Docket Nos. 24-2179 (L), 24-3463

In the

United States Court of Appeals

For the

Ninth Circuit

CARLOS DADA, et al.,

Plaintiffs-Appellants,

v.

NSO GROUP TECHNOLOGIES LIMITED, et al.,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Northern District of California, No. 3:22-cv-07513-JD · Honorable James Donato

APPELLANTS' REPLY IN SUPPORT OF THEIR MOTION TO STRIKE VOLUME II OF APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD AND CERTAIN PORTIONS OF APPELLEES' ANSWERING BRIEF [REDACTED]

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INTRODUCTION

Defendants–Appellees ("Defendants") continue to ignore the simple fact that that they sought leave to file the Sealed Materials with the district court and their request was denied. The district court thus expressly declined to consider the Sealed Materials when deciding the matter on appeal and they are not part of the record before this Court. Defendants' argument that the Sealed Materials are "relevant" holds no water as the district court rejected them. Moreover, Defendants' submission of the Sealed Materials is untimely (as it was when they attempted submission in the district court) and cannot be redeemed either by the rules governing judicial notice or the Court's inherent authority. This Court should not reward Defendants' improper maneuvering and should grant Plaintiffs' Motion to Strike.

ARGUMENT

Defendants distort precedent and the proceedings below to argue that the Sealed Materials are part of the record on appeal. The Sealed Materials were never filed with the district court, should not be considered by this Court, and should be struck.

I. The Sealed Materials were never filed with the district court.

This Court can only consider materials filed with and considered by the district court, Fed. R. App. P. 10(a)(1)—and the sealed materials were not. The Northern District of California Local Rules state that "[o]nce a reply is filed, *no additional memoranda, papers or letters may be filed without prior Court approval*." N.D. Cal.

Loc. R. 7.3(d) (emphasis added). On June 2, 2023, briefing on the Motion to Dismiss closed with Defendants' filing of their reply brief. *Dada v. NSO Grp. Techs. Ltd.*, 2024 WL 1024736 (N.D. Cal. Mar. 8, 2024), ECF No. 54. On January 6, 2024, over seven months later, Defendants filed a motion with the district court seeking leave to file a supplemental memorandum of law, which included the Sealed Materials. *Dada v. NSO Grp. Techs. Ltd.*, 2024 WL 1024736 (N.D. Cal. Mar. 8, 2024), ECF No. 74.[1] On January 9, 2024, the district court denied their request. *Dada v. NSO Grp. Techs. Ltd.*, 2024 WL 1024736 (N.D. Cal. Mar. 8, 2024), ECF No. 76. Put simply, Defendants asked the district court if they could file the Sealed Materials on the docket and were denied.[2] Defendants' litany of citations (Opp. 6–7) to various definitions of when something is "filed" fall flat in light of the district court's clear local rules barring filing without prior court approval. Accordingly, there can be no dispute that the Sealed Materials were never filed with the district court within the meaning of Federal Rule of Appellate Procedure 10(a)(1) and are therefore not part of the record on appeal. *Nicholson v. Hyannis Air Serv., Inc.,* 580 F.3d 1116, 1127

[1] Curiously, Defendants have declined to explain why they waited so long, [redacted] Opp. 2–3.

[2] The fact that Plaintiffs did not oppose Defendants' request to the district court is of no moment; it does not change the fact that the district court denied Defendants permission to file the Sealed Materials.

n.5 (9th Cir. 2009) (a document attached to a proposed sur-reply was never filed within the meaning of Rule 10(a)(1) because the district court denied the plaintiff-appellant leave to file the sur-reply).

Defendants' reliance on *Riordan v. State Farm Mut. Auto. Ins. Co.,* 589 F.3d 999 (9th Cir. 2009), is misplaced. Opp. 6–7. *Riordan* involved consideration of a proposed pre-trial order and deposition excerpts that were accepted by the district court. *Riordan,* 589 F.3d at 1003–04. Here, the materials were rejected by the district court. Additionally, *Riordan*'s denial of a motion to strike and determination that the pre-trial order in question was part of the record on appeal is dicta, as this Court specifically noted that its "review of the pre-trial order in the Supplemental Excerpts of Record does not affect our disposition." *Id.* at 1004 n.3.

Defendants' argument that they were not required to file a cross-appeal similarly misses the mark. Opp. 8–9. The cases Defendants cite deal with arguments relating to the *same final order*, and simply preserve a prevailing party's ability to urge affirmance on alternative grounds even if those grounds were rejected by the court below. This matter involves distinct final orders and, in any case, Defendants' cases do not support the proposition that Defendants can unilaterally create a record on appeal with materials the district court never considered.

II. This Court should not otherwise consider the Sealed Materials.

Defendants' additional arguments that this Court should take judicial notice or otherwise consider [redacted] are misplaced. Defendants' attempt to rely on the Court's ability to take judicial notice of [redacted] under Federal Rule of Evidence 201. Opp. 4-5. But to begin, [redacted] in particular was never filed in any other case and thus does not qualify under the [redacted] standard Defendants advocate. Opp. 5.[3] Additionally, judicial notice would contradict the district court's unambiguous refusal to consider the Sealed Materials. Judicial notice should not be used to circumvent proper appellate procedure and *sub rosa* overrule district court orders.

The cases Defendants cite do not compel a different result. Opp. 4–5. [redacted] involved supplementing the appellate record with materials a district court expressly refused to consider.[4] Because

[3] Although Defendants try to cast the Sealed Materials [redacted] *see* Opp. 4, [redacted] *See* SER-43 (¶¶ 5–6).

[4] [redacted]

they differ in meaningful ways from the case at hand, they are simply not instructive here.

Defendants' alternative attempt to rely on this Court's inherent authority to supplement the record should also be rejected. A court *may* exercise its discretion to supplement the record in "extraordinary cases." *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) (citing *Dickerson v. Alabama*, 667 F.2d 1364 (11th Cir. 1982)). But Defendants cannot cite a single case where this Court has exercised this authority over a district court's contrary order excluding the material from the record.

Moreover, this is no "extraordinary case." As discussed, Defendants needlessly delayed supplementing the record at the district court record and did not appeal the district court's order when their efforts were rejected. Defendants also attempt to wave away the fact that they did not move this Court to supplement the record when Plaintiffs filed their Opening Brief but instead opted for gamesmanship. Opp. 9. Unfortunately, such tactics are typical of Defendants. *See Apple Inc. v. NSO Grp. Techs. Ltd.*, No. 3:21-CV-09078-JD, 2024 WL 251448, at *3 (N.D. Cal. Jan. 23, 2024) (Defendants "used [a supplemental brief] as an opportunity to make arguments that could and should have been made in its opening brief, and that involve

[redacted]

purported facts that were available in many instances before that brief was filed.”). The Court should not condone it.

CONCLUSION

For the reasons discussed above, the Court should strike the Sealed Materials.

Dated: November 25, 2024

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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Respectfully submitted,

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