLM)
9 degree there in the year 2011.

10 3. Prior to joining Fujian Fidelity (Shanghai) Law Firm, I worked as a senior litigator and counsel
11 at Hogan Lovells (Shanghai) Intellectual Property Service Co., Ltd. (a wholly owned subsidiary of Hogan
12 Lovells International LLP) and at various other Chinese law firms. I focus my practice on intellectual
13 property (“IP”) law and cross-border IP-related enforcement and dispute resolution cases.

14 4. As stated below, I was requested by the Plaintiffs, Meta Platforms, Inc. and Instagram, LLC
15 (“Plaintiffs”), to opine on certain legal issues related to the relevant laws of the People’s Republic of China
16 (“Chinese Law”) regarding the case No.3:19-CV-07071-SI, *Facebook, Inc., et al., v. OnlineNIC, et al.*, in
17 front of the United States District Court for the Northern District of California (“the U.S. proceeding”).

18 5. I reviewed the Plaintiffs’ “*First Set of Requests For Production of Documents And Things*”
19 and a letter dated 30 March 2022 from Kronenberger Rosenfeld, LLP, the legal counsel to the Defendant,
20 Xiamen 35.com Internet Technology Co., Ltd. (“35.CN”), with the subject “Meet and Confer Regarding
21 Chinese Government Approval for Discovery” before writing this Declaration.

22 6. I did not have any prior contacts with any parties in the case. Although I was retained by the
23 Plaintiffs, I fully understand my responsibility as an expert witness. I will only provide opinions in an
24 impartial manner based on my knowledge and experience.

25 **QUESTIONS PRESENTED**

26 The following legal issues relating to Chinese Law were presented to me:

27 1. Whether Chinese Law requires a Chinese entity like 35.CN to only respond to evidence
28 discovery in a foreign civil proceeding under the *Convention of 18 March 1970 on the Taking of Evidence*

1 *Abroad in Civil or Commercial Matters* (the “Hague Convention”) and whether Chinese Law generally
 2 prohibits a Chinese entity like 35.CN from voluntarily providing evidence to a foreign court for a civil
 3 proceeding without prior approval of the Chinese authorities?

4 2. Whether recent developments in Chinese Law, including the *Data Security Law of the People’s*
 5 *Republic of China* (“DSL”), would restrict a Chinese entity like 35.CN from providing the evidence
 6 required in the U.S. proceeding and how 35.CN should fulfil its obligations under Chinese Law?

7 3. Whether the information required in the Plaintiffs’ Requests for Production falls into the scope
 8 of data covered under the DSL or not and whether 35.CN would breach Chinese Law and would expose
 9 itself to substantial legal risks by producing the requested information?

10 **ANSWERS AND OPINION**

11 1. Chinese Law does not require that a Chinese entity or individual only respond to evidence
 12 discovery in a foreign civil proceeding under the Hague Convention. Particularly, Chinese Law does not
 13 prohibit a Chinese entity or individual from producing evidence voluntarily to a foreign court in a civil
 14 proceeding, provided that the information contained in the evidence provided does not jeopardize China’s
 15 national security or public interests and does not require the prior approval of Chinese authorities.

16 a) China is a member of the Hague Convention. Whilst Articles 283 and 284 of the *Civil*
 17 *Procedure Law of the People’s Republic of China* (“the China Civil Procedure Law”)¹ stipulate that

18
 19 ¹ A true and correct copy of the Civil Procedure Law of the People’s Republic of China (2021 Amendment,
 20 effective on 1 January 2022, by which the numbering of the articles in this law was updated) in both
 21 English and Chinese is attached as Appendix 1. Prior to the 2021 Amendment, the effective version was
 22 the 2017 China Civil Procedure Law (2017 Amendment, effective from 1 July 2017 to 31 December
 23 2021).

24 **Article 283 (previous Article 276 of 2017 China Civil Procedure Law)** *In accordance with the*
 25 *international treaties concluded or acceded to by the People’s Republic of China or with the principle of*
 26 *reciprocity, the people’s courts of China and foreign courts may make mutual requests for assistance in*
 27 *the service of legal documents, in investigation and collection of evidence or in other litigation actions.*
 28 *The people’s court shall not render the assistance requested by a foreign court, if it impairs the*
sovereignty, security or social and public interest of the People’s Republic of China.

Article 284 (previous Article 277 of 2017 China Civil Procedure Law) *The request for the providing of*
judicial assistance shall be effected through channels provided in the international treaties concluded or
acceded to by the People’s Republic of China; in the absence of such treaties, they shall be effected through
diplomatic channels.

