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-00851-RJL

GOVERNMENT DEFENDANTS' RESPONSE TO NOTICE OF INTERVENTION AS OF RIGHT FILED BY FREDERICK BANKS

The Government Defendants[1] oppose the intervention of applicant Frederick Banks because he cannot satisfy the requirements to intervene as of right and his motion should be denied as frivolous. Full briefing on his motion[2] would be premature, however, while this case is stayed until the Court of Appeals resolves the appeal of this Court's grant of a preliminary injunction. If the Court does not immediately deny the motion as frivolous, then it should hold briefing and consideration of the motion in abeyance until after the Court of Appeals disposes of the pending appeal, and the stay of this action is lifted.

[1] Defendants Barack Obama, President of the United States, Eric Holder, Attorney General of the United States, and General Keith B. Alexander, 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 Michael S. Rogers is automatically substituted as a party to this action in place of former NSA Director General Keith Alexander.

[2] Although Mr. Banks styles his filing as a "Notice," he also refers to it in the body of his filing as a "motion." The Government Defendants treat his filing herein as a motion.

More than one year after this suit was filed, applicant Banks, apparently an inmate at the Northeastern Ohio Correctional Center, seeks to intervene as a matter of right in this action. *See* Notice of Intervention as of Right ("Mot."), ECF No. 122. The applicant attached to his motion a proposed complaint and writ of mandamus. In the putative complaint, he (and two other individuals) allege that various individuals and organizations, including Booz Allen Hamilton, the Director of the Privacy and Civil Liberties Oversight Board, the Director of the Central Intelligence Agency, and Senator Saxby Chambliss—none of whom are defendants in this action—participated in a "civil conspiracy" to collect intelligence on them in order to "maliciously injure" them, "damage their reputations and harass them for various reasons, including their litigation . . . and whistleblowing activities against the federal government." Compl. ¶¶ 1, 3. The applicant alleges that the intelligence was obtained through "[u]pstream" and "PRISM" collections as well as through "bio-electric sensors" and "sub aural communications." *Id.* ¶ 2. A variety of causes of action are asserted, including violations of three constitutional provisions, various state-law torts, as well as the "Northwest Ordinance utmost good faith clause, . . . the Sioux Treaty of Fort Laramie 1868, . . . and the Sioux treaty badmen provision." *Id.* ¶ 6. The applicant also "move[s] the court for an order referring this matter to the House and Senate Intelligence Committees upon receipt." *Id.* ¶ 8.

The applicant seeks to intervene as a matter of right, which is governed by Rule 24(a) of the Federal Rules of Civil Procedure. Rule 24(a) provides, in pertinent part that, "[o]n timely motion, the court must permit anyone to intervene who . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). Drawing from

the language of the rule, a putative intervenor must satisfy four distinct requirements: (1) the application must be timely, (2) the applicant must have a "legally protected interest in the action," (3) the action must threaten to impair that interest, and (4) no party to the action can be an adequate representative for the applicant's interests. *See Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008); *see also, e.g.*, *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). Additionally, the applicant must also demonstrate that he "has standing under Article III of the Constitution." *Fund for Animals*, 322 F.3d at 732.

The applicant's motion, which does not attempt to show that he satisfies any of these requirements, is without merit for many reasons. Most obvious among these, the Complaint he attaches to his motion does not identify a legally protected interest in this action. The applicant's putative complaint—though wide-ranging in factual allegations and relief sought—has nothing to do with the National Security Agency's intelligence activities at issue here. This case, civil action number 13-851, "concerns only the [bulk] collection and analysis of *phone record data*," *Klayman v. Obama*, 957 F. Supp. 2d 1, 8 n.6 (D.D.C. 2013) (emphasis added), which is collected under the "business records" provision of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1861, enacted by Section 215 of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), whereas the applicant's proposed complaint does not challenge the bulk collection of telephony metadata. Put simply, the applicant's putative complaint challenges a broad array of alleged surveillance and other activities that are not at issue here and does not challenge the one program that is at issue. Thus the applicant can have no legally protected interest in this action, much less one that could be impaired by its resolution, and so his application should be denied as frivolous.

Alternatively, the Court should defer full briefing and consideration of this motion because it is premature. On July 30, 2014, by Minute Entry, this Court granted the Government Defendants' motion for a stay of proceedings, ordering that "all proceedings against the Government Defendants are hereby STAYED pending . . . appeal to the United States Court of Appeals for the District of Columbia Circuit from this Court's December 16, 2013, preliminary injunction in Case No. 13-cv-851." Accordingly, if the applicant's motion is not immediately denied as frivolous, then briefing and resolution of the motion should be held in abeyance until such time as the Court lifts the stay it imposed on these proceedings.

For the reasons set forth above, this Court should either deny the applicant's motion as frivolous or hold full briefing and consideration in abeyance.

Dated: August 22, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2014, I did cause a true and correct copy of the Government Defendants' Response to Notice of Intervention as of Right Filed by Applicant Frederick Banks, and a Proposed Order, to be electronically filed using this Court's CM/ECF system for the United States District Court for the District of Columbia and served by U.S. mail on the following person:

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/s/ Rodney Patton
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