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

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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CARLOS DADA, *et al.*,

*Plaintiffs-Appellants*,

v.

NSO GROUP TECHNOLOGIES LIMITED, *et al.*,

*Defendants-Appellees*.

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On Appeal from the United States District Court for the Northern District of California, No. 3:22-cv-07513-JD, Hon. James Donato

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# APPELLEES' OPPOSITION TO APPELLANTS' MOTION TO STRIKE VOLUME II OF THE SUPPLEMENTAL EXCERPTS OF RECORD AND PORTIONS OF APPELLEES' ANSWERING BRIEF

**-- REDACTED --**

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November 18, 2024

Plaintiffs' motion to strike the Sealed Materials (COA Dkt. 72) effectively asks this Court to bury its head in the sand. There can be no serious dispute that the Sealed Materials—which consist of [redacted] and related background information—are relevant to understanding why litigating this case in California would be extraordinarily inappropriate. Plaintiffs nevertheless ask this Court to ignore those materials, despite having raised no objection before the District Court and even though the materials are properly part of the appellate record. Plaintiffs' request is meritless and should be denied.

Although the District Court's correct ruling can be affirmed regardless, there is no question the Court can and should consider the Sealed Materials. Because the materials consist of [redacted] that are not subject to reasonable dispute, the Court may judicially notice them and consider them as an exercise of its inherent authority. Moreover, the Sealed Materials were properly included in the Supplemental Excerpts of Record because—as both the docket and the file-stamped documents themselves show—they were "filed in the district court" and are therefore part of the record on appeal. Fed. R. App. P. 10(a).

Because the Court can and should consider this appeal based on the full record, plaintiffs' motion should be denied.

## BACKGROUND

The underlying Sealed Materials consist of [redacted]. *See* 2-SER-41–64; Mot. 1–2.

When Defendant-Appellees NSO Group Technologies Ltd. and Q Cyber Technologies Limited ("NSO") moved to dismiss the operative complaint in April 2023, NSO could not include these materials with its motion. [redacted]. 2-SER-43 ¶¶ 5–6.[1] [redacted]

[1] Plaintiffs' suggestion (at 2 n.1 & 6) that NSO could have included [redacted] with its motion to dismiss is wrong. [redacted]. SER-43 ¶ 5. Plaintiffs offer no factual support for their contrary speculation, and they did not raise below any objections to the Sealed Materials.

[redacted], *see* 2-SER-61–63, NSO sought to supplement its dismissal motion based on the [redacted] and other recent developments, *see* D.Ct. Dkt. 74.

Plaintiffs never opposed the District Court's consideration of those arguments or materials. *See* D.Ct. Dkt. 74-3 ¶ 7 ("Plaintiffs indicated they do not oppose the administrative motion . . . ."). The materials were accepted by the clerk and deemed "Filed on 1/6/2024." ER-102. Although the District Court ultimately denied NSO's request to supplement its arguments, *see* D.Ct. Dkt. 76, NSO received full relief when the District Court "dismissed" the operative complaint with prejudice and "ordered [the case] closed," ER-10.

## ARGUMENT

The District Court's ruling remains correct and can be affirmed by this Court even without consideration of the Sealed Materials. Nevertheless, the Sealed Materials are powerful evidence that litigating this case in California would be impracticable and inappropriate. There is no reasonable question that this Court can and should consider them.

### A. The Sealed Materials Can and Should Be Considered by This Court on Appeal.

Plaintiffs' motion relies on the "general rule" that this Court can "consider only the district court record on appeal." *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003). But two well-established "exceptions to the general rule" apply here. *Id.* Not only can this Court "take judicial notice" of the Sealed Materials, it also can "exercise [its] inherent authority to supplement the record in extraordinary cases." *Id.* Either way, the Court can and should consider the Sealed Materials.

**Judicial Notice:** The only Sealed Materials cited by NSO in the Argument section of its Answering Brief consist of [redacted] (the remaining [redacted] is cited only as background). *See* AB 29, 43–44, 49. Because those materials are "not subject to reasonable dispute" and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," there is no question that this Court "may judicially notice" them. Fed. R. Evid. 201(b) & (b)(2). This Court commonly [redacted]

[redacted]. Accordingly, even if the materials were not part of the district court record, they are properly subject to judicial notice because they are [redacted].

**Inherent Authority:** In *Lowry*, this Court approved the practice in "[o]ther circuits" of appellate courts exercising their "inherent equitable powers to supplement the record as justice requires." *Dickerson v. Alabama*, 667 F.2d 1364, 1367 n.5 (11th Cir. 1982); *see Lowry*, 329 F.3d at 1024 (endorsing *Dickerson*). Justice so requires here. The Sealed Materials further confirm why litigating this case in California would be extraordinarily impracticable. Not even Plaintiffs dispute this. It would be profoundly unjust for the Court to ignore the realities of this case—and overlook the significance of [redacted] if litigation were to proceed in California. That may be why plaintiffs never objected to the District Court's consideration of the Sealed Materials.

### B. The Sealed Materials Are Properly Part of the Record on Appeal.

The Court should consider the Sealed Materials also because they are properly part of the record on appeal.

