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18 Attorneys for Plaintiffs

19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

21 U.S. WECHAT USERS ALLIANCE,  
 CHIHUO INC., BRENT COULTER,  
 22 FANGYI DUAN, JINNENG BAO, ELAINE  
 PENG, and XIAO ZHANG,

23 Plaintiffs,

24 v.

25 DONALD J. TRUMP, in his official capacity  
 as President of the United States, and  
 26 WILBUR ROSS, in his official capacity as  
 Secretary of Commerce,

27 Defendants.

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Case No. 3:20-cv-05910-LB

**DECLARATION OF MICHAEL W. BIEN  
IN SUPPORT OF ADMINISTRATIVE  
MOTION FOR LEAVE TO FILE UNDER  
SEAL**

Judge: Hon. Laurel Beeler.

Trial Date: None Set

1           1.       I am an attorney duly admitted to practice before this Court. I am a partner  
2 in the law firm of Rosen Bien Galvan & Grunfeld LLP, counsel of record for Plaintiffs. I  
3 have personal knowledge of the facts set forth herein, and if called as a witness, I could  
4 competently so testify. I make this declaration in support of Plaintiffs' Administrative  
5 Motion for Leave to File Under Seal.

6           2.       On September 24, 2020, Defendants in this action filed a Declaration of John  
7 Costello in support of their Motion to Stay Pending Appeal. *See* ECF No. 68-1. Exhibit A  
8 to the Costello Declaration consists of a partially redacted memorandum from Mr. Costello  
9 titled "Proposed Prohibited Transactions Related to WeChat Pursuant to Executive Order  
10 13943" (hereafter "Decision Memo"). Page 14 of the Decision Memo refers to a "proposal  
11 to mitigate the concerns identified in EO 13943" submitted by Tencent to the Department  
12 of Commerce, and describes the proposed mitigation measures at a high level of  
13 generality. Footnote 85 of the Decision Memo indicates that a copy of Tencent's  
14 Mitigation Proposal was attached to the Decision Memo as "Appendix I." Defendants did  
15 not file Appendix I or any other appendices from the Decision Memo on September 24,  
16 2020.

17           3.       On Sunday, September 27, 2020, Plaintiffs' counsel emailed counsel for  
18 Defendants to request "complete copies of the non-classified information in the new  
19 evidence that Defendants submitted in connection with their stay motion," including the  
20 information contained in the appendices to the Decision Memo.

21           4.       On September 28, 2020 Defendants' counsel informed Plaintiffs' counsel  
22 that they were "not ready to provide [any of the appendices containing unclassified  
23 information] at this time," and suggested that the parties "work out a protective order and  
24 then talk about a schedule for production of an administrative record[.]" Plaintiffs'  
25 counsel requested that they be allowed to receive an "attorneys eyes only" copy of  
26 Appendices F and I before the October 1, 2020 filing deadline for their Opposition brief.  
27 Defendants' counsel responded that they would provide Appendix F as requested but that  
28 Plaintiffs' counsel would need to obtain consent from Tencent before Defendants would

1 produce Appendix I.

2         5.       On September 28, 2020, Defendants filed a Notice of Corrected Exhibit in  
3 Support of Motion to Stay, *see* ECF No. 76-1, explaining that certain public information  
4 had been inadvertently redacted from the version of the Decision Memo Defendants filed  
5 on September 24, 2020. Like the version filed on September 24, 2020, the corrected  
6 version of the Decision Memo does not include Appendix I.

7         6.       On the evening of September 29, 2020, Plaintiffs' counsel contacted counsel  
8 for Tencent to ask whether Tencent would be willing to share the Mitigation Proposal  
9 referenced in the Costello memorandum. The next afternoon, on September 30, 2020,  
10 counsel for Tencent informed Plaintiffs' counsel that the Mitigation Proposal "should not  
11 be publicly disclosed, both because it constitutes highly business sensitive/trade secret  
12 information, including potential business plans and potential business partners, and out of  
13 respect for the Commerce/Tencent discussions." As a result, counsel for Tencent stated  
14 that it would assent "to DOJ to provide the Proposal to plaintiffs now, subject to the  
15 agreement by all plaintiffs' counsel ... that it will be subject to Attorneys-Eyes-Only  
16 treatment and subject to the highest protections available under the forthcoming protective  
17 order, and used solely in connection with the *Us WeChat Users Alliance v. Trump* action."  
18 Plaintiffs' counsel agreed to these conditions, and counsel for Defendants subsequently  
19 provided Plaintiffs' counsel with a copy of Appendix I at approximately 6:45 p.m. PST on  
20 September 30, 2020.

21         7.       On Thursday, October 1, 2020, Plaintiffs filed their Opposition to  
22 Defendants' Motion to Stay. *See* ECF No. 78. The same day, Defendants filed a copy of  
23 Appendix F on the Court's docket. *See* ECF No. 77. Defendants did not provide the Court  
24 with a copy of Appendix I. *Id.*

25         8.       On Friday, October 2, 2020, Plaintiffs' counsel emailed a proposed  
26 protective order to counsel for Defendants, along with a redlined version of the proposed  
27 order comparing it to the Northern District of California template. Plaintiffs' counsel  
28 requested that Defendants either approve the proposed order or propose revisions by 10

1 a.m. PST on Monday, October 5, 2020. Counsel for Defendants responded that they  
2 would “look at this after our filing on Tuesday, most likely Wednesday.”

3 9. Later on Friday, October 2, 2020, Plaintiffs’ counsel wrote to counsel for  
4 Defendants to ask whether Defendants would stipulate to Plaintiffs filing Appendix I under  
5 seal on Monday, October 5, 2020 before entry of a stipulated protective order, with an  
6 explanation in the motion that Appendix I would be “subject to Attorneys-Eyes-Only  
7 treatment and the highest protections available under the forthcoming protective order, and  
8 used solely in connection with the *US WeChat Users Alliance v. Trump* action.”

9 Defendants’ counsel responded that they would need time to work through the  
10 “institutional ramifications” of stipulating to file Appendix I under seal. Defendants  
11 proposed that the parties “pick this discussion back up on Wednesday,” after Defendants  
12 filed their Reply brief in support of their Motion to Stay, because “there are nine days  
13 between the time we file our reply brief [on Tuesday, October 6, 2020] and the hearing set  
14 by Judge Beeler,” which would “give[] us plenty of time to work together to get the  
15 mitigation proposal, which is only 7 pages, in front of Judge Beeler before the hearing.”

16 10. On October 7, 2020, Defendants’ counsel emailed Plaintiffs’ counsel stating  
17 the Government’s position “as not opposing your motion to seal, for purposes of this  
18 motion only.” Subsequent to Defendants’ counsel’s recommendation that the parties alert  
19 Tencent’s counsel to this Administrative Motion, Plaintiffs’ counsel provided a draft to  
20 Tencent’s counsel (copying Defendants’ counsel), and asked for Tencent’s position on the  
21 Administrative Motion. On October 8, 2020, Tencent’s counsel indicated that “Tencent  
22 supports the sealing of this document.”

23 I declare under penalty of perjury under the laws of the United States of America  
24 that the foregoing is true and correct, and that this declaration is executed at San Francisco,  
25 California this 8th day of October, 2020.

26  
27 /s/ Michael W. Bien  
28 Michael W. Bien