IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY KLAYMAN, *et al.*, Plaintiffs, v. BARACK OBAMA, President of the United States, *et al.*, Defendants.	Civil Action No. 1:13-cv-0851-RJL

GOVERNMENT DEFENDANTS' RESPONSE TO STATEMENT OF MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 7(h), the Government Defendants[1] hereby respond to Plaintiffs' Statement of Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment (ECF No. 108-1) as follows:

1. On June 5, 2013, *The Guardian*, a British newspaper, reported the first materials leaked by former NSA contract employee Edward Snowden that revealed the existence of U.S. government intelligence collection and surveillance programs on American citizens, regardless of any probable cause they were in communication with terrorists. *See* Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, GUARDIAN (London), June 5, 2013; Leon Memorandum Opinion, dated Dec. 16, 2013 ("Mem. Op.") at 6.

RESPONSE: Undisputed, but not material, that *The Guardian* published the referenced article, to which the Court is respectfully referred for a complete and accurate statement of its contents. Otherwise the facts asserted in this paragraph, and those stated in the cited article, are

[1] The Government Defendants are defendants Barack Obama, President of the United States, Eric Holder, Attorney General of the United States, Admiral Michael S. Rogers, Director of the National Security Agency (NSA), , insofar as they are sued in their official capacities, together with defendants NSA and the United States Department of Justice (DOJ). Pursuant to Federal Rule of Civil Procedure 25(d), Admiral Rogers is automatically substituted as an official-capacity defendant to this action, but not in his individual capacity, in place of former NSA Director General Keith Alexander.

disputed on the ground that they are based on, or constitute, hearsay inadmissible for the truth of the matters stated therein.

2. *The Guardian's* report disclosed a secret Foreign Intelligence Surveillance Court ("FISC") order, dated April 25, 2013, that required Verizon Business Network Services to produce to the NSA on "an ongoing daily basis . . . all call detail records or 'telephony metadata' create by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls." Secondary Order, *In re Application of the [FBI] for an Order Requiring the Production of Tangible Things from Verizon Business Network Services, Inc. on Behalf of MCI Communication Services, Inc. d/b/a/ Verizon Business Services*, No. BR 13-80 at 2 (FISC Apr. 25, 2013) ("Secondary Order"); Mem. Op. at 6.

RESPONSE: Undisputed, but not material, that *The Guardian* published the referenced article, to which the Court is respectfully referred for a complete and accurate statement of its contents. Facts asserted in the article are disputed on the ground that they constitute hearsay inadmissible for the truth of the matters stated therein.

Undisputed that the Foreign Intelligence Surveillance Court ("FISC") issued the referenced April 25, 2013, Secondary Order to Verizon Business Network Services, Inc. The Court is respectfully referred to the Secondary Order for a complete and accurate statement of its contents.

3. The Secondary Order "show[ed] . . . that under the Obama administration the communication records of millions of US citizens are being collected indiscriminately and in bulk—regardless of whether they are suspected of any wrongdoing." Greenwald, *supra*; Mem. Op. at 6-7.

RESPONSE: This paragraph is disputed on the basis that it quotes a statement from the article published by *The Guardian*, which is hearsay inadmissible for the truth of the matters stated therein. The Court is respectfully referred to the Secondary Order for a complete and accurate statement of its contents.

4. **The Government Defendants had confirmed and admitted to** the authenticity of the Secondary Order as well as the existence of the Bulk Telephony Metadata Program ("Program") under which "the FBI obtains orders from the FISC pursuant to Section 215 [of the USA PATRIOT Act] directing certain telecommunications service providers to produce to the NSA on a **daily basis** electronic copies of 'call detail records.'" Govt.'s Opp'n at 8; Mem. Op. at 7 (emphasis added).

RESPONSE: Not disputed that the Government has confirmed the authenticity of the Secondary Order and the existence of the bulk telephony metadata program carried out under authority of Section 215 of the USA-PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), codified at 50 U.S.C. § 1861. Not disputed that the quoted language appears in the description of the program set forth in the Government Defendants' Opposition to Plaintiffs' Motions for Preliminary Injunctions (ECF No. 25) (Gov't Defs.' PI Opp.") at 8–13, to which the Court is respectfully referred for a complete and accurate statement of its contents.