The record on appeal includes all "original papers and exhibits *filed* in the district court." Fed. R. App. P. 10(a)(1) (emphasis added). The verb "filed" takes it meaning from the Federal Rules of Civil Procedure and local rules. *See* Fed. R. App. P. 1(a)(2) ("filing a . . . document in the district court . . . must comply with the practice of the district court"). Accordingly, this Court has explained, "'[a] paper is *filed*'" within the meaning of Rule 10(a)(1) "'by delivering it' to the clerk" for entry on the docket. *Riordan v. State Farm Mut. Auto. Ins. Co.*, 589 F.3d 999, 1003–04 (9th Cir. 2009) (quoting Fed. R. Civ. P. 5(d)(2)); *see also* N.D. Cal. L.R. 1-5(e) ("'File' means delivery to and acceptance by the Clerk of a document . . . which is approved for filing and which will be included in the official files of the Court and noted in the docket of the case.").

For a document to be "part of the Record on Appeal," therefore, it need only "bear[ ] the clerk's stamp," and have been "in compliance with Rule 5(d)(2)" for entry on the docket and "properly called to the district court's attention." *Riordan*, 589 F.3d at 1004; *see also File*, Black's Law

Dictionary (12th ed. 2024) ("file" means "[t]o deliver a legal document to the court clerk or record custodian for placement into the official record").

All underlying Sealed Materials satisfy this definition. They were accepted for filing by the clerk, e-stamped "Filed," and entered onto the docket as "Filed on 1/6/2024." ER-102. Both the District Court and plaintiffs were thus aware of those materials. (Plaintiffs even "indicated they d[id] not oppose" consideration of the materials, D.Ct. Dkt. 74-3). Although the District Court ultimately did not consider NSO's supplemental arguments, that did not change that the Sealed Materials "bear[ ] the clerk's stamp," were "in compliance with Rule 5(d)(2)," and were "called to the district court's attention." *Riordan*, 589 F.3d at 1003–04. They are therefore "part of the Record on Appeal." *Id.*

Plaintiffs' contrary argument rests on inapposite authorities. Most of their cited cases involved documents that, unlike here, were "never filed or submitted to the court below." *Kirschner v. Uniden Corp.*, 842 F.2d 1074, 1077 (9th Cir. 1988); *see also Lowry*, 329 F.3d at 1024 ("The district court docket shows that the letter was never made a part of the record . . . because it post-dates . . . [the] opening brief on appeal"); *Barcamerica Int'l USA Tr. v. Tyfield Importers, Inc.*, 289 F.3d 589, 594–

95 & n.6 (9th Cir. 2002) (full deposition transcripts could have been part of record on appeal "[h]ad the transcripts been filed" in the district court, rather than "lodged" with the clerk pursuant "to the unique nature of the Eastern District of California's Local Rules").

None of plaintiffs' remaining authorities addresses *Riordan* or even mentions the governing definition of "filed" set forth in the Federal Rules. Those cases are all distinguishable, moreover, because they involved materials submitted by the *losing party* below, who was required to "appeal the rejection of her [documents] by the district court." *Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1127 n.5 (9th Cir. 2009); *see Delgadillo v. Kijakazi*, No. 20-56211, 2022 WL 301548, at *1 (9th Cir. Feb. 1, 2022) (appellant "waived any argument to supplement the record" by failing to appeal on this issue); *see also Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 684 n.1 (9th Cir. 1993) (appellant lodged amended complaint in district court).

These cases have no bearing here because NSO was a *prevailing party* that obtained complete relief below. An "appellee need not cross-appeal" where it "does not seek to 'enlarge' the rights it obtained under the district court judgment" but instead proffers an alternative basis for

"leav[ing] the parties where the district court left them." *Rivero v. City & County of San Francisco*, 316 F.3d 857, 862 (9th Cir. 2002); *see also*, *e.g.*, *Valdez v. Rosenbaum*, 302 F.3d 1039, 1044 (9th Cir. 2002) ("[P]revailing parties . . . need not have filed cross-appeals in order to . . . preserve alternative grounds for affirming the judgment."); *Lee v. Burlington N. Santa Fe Ry. Co.*, 245 F.3d 1102, 1107 (9th Cir. 2001) (similar). Because NSO could not have enlarged its rights under the judgment by appealing the District Court's denial of leave to supplement its arguments, NSO was not required to cross-appeal on this issue.

Plaintiffs' closing complaints (at 5–6 & n.2) about the timing of NSO's submission are misplaced. Unlike in plaintiffs' lone cited authority, *Lowry*, NSO presented these materials to the District Court, where plaintiffs knew about them and did not object to their consideration. While plaintiffs have now changed their tune, they had "the opportunity to address these issues" in their Reply Brief. *Contra* Mot. 5 n.2. It is not unfair for this Court to consider materials that are relevant to the issues on appeal, especially when those materials are subject to judicial notice and plaintiffs previously voiced no objection to a court's consideration of them.

## CONCLUSION

For these reasons, the Court should deny plaintiffs' motion to strike the Sealed Materials.

Respectfully submitted,

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