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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CIVIL) NO. 804 OF 2017

**[Arising from the final judgment dated 23.09.2016 passed by the Hon'ble
Delhi High Court in Writ Petition (C) No. 7663/2016]**

IN THE MATTER OF:

Karmanya Singh Sareen & Anr.

...Petitioners

Versus

Union of India & Ors.

...Respondents

COUNTER-AFFIDAVIT ON BEHALF OF

RESPONDENT NO. 3 FACEBOOK, INC.

Paul Grewal, age 45, power of attorney holder of Respondent No. 3 Facebook, Inc., a company incorporated under the laws of Delaware and having its registered office at 1 Hacker Way, Menlo Park, California 94025, USA, does hereby solemnly affirm and state:

1. I am Power of Attorney holder for, and an employee of Facebook, Inc. and competent and authorized to swear and depose this Counter-Affidavit ("Affidavit") on its behalf. I state that I have read the Special Leave Petition ("Petition") filed by the Petitioners and understand the contents of same.
2. This Affidavit is filed pursuant to this Hon'ble Court's order dated 6 February 2017 regarding the judgment dated 23 September 2016 issued by the Hon'ble Delhi High Court in Writ Petition (C) No. 7663/2016

titled "*Karmanya Singh Sareen & Anr. v. Union of India & Ors*" ("Judgment"). Facebook, Inc. reserves the right to file additional affidavits in reply to the Petition, as appropriate.

PRELIMINARY SUBMISSIONS

I. Summary of Reasons Why the Petition Should Be Dismissed

3. At the very outset, this respondent craves leave of this Hon'ble Court to summarize certain elemental legal issues, which go to the very root of this matter and warrant the outright dismissal of the Petition. These facets, it is submitted, deserve to be adjudicated first, as preliminary issues, since they pertain to the very maintainability of the writ petition out of which the Special Leave Petition arises. Consequently, if this Hon'ble Court decides any of these issues against the Petitioners, no further question, on the merits of the matter, would arise for adjudication, and the Petition would have to be rejected.
4. The preliminary issues that arise in this case are the following:
 - (i) As explained in greater detail in Section III of this Affidavit, and as found by the Hon'ble High Court in paragraph 14 of the impugned judgment, Petitioners impugn, in substance and effect, a consensual contract entered into between private parties for the provision of certain services. The parties have voluntarily entered into the agreements in question. Furthermore, the subscribers, whose cause Petitioners seek to espouse, are free to terminate the agreements merely by deleting their respective accounts with WhatsApp. Neither WhatsApp nor Facebook can, in any manner, prevent the subscribers from doing so. This being so, no writ

petition under Article 226 of the Constitution of India would lie, for the relief of re-writing or substituting the terms of the contract voluntarily entered into between the parties. Neither the interpretation of such a contract nor the implementation thereof can be the subject matter of a petition under Article 226 of the Constitution.

- (ii) As explained in greater detail in Section IV, it would also follow, in any event, that no writ or direction would be issued by the High Court under Article 226 of the Constitution, and, consequently by this Hon'ble Court in a matter arising out of such a writ petition, against Facebook or WhatsApp. This is because being private entities, they would not be amenable to the writ jurisdiction of the High Court. Indeed, the Hon'ble High Court itself, in paragraph 18 of the impugned judgment, has noted and accepted this position.
- (iii) As explained in greater detail in Section V, a robust statutory regime regarding consent, data protection, and privacy in the cyber world already exists in India, in the form of the Information Technology Act, 2000 ("IT Act") and the Rules framed thereunder, as well as the Indian Contract Act, 1872 ("Contract Act"). In these circumstances, the Hon'ble High Court rightly declined to interfere, and, as such, no intervention by this Hon'ble Court is called for in the matter.
- (iv) There is no doubt that valid consent was obtained by WhatsApp under the facts of this case. This is because the users voluntarily

and affirmatively consent to the sharing of information with WhatsApp. As a result, no writ petition can lie.