5. The Program is "a 'counterterrorism program' under [50 U.S.C. §] 1861[, **conducted for more than seven years**, that] collect[s], compiles, retains, and analyzes certain telephony records, which it characterizes as "business records" created by certain telecommunications companies." Mem. Op. at 15-16 (emphasis added).

RESPONSE: Undisputed that the Section 215 bulk telephony metadata program is conducted for counter-terrorism purposes; that it has been conducted since May 2006; and that it involves the acquisition, storage, and analysis by the NSA of information contained in business records, created by certain telecommunications companies, known as "call detail records." Declaration of Teresa H. Shea, Signals Intelligence Director, NSA (Gov't Defs.' PI Opp., Exh. C) (ECF No. 25-4) ("Shea Decl."), ¶¶ 10–16.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

6. In principle, but not in practice, the Program is "meant to detect: (1) domestic U.S. phone numbers calling outside of the United States to foreign phone numbers associated with terrorist groups; (2) foreign phone numbers associated with terrorist groups calling into the U.S. to U.S. phone numbers; and (3) 'possible terrorist –related communications' between numbers inside the U.S." Mem. Op. at 20-21.

RESPONSE: Undisputed that the Section 215 bulk telephony metadata program was specifically developed to assist the U.S. Government in detecting communications between known or suspected terrorists who are operating outside of the U.S. and who are communicating with others inside the U.S., as well as communications between operatives who are located within the U.S. Shea Decl. ¶ 10.

To the extent this paragraph is meant to convey any different or conflicting understanding, including but not limited to the assertion that the program is meant to detect terrorist communications "[i]n principle, but not in practice," it is disputed on the basis that it is unsupported by reference to admissible evidence. The Government Defendants note that the qualifying phrase "[i]n principle, but not in practice" does not appear on the cited pages of the Court's December 16, 2013, Memorandum Opinion (ECF No. 48) ("Mem. Op."). In addition, statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

7. The records collected under the Program consist of "metadata," which includes information about what phone numbers were used to make and receive calls, when the calls took place, and how long the calls lasted. Mem. Op. at 15.

RESPONSE: Undisputed that the call detail records acquired by the NSA under the Section 215 bulk telephony metadata program contain "metadata," defined under the FISC orders authorizing the program as "comprehensive communications routing information" including but not limited to "originating and terminating telephone number[s], International Mobile Subscriber Identity (IMSI) number[s], International Mobile Station Equipment Identity (IMEI) number[s], trunk identifier[s], telephone calling card numbers, and time and duration of

call." *In re Application of the FBI for an Order Requiring the Production of Tangible Things [etc.]*, Dkt. No. BR 13-80, Primary Order (F.I.S.C. Apr. 25, 2013) (Gov't Defs.' PI Opp., Exh. E) (ECF No. 25-6) ("Primary Order") at 3 n.1.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

8. Through targeted searches of metadata records, the NSA "tries to discern connections between terrorist organizations and previously unknown terrorist operatives located in the United States." Mem. Op. at 16.

RESPONSE: Undisputed that through queries of the data using identifiers (e.g., telephone numbers) that are reasonably suspected of being associated with identified international terrorist organizations that are subjects of FBI counterterrorism investigations, NSA analysts attempt to determine whether known or suspected terrorists have been in contact with individuals in the U. S. Shea Decl. ¶¶ 8, 10, 19–20; Declaration of Robert J. Holley (Gov't Defs.' PI Opp., Exh. D) (ECF No. 25-5) (Holley Decl.) ¶ 5.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

9. The telephone metadata records, which "[telecommunications] companies create and maintain as part of their business of providing telecommunications services to customers[,]" have been continually produced since May 2006 under the FBI's production orders from the FISC. *See* Mem. Op. at 16.

RESPONSE: Undisputed that the call detail records acquired by the NSA under the Section 215 bulk telephony metadata program are records that the telecommunications companies already generate and maintain in the ordinary course of business for their own pre-existing business purposes (such as billing and fraud prevention). Shea Decl. ¶ 18; Holley Decl. ¶ 10. Undisputed that the program has been conducted since May 2006, and that the FISC orders

issued under the program require the telecommunications service providers to which they are directed to produce call detail records to the NSA on an ongoing daily basis for the duration of each order. Shea Decl. ¶ 13; Holley Decl. ¶¶ 6, 11.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

10. The NSA consolidates the metadata records provided by different telecommunications companies into one database and under the FISC's orders, the NSA may retain the records for up to five entire years. Mem. Op. at 16.

