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| UNITED STATES DISTRICT COURT  northern DISTRICT OF CALIFORNIA  OAKLAND DIVISION | | |
| WHATSAPP INC., a Delaware corporation,  and FACEBOOK, INC., a Delaware  corporation,  Plaintiffs,  v.  NSO GROUP TECHNOLOGIES LIMITED  and Q CYBER TECHNOLOGIES LIMITED,  Defendants. |  | Case No. 4:19-cv-07123-PJH  DECLARATION OF JOSEPH N. AKROTIRIANAKIS IN SUPPORT OF defendants NSO GROUP TECHNOLOGIES LIMITED and Q CYBER TECHNOLOGIES LIMITED’s Administrative Motion To File Under Seal  Judge: Hon. Phyllis J. Hamilton |

I, Joseph N. Akrotirianakis, declare as follows:

#### I am a member of the California State Bar and the bar of this court and a partner in the law firm of King & Spalding LLP, counsel of record to Defendants NSO Group Technologies Limited and Q Cyber Technologies Limited (collectively, the “Defendants”). I have personal knowledge of the facts set forth herein, except as otherwise stated.

#### The Complaint was filed October 29, 2019. (Dkt. No. 1.) Defendants were served March 12, 2020, and on April 2, 2020, Defendants moved to dismiss the complaint. (Dkt. No. 45.) The parties’ conducted the Rule 26(f) conference on May 6, 2020. (See Dkt. No. 76.) Thereafter, on June 2, 2020, Plaintiffs served Requests for Production of Documents, to which Defendants timely responded on July 6, 2020. On June 16, 2020, Defendants moved to stay discovery pending resolution of Defendants’ motion to dismiss. (Dkt. No. 95.) On July 16, 2020, the Court ruled on Defendants’ motion to dismiss the complaint and denied as moot Defendants’ motion to stay discovery. (Dkt. No. 111.)

#### Defendants seek to file under seal certain documents (the “Sealed Documents”) which are submitted to the Court for its consideration in connection with the Initial Case Management Conference. As described in the Sealed Documents, including paragraph 3-10 and 12 of this Declaration and paragraph 6 of the accompanying Declaration of Chaim Gelfand, actions by the Government of Israel will have direct implications for Defendants’ ability to proceed with discovery and are likely to affect other proceedings in this case. The Sealed Documents contain highly sensitive, traditionally nonpublic government information that the Honorable Tzachi Uziel, Chief Justice of the Magistrate Court in Tel Aviv-Jaffa,[[1]](#footnote-1) has ordered be kept confidential upon a request submitted by the Government of Israel. Accordingly, consistent with principles of international comity, Defendants now seek leave of this Court to file unredacted copies of the Sealed Documents under seal and ask that they be so maintained.

#### On July 19, 2020, the Government of Israel filed in the Magistrate Court of Tel Aviv–Jaffa a request titled “Request for the Issuance of a Search Warrant on the Premises, to Seize Computers (Including Computers of the Companies) and Access to the Computer Materials.” (Gelfand Decl. Exh. B (“Request”) at \_\_.) The Request was presented ex parte by Dr. Haim Vismonski, Director of the Cyber Department of the Israeli State Attorney’s Office, and Moran Eshol, an attorney in the Cyber Department of the State Attorney’s Office. As set forth in the accompanying Declaration of Chaim Gelfand, the Request and the resulting Order were neither announced in advance to, nor expected by, Defendants. (Gelfand Decl. ¶ \_\_.) The Request sought a warrant to search Defendants’ business premises and seize “[a]ny document or object” held by Defendants. The Request was made “for the purpose of preventing the disclosure of information that is within [Defendants’] ownership, or is held by [Defendants], by [Defendants’] employees, or by those who act on [Defendants’] behalf, which is likely to cause ‘grave national security-foreign relations’ damage to the State of Israel.” (Gelfand Decl. Exh. \_\_ at \_\_.) Through the Request, the Government of Israel sought to prohibit Defendants from making “any change, deletion or transfer to an external person or entity” with respect to “all of the documents and computer materials which are under the ownership of” Defendants. (Gelfand Decl. Exh. \_\_ at \_\_.)