In passing, it may also be pointed out that insofar as the content of the messages transmitted on the WhatsApp platform is concerned, the sanctity and secrecy thereof is guaranteed by the "end-to-end encryption" implemented by WhatsApp. Neither WhatsApp nor Facebook is in any position to access the content in any of the messages.

- 5. As would be seen, the above are preliminary issues and in the event any of these issues is decided in favour of the Respondents, this Special Leave Petition would have to be rejected on that basis alone. Without prejudice, and in addition to what is stated hereinabove, Facebook submits the following detailed reply in response to the averments made in the Special Leave Petition.

II. Background on Facebook and Its Relationship with WhatsApp

A. Facebook

- 6. Founded in 2004, Facebook is a global social network used for both personal and professional purposes. Facebook's mission is to give people the power to share and make the world more open and connected. People use Facebook to stay connected with friends and family, to discover what's going on in the world, and to share and express what matters to them. Facebook does not charge users for its service.
- 7. Per the terms governing the use of the Facebook service known as the Statement of Rights and Responsibilities ("SRR"), when registering to use the Facebook service, users located outside of the United States and

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Canada, including Indian users, enter into the SRR with Facebook Ireland Limited (“Facebook Ireland”), while only users located in the United States and Canada enter into the SRR with Facebook, Inc. A copy of the SRR as readily and freely available on the Facebook service is annexed hereto as ANNEXURE^{R3/1} from pages 18 to 40. This is echoed by the Facebook Service’s Data Policy. A copy of the Data Policy as is readily and freely available on the Facebook service is annexed hereto as ANNEXURE^{R3/2} from pages 41 to 53.

B. Facebook’s acquisition of WhatsApp

8. Facebook acquired WhatsApp in 2014. Since then, WhatsApp has been part of the Facebook family of companies. WhatsApp’s service, however, is operated independently of the Facebook service as a stand-alone service.
9. WhatsApp’s former 2012 Privacy Policy allowed for the sharing of information with third parties as outlined in that Policy.

C. Consent by WhatsApp Users to the Sharing of Information with Facebook

10. At the time Facebook acquired WhatsApp, use of WhatsApp’s service was governed by its Terms of Service and Privacy Policy enacted in 2012. On August 25, 2016, WhatsApp launched an update to its Terms of Service and Privacy Policy (“WhatsApp’s Update”).
11. Facebook understands that WhatsApp obtained valid user consent to WhatsApp’s Update, including with regard to the sharing of information with Facebook, based on prominent notifications to WhatsApp users and the user consent process implemented by WhatsApp. While Facebook

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defers to WhatsApp to address WhatsApp's Update in more detail, Facebook notes the following "Affiliated Companies" provision in WhatsApp's Update, which is available to WhatsApp users through the WhatsApp application itself and through the WhatsApp website:

"We joined the Facebook family of companies in 2014. As part of the Facebook family of companies, WhatsApp receives information from, and shares information with, this family of companies. We may use the information we receive from them, and they may use the information we share with them, to help operate, provide, improve, understand, customize, support, and market our Services and their offerings. This includes helping improve infrastructure and delivery systems, understanding how our Services or theirs are used, securing systems, and fighting spam, abuse, or infringement activities. Facebook and the other companies in the Facebook family also may use information from us to improve your experiences within their services such as making product suggestions (for example, of friends or connections, or of interesting content) and showing relevant offers and ads. . . ."

12. Thus, WhatsApp's Update explicitly enabled certain new Facebook uses of WhatsApp user information, including, for example, to allow Facebook to use WhatsApp user information to improve users' Facebook advertisements and products experiences.
13. Facebook is also aware that WhatsApp provided its existing users with control over Facebook's use of their account information, which enabled

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those users to decide whether or not Facebook may use their account information to improve their Facebook advertisements and products experiences. This control was available to existing WhatsApp users through the WhatsApp application itself. The control remained available in the user's application settings for an additional thirty days after the user's initial agreement to WhatsApp's Update. Facebook honours the choice of these WhatsApp users as to whether or not to allow Facebook to use their account information to improve their Facebook advertisements and products experiences.