RESPONSE: Undisputed that under the FISC orders authorizing the Section 215 bulk telephony metadata program, the NSA consolidates and stores the metadata it acquires in secure networks, and must destroy metadata no later than five years after their initial collection. Shea Decl. ¶¶ 23, 30; Primary Order at 4, 14.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

11. When an NSA intelligence analyst runs a query, the quantity of phone numbers captured is very large, potentially and sometimes up to 1,000,000 numbers total. Mem. Op. at 18-19.

RESPONSE: This paragraph is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein. The Government Defendants also note that the cited portion of the Court's December 16, 2013, Memorandum Opinion discusses a solely hypothetical scenario, Mem. Op. at 18–19, and note further that under current FISC orders, the results of authorized queries of the NSA's database are limited to metadata within two "hops," no longer three, of the

suspected-terrorist selector used to conduct the query. Declaration of Teresa H. Shea (filed herewith) ("*Klayman* Shea Decl.") ¶¶ 3–5.

12. Since the Program began in May 2006, the FISC has repeatedly issued orders directing telecommunication service providers to produce records in connection with the Program. Mem. Op. at 21.

RESPONSE: Undisputed that beginning in May 2006 and continuing to this day, the FBI has obtained orders from the FISC pursuant to Section 215 directing certain telecommunications service providers to produce all call detail records created by them containing information about communications between telephone numbers, generally relating to telephone calls made between the United States and a foreign country and calls made entirely within the U.S. Shea Decl. ¶¶ 13–14.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

13. Fifteen different FISC judges have issued thirty-five orders authorizing the Program and under those orders, the Government defendants must continuously seek renewal of the authority to collect telephony records, which occurs as often as every ninety days. Mem. Op. at 21.

RESPONSE: Undisputed that to date sixteen (16) different FISC judges have on thirty-seven (37) occasions issued orders for the bulk production of telephony metadata to the NSA under the Section 215 program. *Klayman* Shea Decl. ¶ 7; *see also* Shea Decl. ¶ 14; Holley Decl. ¶ 11. Also undisputed that by the terms of the orders they must be renewed approximately every ninety (90) days.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

14. The Government Defendants admit that they have failed to comply with the minimization procedures set forth in the orders. Mem. Op. at 21.

RESPONSE: Undisputed, but not material, that since the Section 215 bulk telephony metadata program was initiated, there have been a number of significant compliance and implementation issues that were discovered as a result of internal NSA oversight and inter-agency reviews. Upon discovery, these violations were reported to the FISC and Congress, the NSA remedied the problems, and the FISC reauthorized the program. Even the most serious of these incidents—in which an "alert list" of selectors that had not gone through the process of becoming "RAS" approved was used to query the metadata—involved identifiers that were suspected of being associated with foreign terrorist organizations. Shea Decl. ¶¶ 36–43.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

15. The Honorable Reggie Walton of the FISC concluded he had no confidence that the Government was doing its utmost to comply with the court's orders. Mem. Op. at 21-22.

RESPONSE: Undisputed, but immaterial for purposes of this case, that in March 2009, upon being notified by the Government that the NSA had employed the "alert list" of non-RAS approved identifiers to query the database, Judge Walton, for the FISC, issued an order that prohibited the Government from accessing the metadata for foreign-intelligence purposes except as authorized by the FISC on a case-by-case basis (except in life-threatening situations), stating that the Court no longer had "every confidence that the government [was] doing its utmost to ensure that those responsible for implementation fully comply with the Court's orders." *In re Production of Tangible Things [Redacted]*, 2009 WL 9150913, *6, 9 (F.I.S.C. Mar. 2, 2009). Following the completion of an end-to-end review of the NSA's handling of the metadata and the submission of a report thereon to the FISC, the FISC entered an order in September 2009

once again permitting the NSA to make "RAS" determinations and to query the metadata using RAS-approved identifiers without seeking pre-approval from the FISC. Shea Decl. ¶¶ 37–40.