#### As the Request indicates on its face, the seizure was not sought for purposes of a criminal investigation or any other investigatory matter. (Gelfand Decl. Exh. B at \_\_.) The Israeli government sought the warrant to seize information from the Defendants for the purpose of preventing the disclosure of information that would be “likely to cause ‘grave national security-foreign relations’ damage to the State of Israel.” (Gelfand Decl. Exh. B at \_\_.)

#### On July 19, 2020, Chief Justice Uziel issued an Order granting the Request. (Gelfand Decl. (“Order”) Exh. D at \_\_.) Chief Justice Uziel found the issuance of the seizure warrant was necessary “to prevent serious diplomatic and security damage” to Israel. (Gelfand Decl. Exh. D at 1.) Chief Justice Uziel’s Order prohibits Defendants from “making any changes, deletion or transfer to any external party that is not an employee of one of the [Defendants], with regard to any document or computer matters that are owned by the [Defendants] or in their possession, their employees or anyone on their behalf, that could possibly be found to be related to the issues of the [Defendants].” (Gelfand Decl. Exh. D at 1.) The Order also authorizes the State of Israel to search Defendants’ premises and seize “[a]ny document or item that may contain data or content that may possibly cause serious diplomatic-security damage, including computers (which includes cellular phones), organizational computers, magnetic media, and computer items of an ‘organization’ . . . that is located on the premises.” (Gelfand Decl. Exh. D at 1-2.) And the Order also authorizes “continuous penetration and re-penetration” of “computer materials and anything that embodies computer materials” and “computer material[] that the seized computer has authorization to access, in any place that such computer materials are located.” (Gelfand Decl. Exh. D at 3.)

#### Since obtaining the Order, as set forth in the Gelfand Declaration, the Government of Israel has removed from Defendants’ premises a significant portion of the physical documents previously in Defendants’ possession, custody, and control and has begun seizing Defendants’ electronically-stored information (ESI). (Gelfand Declaration ¶¶ \_\_-\_\_.)

#### On July 19, 2020, the Deputy Attorney General for International Law, Dr. Roy Schondorf, and the Director of the Cyber Department of the Israeli State Attorney’s Office Dr. Vismonski called Defendants’ Israeli counsel, Adv. Roy Blecher, and requested an immediate meeting with Defendants' Chief Executive Officer, Shalev Hulio; Defendants’ General Counsel, Shmuel Sunray; and Adv. Blecher. Dr. Schondorf and Dr. Vismonski notified Adv. Blecher (and through him, Defendants) for the first time of the existence of the Order and stated that further information would be provided at the meeting. At the meeting held a few hours later, Dr. Vismonski served the Order on Defendants’ Israeli counsel and also delivered to Messrs. Hulio, Sunray, and Blecher a copy of a letter. (Gelfand Decl. Exh. F (“Vismonski Letter”).) In the Vismonski LetterDr. Vismonski informed Defendants of the seizure warrant and explained, as is indicated in the letter, that “[t]he purpose of the Courts’ Order is to prevent disclosure of information, which is likely to cause grave damage to the State of Israel’s national security and foreign relations.” (Gelfand Decl. Exh. F ¶ 3.) Dr.Vismonski warned Defendants that according to the Order they are “forbidden to make any disposition of all of the documents and computer materials which are owned or held by the companies, by their employees or by those who act on their behalf,” including a prohibition on “making any change, deletion or transfer of these materials to any external person or entity that is not currently employed in one of the companies.” (Gelfand Decl. Exh. F ¶ 2.) The Director of the Cyber Department of the Israeli State Attorney’s Office, Dr. Vismonski also informed Defendants that they are prohibited from disclosing “any information whatsoever with regard to the Order, including information with regard to the very existence of the Order forbidding publication, to the hands of any person or entity,” with a few specific exceptions. (Gelfand Decl. Exh. F ¶ 4.)