III. There Is No Violation of User Privacy Because WhatsApp Obtained User Consent to the Sharing with Facebook

14. As noted above, Facebook understands that WhatsApp obtained valid user consent to WhatsApp's Update, including the sharing of user information with Facebook.
15. Given that WhatsApp obtained valid user consent to its Update, there is no violation of user privacy.
16. Further, as explained on WhatsApp's website, messages between WhatsApp users are protected by end-to-end encryption so that third parties and WhatsApp cannot read them and the messages can only be read by the recipient.
17. Facebook confirms that (a) WhatsApp is not sharing the content of its users' messages with Facebook, (b) Facebook is unable to access the content of messages sent between users of WhatsApp's service, and (c) WhatsApp's sharing of user information with Facebook in no way allows Facebook to access the content of WhatsApp's users' messages.

18. Given that WhatsApp obtained valid user consent to its Update, and given that Facebook is unable to access the content of any messages sent between users on WhatsApp's service, there is no violation of user privacy.

IV. Petitioners Cannot Invoke Writ Jurisdiction to Challenge the Private Contractual Relationship between WhatsApp and Its Users

19. It is settled law that writ jurisdiction under Article 226 of the Constitution of India is not properly invoked to address a dispute over a contractual relationship between private parties. Disputes arising out of private contracts – including the enforceability of contracts – are not properly the subject of writ jurisdiction.
20. Here, as explained above, the relationship between WhatsApp and its users is purely a contractual relationship. Users have the freedom to agree or not to agree to WhatsApp's Update. Users also have the freedom to discontinue their use of WhatsApp's service at any time.
21. The Delhi High Court, after analysing Petitioners' contentions, correctly recognized that this dispute is a private contractual matter: "[T]he users of 'WhatsApp' and [WhatsApp] are parties to a private contract, and the users of 'WhatsApp' having voluntarily opted to avail the services of the said Application, are bound by the terms of service offered by [WhatsApp]." (Judgment, para. 14.)
22. Accordingly, the Delhi High Court correctly stated that the present petition is not amenable to writ jurisdiction under Article 226 of the Constitution of India. (Judgment, para. 18, emphasis added.)
23. Facebook respectfully submits that because writ jurisdiction does not

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extend to resolving a purely contractual dispute arising out of a contractual relationship between private parties, Petitioners' attempt to invoke writ jurisdiction under Article 226 of the Constitution of India is impermissible.

V. There Is No Absence of a Legal Framework that Would Support Petitioners' Prayer for the Framing of Laws to Regulate WhatsApp

24. Petitioners pray that this Hon'ble Court frame laws, or direct the Union of India and the Telecom Authority of India Limited ("TRAI") to formulate laws, to regulate WhatsApp and other similar internet-based messaging services. Petitioners' prayers are based on their assertion that there is an absence of a statutory or legal framework. But the existing legal framework – including the IT Act and Contract Act – already provide a sufficient legal framework governing data protection and privacy, as well as the validity of consent. Thus, Petitioners' request for intervention is unwarranted and impermissible.
25. Specifically, the IT Act, and the rules promulgated thereunder, provide a framework to govern transactions carried out electronically. The IT Act and associated rules govern data protection and privacy in India.
26. The Contract Act provides a framework to govern the sufficiency of user consent to the terms of service. Not only does the Contract Act set forth the requirements for an enforceable contract, but it sets forth what constitutes free consent, one of the requirements for an enforceable contract.
27. Additionally, this Hon'ble Court has consistently expressed its position that it seeks to avoid issuing directions that direct the exercise of

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legislative power. Here, Petitioners ask this Hon'ble Court to direct the Central Government to exercise its legislative power under Section 87 of the IT Act. Facebook respectfully submits that Petitioners' prayer should be denied.

PARAGRAPH-WISE RESPONSE

28. Without prejudice to the foregoing Preliminary Submissions, Facebook submits the following paragraph-wise response to the averments and allegations in the Petition. At the outset, Facebook denies each and every averment and allegation in the Petition as if the same has been denied *in seriatim*, and nothing herein may be deemed to have been admitted by Facebook unless expressly admitted herein.
29. The contents of Paragraph 1.1 being a matter of record merit no response.
30. The contents of Paragraphs 1.2 to 1.4 do not pertain to Facebook and merit no response.