1 foreign organizations or individuals cannot serve documents, conduct investigations, or collect evidence
 2 directly in China, but instead need to request judicial assistance from the Chinese courts in accordance
 3 with applicable international treaties (*i.e.* the Hague Convention) or with the principle of reciprocity, the
 4 China Civil Procedure Law does not require that Chinese entities or individuals only respond to requests
 5 for evidence collection in proceedings before foreign courts through the Hague Convention.

6 b) Different from international criminal proceedings, where Chinese Law provides for an
 7 absolute clause prohibiting Chinese entities or individuals from providing evidence to foreign courts
 8 without prior consent by the competent Chinese authority², in civil proceedings, Chinese Law does not
 9 have an absolute clause prohibiting Chinese entities or individuals from voluntarily providing evidence to
 10 a foreign court, provided that the information contained in the evidence does not jeopardize China’s
 11 national security or public interests and does not require the prior approval of the competent Chinese
 12 authority.

13 2. Recent developments in Chinese Law, like the adoption of the DSL,³ impose some general
 14 restrictions on providing data stored in China to foreign judicial or law enforcement bodies and require
 15

16 *A foreign embassy or consulate accredited to the People's Republic of China may serve documents on its*
 17 *citizens and make investigations and collect evidence among them, provided that the laws of the People's*
 18 *Republic of China are not violated and no compulsory measures are taken.*

19 *Except for the conditions provided in the preceding paragraph, no foreign organization or individual may,*
 20 *without the consent of the competent authorities of the People's Republic of China, serve documents or*
 21 *make investigations and collect evidence within the territory of the People's Republic of China.*

22 ² A true and correct copy of the *Law of the People’s Republic of China on International Criminal Justice*
 23 *Assistance* in both English and Chinese is attached as Appendix 2.

24 **Article 4** *The People's Republic of China and a foreign country shall carry out international criminal*
 25 *justice assistance pursuant to the principle of equality and reciprocity. International criminal justice*
 26 *assistance shall neither harm the sovereignty, security and social public interests of the People's Republic*
 27 *of China nor violate the fundamental principles of the laws of the People's Republic of China. Without*
 28 *consent by the competent authorities of the People's Republic of China, none of the authorities,*
organizations and individuals in foreign countries may carry out the criminal proceeding activities
prescribed hereof within the territory of the People's Republic of China and none of the authorities,
organizations and individuals within the territory of the People's Republic of China may provide any
foreign countries with evidential materials and the assistance prescribed hereof.

³ A true and correct copy of the *Data Security Law of the People’s Republic of China* in both English and

TUCKER ELLIS LLP
Chicago ♦ Cleveland ♦ Columbus ♦ Los Angeles ♦ San Francisco ♦ St. Louis

1 prior approval from the competent Chinese authority. Pending the adoption of detailed implementing rules
 2 and guidelines under this legislation, which should shed light on how the general restrictions are to be
 3 implemented and enforced, a Chinese entity like 35.CN has the obligation to audit and assess if the
 4 evidence/documents requested fall into the scope of data which require prior approval for transfer, to
 5 actively communicate and seek approvals of the competent Chinese authority, and to seek the personal
 6 consent of the data subjects if applicable, to fulfil its obligations under both Chinese Law and U.S. law.

7 a) The DSL became effective on 1 September 2021 and it applies to data processing activities
 8 and security supervision thereof conducted in the territory of the People's Republic of China. According
 9 to Article 36 of the DSL, without the prior approval of the competent Chinese authority, Chinese entities
 10 and individuals shall not provide data stored within China to foreign judicial or law enforcement
 11 organizations. Whoever fails to comply with Article 36, and provides data to foreign judicial or law
 12

13 _____
 14 Chinese is attached as Appendix 3.

15 *Article 36* The competent authority of the People's Republic of China shall handle the requests for data
 16 provision by foreign judicial or law enforcement organizations in accordance with relevant laws and
 17 international treaties and conventions concluded or acceded to by the People's Republic of China, or
 18 under the principle of equality and reciprocity. Without the approval of the competent authority of the
 19 People's Republic of China, domestic organizations and individuals shall not provide the data stored
 20 within the territory of the People's Republic of China to foreign judicial or law enforcement organizations.

21 *Article 3* For the purpose of this Law, data shall refer to any record of information in electronic or other
 22 form. Data processing shall include the collection, storage, use, processing, transmission, provision,
 23 disclosure, etc. of data. Data security shall mean taking necessary measures to ensure that data are under
 24 the state of effective protection and in lawful use, and having the ability to keep the data in constantly
 25 secure state.

26 *Article 21* The State shall establish the data classified and categorized protection system to protect data
 27 in a classified and categorized manner based on the degree of importance of data in economic and social
 28 development, as well as the extent of damage caused to national security, public interests or the legitimate
 rights and interests of individuals and organizations once data are tampered with, destroyed, leaked or
 illegally obtained or illegally used. The national data security work coordination mechanism shall
 coordinate relevant departments to formulate the catalogue of important data and strengthen the
 protection of important data. Data related to national security, the lifeline of the national economy,
 important people's livelihood, and major public interests are the State's core data, and shall be subject to
 stricter management system. All regions and departments shall, in accordance with the data classified
 and categorized protection system, determine the specific catalogue of important data for protection of
 their respective region, department and relevant industry, and protect the data included in such
 catalogues on a priority basis.