The Court is respectfully referred to the FISC's March 2, 2009 order for a complete and accurate statement of its contents.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

16. The Honorable John Bates, Presiding Judge of the FISC, found that the Government had misrepresented the scope of its targeting of certain internet communications pursuant to 50 U.S.C. § 1881a. Mem. Op. at 22.

RESPONSE: Undisputed, but immaterial for purposes of this case, that on October 3, 2011, the FISC, by Judge Bates, issued a Memorandum Opinion granting in part and denying in part the Government's request for authorization to acquire certain telephone and Internet communications pursuant to Section 702 of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 188la. Undisputed, but immaterial for purposes of this case, that in light of the Government's disclosure that the NSA's acquisition of Internet communications through its "upstream" collection under Section 702 was accomplished by acquiring Internet "transactions" containing single or multiple discrete communications, Judge Bates wrote that "[t]he Court is troubled that the government's revelations regarding NSA's acquisition of Internet transactions mark the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program." *Id.* at 15–16 & n.14. The Court is respectfully referred to Judge Bates' opinion for a complete and accurate statement of its contents. *Available at* http://www.dni.gov/index.php/newsroom/press–releases/191–press–releases–2013/915–dni–declassifies–intelligence–community–documents–regarding–collection–under–section–702–of–the–foreign–intelligence–surveillance–act–fisa.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

17. The Government's revelations regarding NSA's acquisition of Internet transactions mark the third instance in less than three years in which the Government disclosed a substantial misrepresentation regarding the scope of a major collection program. Mem. Op. at 23.

RESPONSE: *See* response to paragraph 16, above.

18. Plaintiffs filed a complaint on June 6, 2013 (*Klayman I*). *See* Mem. Op. at 8.

RESPONSE: Undisputed.

19. *Klayman I* Plaintiffs Larry Klayman, Charles Strange, and Mary Ann Strange brought suit against the NSA, the Department of Justice ("DOJ"), multiple executive officials, whom include President Barack H. Obama, Attorney General Eric H. Holder, Jr., General Keith B. Alexander, Director of the NSA, and U.S. District Judge Roger Vinson, and Verizon Communications as well as its chief executive officer. Second Am. Compl. ¶¶ 9-19; Mem. Op. at 8.

RESPONSE: Undisputed, but the Court is respectfully referred to the Second Amended Complaint (ECF No. 37), and to the Third Amended Complaint (ECF No. 77) for complete and accurate statements of their contents.

20. Plaintiffs Larry Klayman and Charles Strange are subscribers of Verizon wireless for cellular phone service. Mem. Op. at 3 n.5.

RESPONSE: Undisputed, but immaterial, that as of October 28, 2013, Plaintiffs Klayman and Charles Strange had been subscribers of Verizon Wireless cellular phone service "for many years." Affidavit of Larry Klayman (ECF No. 13-2) ¶ 3; Affidavit of Charles Strange (ECF No. 13-3) ¶ 2.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

21. The United States District Court for the District of Columbia ("the Court") has the authority to evaluate Plaintiffs' constitutional challenges to the NSA's conduct. Mem. Op. at 5.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

22. Plaintiffs have standing to challenge the constitutionality of the Government Defendants' bulk collection and querying of phone record metadata. Mem. Op. at 5.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

23. Plaintiffs have standing to challenge both of the NSA's Bulk Telephony Metadata Program's searches: (1) the bulk collection of metadata and (2) the analysis of that data through the NSA's querying process. Mem. Op. at 36.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

24. The NSA's bulk telephony metadata collection and analysis violates a reasonable expectation of privacy. Mem. Op. at 47.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

25. A Fourth Amendment search occurred in this case. Mem. Op. at 56.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

26. Plaintiffs have demonstrated a substantial likelihood of success on the merits of their Fourth Amendment claim. Mem. Op. at 5.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

27. Plaintiffs will suffer irreparable harm absent injunctive relief. Mem. Op. at 5.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

28. The public interest weighs heavily in favor of granting an injunction. Mem. Op. at 65.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

29. The NSA's bulk collection program is indeed an unreasonable search under the Fourth Amendment. Mem. Op. at 62.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

Dated: May 9, 2014

Respectfully submitted,

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