RESPONSE TO QUESTIONS OF LAW

31. It is submitted that no questions of law arise for consideration of this Hon'ble Court. In view of the Preliminary Submissions raised by Facebook, the present Writ Petition should be dismissed.
32. The contents of Paragraph 3 merit no response.
33. The contents of Paragraph 4 merit no response.

PARAGRAPH-WISE RESPONSE TO GROUNDS

34. In response to Ground 5.1, it is submitted that the same is untenable and

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hence denied. The High Court in the Judgment has in detail dealt with the merits of the non-maintainable case set out by Petitioners and has categorically observed that same is not amenable to writ jurisdiction. Any imputations made by Petitioners in this regard are denied as being non-maintainable.

35. The contents of Grounds 5.2, 5.3, 5.4, and 5.5 do not pertain to Facebook and thus merit no response.
36. The contents of Ground 5.6 are misconceived and thus denied. It is denied that there is an absence of a statutory or regulatory framework to protect the privacy of life and liberty, as alleged or at all.
37. In response to Grounds 5.7 and 5.8, it is submitted that the same are misconceived, untenable, and hence denied. It is denied that any rights have been compromised, as alleged by the Petitioners or at all.
38. The contents of Grounds 5.9 and 5.10 do not pertain to Facebook and thus merit no response.
39. The contents of Ground 5.11 are misconceived and thus denied. It is denied that there is any requirement for a new legal framework. As mentioned above, there is no absence of a statutory or regulatory framework in the field. The cursory allegations regarding vulnerability or violation, as alleged, are baseless and hence denied.
40. The contents of Ground 5.12 do not pertain to Facebook and thus merit no response.
41. The contents of Grounds 5.13, 5.14, and 5.15 are denied. It is submitted that there is no absence of a statutory or regulatory framework to protect

the privacy of life and liberty as alleged or at all, nor is there is any urgent requirement for bringing into existence any new regulatory framework or mechanism. The contents of the direction issued to the Union of India and TRAI are a matter of record and do not merit response.

42. The contents of Ground 5.16 do not pertain to Facebook and thus merit no response. In response to Ground 5.17, it is submitted that the same is misconceived and thus denied.
43. The contents of Ground 5.18 are denied. The apprehension that private conversations are being accessed by third parties are baseless and hence denied. All imputations beyond this do not merit response.
44. The contents of Ground 5.19 do not pertain to Facebook and thus merit no response.
45. The contents of Ground 5.20 are denied. The Hon'ble High Court correctly found that the issue sought to be espoused in the petition in that case was not amenable to writ jurisdiction under Article 226 of the Constitution of India. It is denied that there is an absence of a statutory or regulatory framework as alleged.
46. The contents of Grounds 5.21, 5.22, 5.23, and 5.24 do not pertain to Facebook and thus merit no response.
47. The contents of Grounds 5.25 do not pertain to Facebook and thus merit no response. It is, however, denied that there is "any slackness, delay, or lackadaisical attitude on the part of Respondent Nos. 1 and 5" as alleged or at all. It is also denied that there is any "colossal threat of violation of fundamental rights of Petitioners" as alleged or at all. It is also denied that any information of Petitioners is accessed, exploited, or

compromised by any internet based service provider.

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48. The contents of Ground 5.26 and 5.27 do not pertain to Facebook and thus merit no response.
49. The contents of Ground 5.28 are misconceived, untenable, and perfunctory in nature, and thus denied. It is reiterated that there is no compromise or illegal or unconstitutional exploitation of the private and confidential information shared by users. It is submitted that beyond making such cursory statements in its Petition, Petitioners have failed to demonstrate any activity or incidence which substantiates their untenable averments.
50. The contents of Grounds 5.29 and 5.30 are denied. It is reiterated that there is no absence of a statutory or regulatory framework. It is denied that there is a clear and immediate threat not only to the privacy and personal rights of the users / consumers, but also to the safety and security of the nation.
51. The contents of Ground 5.31 are misconceived and denied. The allegation regarding change in policy do not pertain to Facebook and thus merit no response.
52. The contents of Ground 5.32 do not pertain to Facebook and thus merit no response.
53. The contents of Ground 5.33 are misconceived and denied. The allegation regarding unilateral amendment to the terms of policy do not pertain to Facebook and thus merit no response.
54. The contents of Ground 5.34 are misconceived and denied. It is