1 enforcement organizations without the prior approval of the competent authority, may be punished with
2 an administrative warning, a fine, a business suspension, and/or revocation (Article 48).

3 b) According to the DSL, data refers to any record of information in electronic or other form
4 (Article 3) and, depending on the degree of the importance of the data in economic and social development
5 and the extent of damage caused to national security and public interests, the data can be further classified
6 as core data, important data, or general data (Article 21). Specifically, according to Article 21 of the DSL,
7 the Chinese government shall establish the “*data classified and categorized protection system*” to protect
8 data in a classified and categorized manner, based on the degree of importance of such data in economic
9 and social development, as well as based on the extent of damage that would be caused to national security,
10 public interests or the legitimate rights and interests of individuals and organizations if such data is
11 tampered with, destroyed, leaked, illegally obtained or illegally used. There is no clear and concrete
12 definition regarding what constitutes “**important data**”, but according to Article 21, the Chinese
13 competent authority shall formulate the catalogue of **important data** and strengthen the protection of such
14 **important data**. According to Article 21, **core data** refers to data related to national security, the lifeline
15 of the national economy, important people's livelihood, and major public interests. Furthermore, data
16 which does not fall into the scope of core data or important data should be considered as general data.

17 c) Similar to the DSL, the *Personal Information Protection Law of the People's Republic of*
18 *China* (“PIPL”),⁴ which has become effective on 1 November 2021, also contains a similar requirement
19 that prior approval by the competent authority is necessary for cross-border transfer of personal data stored
20 within China (Articles 38, 41).

21 d) The DSL and PIPL, taken together with the *Cybersecurity Law of the People's Republic of*
22 *China* (effective 1 June 2017), constitute the framework of data security and data protection legislation in
23 China and impose obligations on Chinese entities like 35.CN regarding cross-border data transfer.

24 e) However, the provisions of the DSL and PIPL are very general and mainly focus on guiding
25 provisions and principles. The categories of data within the scope of application of the DSL and PIPL are
26

27 _____
28 ⁴ A true and correct copy of the *Personal Information Protection Law of the People's Republic of China*
in both English and Chinese is attached as Appendix 4.

1 also very broad and remain unclear. Pending the adoption of detailed implementing rules and guidelines
 2 under the DSL and PIPL, which should shed light on how these laws should be implemented and enforced
 3 in practice, Chinese entities like 35.CN, which need to comply with both Chinese Law and U.S. law,
 4 should review the documents requested in discovery, consult with their Chinese counsel, assess whether
 5 the requested information falls within the scope of such legislation, classify the information, actively
 6 communicate with the competent Chinese authority to seek approval for production, and seek personal
 7 consent for the information involving personal data, if applicable, to fully comply with their obligations
 8 under such legislation.

9 3. I have reviewed the Plaintiffs' "*First Set of Requests for Production of Documents and*
 10 *Things*" and note that some of the information requested may not fall within the scope of the DSL, and
 11 therefore would not be subject to prior approval by the competent Chinese authorities at all. Moreover,
 12 for the information that may fall into the scope of the DSL, most of it is unlikely to be classified as core
 13 data or important data, and therefore there is a reasonably good chance that the transfer of such data would
 14 be approved by the competent Chinese authority.

15 a) Information not stored in China does not fall within the scope of the DSL and consequently
 16 does not require prior approval from the competent Chinese authority. I note RFPs 17-23 relate to
 17 information regarding contracts with U.S. citizens/companies and RFPs 76-81 relate to information
 18 regarding prior actions/litigation/disputes in the U.S.A. If this information is not stored in China, it does
 19 not fall within the scope of the DSL and therefore would not require prior approval by the competent
 20 authority in China before production.

21 b) Furthermore, most of the requested information is unlikely to be classified as core data or
 22 important data under the DSL: I have reviewed the Plaintiffs' "Requests for Production" and note that
 23 some information relating to 35.CN is likely to be publicly available. For example, RFPs 1-16 relating to
 24 35.CN's general corporate, financial, and ownership information, some of which may have been disclosed
 25 by 35.CN as a publicly listed company; RFPs 38-39 relating to 35.CN's trademark rights, which are
 26 searchable in publicly accessible databases etc. The production of publicly available information is
 27 unlikely to present substantial legal risks for 35.CN and the prior approval of the competent Chinese
 28 authority can likely be obtained. Even if some of the requested information is not publicly available and

