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November 4, 2021

Molly Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *NSO Group Technologies Ltd. et al. v. WhatsApp Inc., et al.*, No. 20-16408

Dear Ms. Dwyer:

Pursuant to Federal Rule of Appellate Procedure 28(j) and 44 U.S.C. § 1507 (“The contents of the Federal Register shall be judicially noticed.”), appellees advise the court that the Department of Commerce published a final rule in the Federal Register today adding appellee NSO Group to the federal government’s Entity List. 86 Fed. Reg. 60759 (Nov. 4, 2021), <https://www.federalregister.gov/documents/2021/11/04/2021-24123/addition-of-certain-entities-to-the-entity-list>.

The Entity List identifies entities reasonably believed to be involved in activities contrary to the national security or foreign policy interests of the United States and subjects those entities to strict export licensing requirements. *Id.* The End-User Review Committee (ERC), composed of representatives of the Departments of Commerce, State, Defense, Energy, and, where appropriate, Treasury, makes all decisions about additions to the Entity List. *Id.* The ERC added NSO to the Entity List because “investigative information has shown” that NSO “developed and supplied spyware to foreign governments that used this tool to maliciously target government officials, journalists, businesspeople, activists, academics, and embassy workers.” *Id.*

Appellees have argued that no established government practice accords foreign-official conduct-based immunity to entities like NSO and that, in any event, NSO cannot qualify for conduct-based immunity. Appellee Br. 23-66. NSO’s Entity List designation confirms that NSO’s immunity claim has no support in established U.S. law. Under the “two-step procedure” applicable “when a foreign official assert[s] immunity,” the defendant must show either that the State Department issued it a suggestion of

immunity or that the asserted “ground of immunity” reflects “the established policy of the [State Department] to recognize.” *Samantar v. Yousuf*, 560 U.S. 305, 311-12 (2010). Nothing supports a finding that the State Department has accorded immunity to an entity that has appeared on a designated list reflecting the federal government’s determination that such entity engaged in activities contrary to the national security or foreign policy interests of the United States.

Sincerely,

/s/ Michael R. Dreeben

Michael R. Dreeben

Counsel for Plaintiffs-Appellees
WhatsApp Inc. et al.