submitted that section 72 of the IT Act is not applicable in the present context. Section 72 of the IT Act imposes a penalty for breach of confidentiality and privacy by any person who secures access to any electronic record, book, register, correspondence, information, document or other material in pursuance of any of the powers conferred under the IT Act without the consent of the person concerned, and is not applicable in this context.

55. The contents of Ground 5.35 are misconceived, baseless, and hence denied. The Petitioners have made some cursory allegations without any basis. Such casual allegations deserve a summary dismissal by this Hon'ble Court.
56. The contents of Ground 5.36 are misconceived and denied. It is most respectfully submitted that the law in India in relation to consent is well-settled.
57. The contents of Grounds 5.37 are denied.
58. The contents of Grounds 5.38 to 5.43 do not pertain to Facebook and thus merit no response.
59. The contents of Ground 5.44 are denied.
60. The contents of Grounds 5.45 to 5.53 do not pertain to Facebook and thus merit no response.
61. The contents of Ground 5.54 are denied. It is denied that there is any need to make special provisions as alleged or at all. As elaborated above, there is no absence of a statutory or regulatory framework and thus no need for any such special provisions, as sought by Petitioners.

62. The contents of Ground 5.54 are denied.

63. The contents of Grounds 5.56 to 5.60 do not pertain to Facebook and thus merit no response.

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RESPONSE TO GROUNDS FOR INTERIM RELIEF

64. The contents of Grounds 6.1, 6.2, and 6.3 do not pertain to Facebook. In any event the same seem to be misconceived and are hence denied.

65. The contents of Ground 6.4 are denied. The Hon'ble High Court correctly found that the issue sought to be espoused in the petition in that case was not amenable to writ jurisdiction under Article 226 of the Constitution of India.

66. The contents of Ground 6.5 are denied. It is further submitted that the fact that Petitioners contend that they will suffer personal injustice and harm undermines their assertion that the Petition addresses a matter of "public interest" or that they do not have any personal interest in the Petition.

67. The contents of paragraph 7 of the Petition (Main Prayer) are wrong and denied. It is submitted that Petitioners are not entitled to any relief whatsoever.

68. The contents of paragraph 8 of the Petition (Prayer for Interim Relief) are wrong and denied. It is submitted that Petitioners are not entitled to any interim relief whatsoever. The Petitioners have not obtained any interim relief before the Hon'ble High Court. Thus, there is no justifiable basis for seeking it before this Hon'ble Court.

69. The submissions made herein are without prejudice to the rights of Respondent No. 3 under the applicable law of the contract.

Since there was no notice issued in the Court below, no facts were pleaded or Affidavit was filed before the Court below.

It is most humbly prayed that this Hon'ble Court may be pleased to take the present Affidavit on record and dismiss the Petition in view of the above factual clarifications.

SOLEMNLY AFFIRMED AT _____ ON THIS THE ____ DAY OF _____, 2017

DEPONENT

VERIFICATION:

Verified at _____, on this _____ day of _____ 2017 that the contents of the above Affidavit are true to the best of my knowledge and based on information received and believed to be correct. No part of the above Affidavit is false and nothing material has been concealed therefrom.

DEPONENT

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

CIVIL CODE § 1189

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State of California)
County of San Mateo)

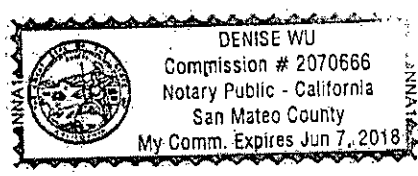
On March 17, 2017 before me, Denise Wu, Notary Public
Date Here Insert Name and Title of the Officer

personally appeared Paul Brewer
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature Denise Wu
Signature of Notary Public

Place Notary Seal Above

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