#### At the time Defendants received the Vismonski Letter, a Non-Disclosure Order barred Defendants from disclosing the existence of the Order to this Court or Plaintiffs. (Gelfand Decl. Exh. F ¶ 4.) Defendants subsequently sought permission from the Israeli State Attorney’s office to disclose the Order, and on July 22, 2020, Defendants and the Israeli State Attorney’s office jointly requested that Chief Justice Uziel issue an order lifting the non-disclosure order for the limited purpose of allowing disclosure of the Request, the Order, and the Vismonski Letter to this Court and to Plaintiffs’ counsel. Dr. Vismonski conditioned the State of Israel's consent to the joint request to the partial lifting of the non-disclosure order on Defendants’ written promise to use best efforts to request that this Court (the United States District Court for the Northern District of California) order that the Sealed Documents and information related to them not be disseminated further and remain under seal. Chief Justice Uziel granted the joint request, authorizing Defendants to submit the Sealed Documents to this Court and to Plaintiffs’ counsel.[[2]](#footnote-2) Although Chief Justice Uziel’s order granting a limited lifting of the non-disclosureorder itself remains subject to the same non-disclosure order, Defendants are presently seeking permission to share that further order of Chief Justice Uziel with the Court and Plaintiffs.

#### Defendants seek to file paragraphs 3-10 and 12 of this Declaration under seal and, to the extent necessary in the future, permission to file under seal additional matters that make reference to the content of this Declaration, paragraph 6 and Exhibits A-F of the accompanying Gelfand Declaration, or the sealed proceedings before the Tel Aviv–Jaffa Magistrate Court. Exhibits A through F of the Gelfand Declaration comprise:

1. The Israeli government’s “Request for the Issuance of a Search Warrant on the Premises, to Seize Computers (Including Computers of the Companies) and Access to the Computer Materials,” dated July 19, 2020 (Hebrew);
2. English translation of Exhibit A. (Gelfand Decl. ¶ \_\_.)
3. The Tel Aviv–Jaffa Magistrate Court’s “Decision - Search Warrant on the Premises, Seizure and Access to Computer Materials,” dated July 19, 2020 (Hebrew);
4. English translation of Exhibit C. (Gelfand Decl. ¶ \_\_.)
5. Dr. Haim Vismonski’s letter to Adv. Roy Blecher, dated July 19, 2020, which provides information about the search and seizure warrant to Defendants (Hebrew).
6. English translation of Exhibit E. (Gelfand Decl. ¶ \_\_.)

#### [Insert description of correspondence with opposing counsel (following protective order) and any explanation of why a stipulation to a sealing order could or could not be obtained.]

#### Good cause exists to seal each of the above-listed documents because the Sealed Documents come from Israeli courts and Israeli officials, and they are therefore entitled to deference , consistent with international comity.

#### First, the Sealed Documents relate to Israel’s efforts to protect its national security and foreign relations interests and come directly from an Israeli judicial officer and the Israeli executive branch. As such, the Sealed Documents contain traditionally nonpublic government information for which there is no constitutional right of access. See, e.g., N.Y. Times Co. v. Dep't of Justice, 806 F.3d 682, 688 (2d Cir. 2015) (“As a general rule, there is no constitutional right of access to traditionally nonpublic government information.”) The fact that these documents were issued by Israeli officials and courts and governmental agencies and contain highly sensitive, nonpublic government information of a foreign government “alone counsels in favor of finding that there is no presumptive public right of access” to these documents. Omari v. Ras Al Khaimah Free Trade Zone Authority, 16 Civ. 3895, 2017 WL 3896399, at \*14 (S.D.N.Y. Aug. 18, 2017) (sealing a white paper commissioned by a ruler of a political subdivision of foreign nation because it contained “highly sensitive, traditionally nonpublic government information, in this case of a foreign government”); see also In re Terrorist Attacks on September 11, 2001, No. 03-MDL-01570 (GBD)(SN), 2019 WL 3296959, at \*5 (S.D.N.Y. July 22, 2019) (sealing multiple documents and finding that the documents contained “traditionally nonpublic information” because the documents involved senior foreign officials, were designated as sensitive at the time of creation, and detailed information about the nation’s response to certain investigations).