1 may arguably include potential trade secrets, for example all the requested contracts, agreements,
 2 communications between different parties, and all relevant documents related to payments, loans,
 3 investments and business relationships, I believe this kind of information is unlikely to be classified as
 4 core data or important data (which should be strictly prohibited from being transferred to foreign courts
 5 as evidence under the applicable legislation). Moreover, the PRC government should, according to Article
 6 21 of the DSL, establish a data classification and classification protection system, and implement rules
 7 regarding classification and classification protection for data according to the importance of such data in
 8 economic and social development. According to Article 24 of the DSL, the government should also
 9 establish a data security review system to conduct national security review of data processing activities
 10 that affect or may affect national security. It can be seen from the foregoing provisions that not all data is
 11 subject to the same strict protection measures under Chinese Law, and that only core data and important
 12 data affecting national security will be subject to national security review. Data that is not classified as
 13 core data or important data would be classified as general data which is likely to receive permission from
 14 the relevant authorities to produce to a foreign court. Depending on the type of information required to be
 15 produced, it is therefore reasonable to assume that the relevant authorities would provide permission to
 16 produce to a foreign court the vast majority of evidence requested by the Plaintiffs.

17 c) Regarding the personal information involved in the requested evidence, in accordance with
 18 the relevant provisions of the PIPL, the personal information that must be disclosed when entering into,
 19 or performing a contract can be used in accordance with such law without the prior consent of the
 20 individual concerned. Furthermore, the most important element concerning the assessment under the PIPL
 21 is that 35.CN is not a personal information processor that specializes in collecting and processing personal
 22 information. Therefore, if the materials provided by 35.CN involve personal information, it can redact
 23 such information or explicitly request that the Plaintiff must not disclose or use such personal information.
 24 I have been informed that a protective order has been entered in this case that may protect such information
 25 and restrict its disclosure. Therefore, in my opinion, personal information protection is not a valid
 26 justification to refuse to produce the relevant evidence.

27 d) On the basis of the elements set out above, 35.CN should produce relevant evidence to
 28 prove that, after being served with the Plaintiffs' Requests for Production, it has diligently applied with

1 the competent Chinese authority for the approval of the data transfer and should produce the response it
2 receives from such authority.

3 **CONCLUSION**

4 In conclusion, in my opinion, Chinese Law does not require 35.CN to respond to Plaintiffs’
5 Requests for Production exclusively under the Hague Convention and does not absolutely prohibit 35.CN
6 from providing evidence voluntary, without seeking the prior approval of the competent Chinese authority.
7 Proceeding under the Hague Convention and obtaining the prior approval of the competent Chinese
8 authority is not the only path for 35.CN to fulfil its obligations under the Plaintiffs’ Requests for
9 Production. Furthermore, in my opinion, the information relating to the Plaintiffs’ Requests for Production
10 is unlikely to be classified as core data or important data under the DSL, and in my opinion, 35.CN would
11 not expose itself to substantial legal risks by producing such information in the U.S. proceeding.

12 I declare under penalty of perjury under the laws of the State of California and related laws of the
13 United States of America that the foregoing is true and correct to my knowledge, and that this Declaration
14 was executed by me on 24 June 2022 at Beijing, the People’s Republic of China.

15
16
17 _____
18 JONATHAN (YONG) LIANG
19
20
21
22
23
24
25
26
27
28

TUCKER ELLIS LLP
Chicago ♦ Cleveland ♦ Columbus ♦ Los Angeles ♦ San Francisco ♦ St. Louis


TUCKER ELLIS LLP
Chicago ♦ Cleveland ♦ Columbus ♦ Los Angeles ♦ San Francisco ♦ St. Louis

1 the competent Chinese authority for the approval of the data transfer and should produce the response it
2 receives from such authority.

3 **CONCLUSION**

4 In conclusion, in my opinion, Chinese Law does not require 35.CN to respond to Plaintiffs'
5 Requests for Production exclusively under the Hague Convention and does not absolutely prohibit 35.CN
6 from providing evidence voluntary, without seeking the prior approval of the competent Chinese
7 Proceeding under the Hague Convention and obtaining the prior approval of the competent Chinese
8 authority is not the only path for 35.CN to fulfil its obligations under the Plaintiffs' Requests for
9 Production. Furthermore, in my opinion, the information relating to the Plaintiffs' Requests for Production
10 is unlikely to be classified as core data or important data under the DSL, and in my opinion, 35.CN would
11 not expose itself to substantial legal risks by producing such information in the U.S. proceeding.

12 I declare under penalty of perjury under the laws of the State of California and related laws of the
13 United States of America that the foregoing is true and correct to my knowledge, and that this Declaration
14 was executed by me on 24 June 2022 at Beijing, the People's Republic of China.

15
16
17 
18 JONATHAN (YONG) LIANG
19 