1. *Second*, international comity counsels that the Sealed Documents be kept confidential because Israel itself has ordered the documents be kept confidential in order to protect its national security interests. The Supreme Court has described the doctrine of international comity as “the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.” *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 543 n. 27, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987). Information sealed by a foreign court should remain sealed in other courts “[i]n the interests of judicial comity.” *United States v. Sater*, 98-CR-1101 (ILG), 2019 WL 3288289, at \*4 (E.D.N.Y. July 22, 2019). This is particularly true where, as here, the documents sought to be sealed “are not publicly accessible [and] disclosure of the [documents] here, would harm the integrity of those respective judicial systems.” *Compal Elecs., Inc. v. Apple Inc.*, No. 317CV00108GPCMDD, 2017 WL 11423604, at \*3 (S.D. Cal. Sept. 5, 2017) (sealing documents because of a “concern for comity”); *see also Accent Delight Int’l Ltd. v. Sotheby’s*, No. 18-CV-9011 (JMF), 2019 WL 2602862, at \*9 (S.D.N.Y. Jun. 25, 2019) (holding that, under principles of comity, where a foreign court has taken under advisement whether to keep a document sealed, the District Court would permit the foreign court to “rule on the issue in the first instance” rather than decide whether to unseal a duplicative document on its own docket). Because Israel has ordered the Sealed Documents be kept confidential in the interests of national security and foreign relations, international comity supports honoring that requirement and keeping the documents confidential.

#### Third, because Israel has prohibited Defendants from publicly disclosing the Sealed Documents, protection of the documents is warranted. See Strauss v. Credit Lyonnais, S.A., Nos. 06-cv-702 and 07-cv-914, 2011 WL 4736359, at \*5 (E.D.N.Y. Oct. 6, 2011) (sealing a non-party’s banking records because, among other things, French law prohibited the documents' disclosure).

#### Accordingly, good cause (and, if necessary, a compelling reason) exists to seal each of the above-listed documents, and Defendants respectfully request that the Court grant the accompanying Administrative Motion to File Under Seal and order the Sealed Documents be kept under seal.

#### The Declarant has carefully sought sealing of only those parts of this Declaration as are necessary to comply with other court orders binding on Defendants, as described above, and, on behalf of Defendants, respectfully submits that the good cause and compelling reasons standards are met with respect to the sealing of paragraphs 3-9 and 11, above, and paragraph 6 and the Exhibits to the accompanying Gelfand Declaration. If the Court disagrees, the Declarant respectfully requests that the unredacted version of this Declaration and the Exhibits to the Gelfand Declaration be stricken from the record and not reflected in the docket of this action and that any copies thereof be destroyed.

I declare under the penalty of perjury and the laws of the United States that the foregoing is true and correct this \_\_th day of July 2020, at Altadena, California.

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JOSEPH N. AKROTIRIANAKIS

1. In the Israeli judiciary system, the Magistrate Court is the basic trial court, akin to the United States District Court. Appeals from judgments of the Magistrate Court are heard in the District Court, which also has limited original jurisdiction. There are six districts, and six District Courts, in Israel. Israel’s court of last resort is the Supreme Court, which like the United States Supreme Court, has discretionary appellate and limited original jurisdiction. [↑](#footnote-ref-1)
2. Chief Justice Uziel’s further order also permits Defendants to seek an order allowing disclosure of the Sealed Documents to certain specified members of Plaintiffs’ senior corporate leadership. [↑](#footnote-ref-2)