

Exhibit 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

LARRY KLAYMAN, *et. al*

Plaintiffs,

v.

BARACK HUSSEIN OBAMA II, *et. al*

Defendants.

Civil Action No. 13-CV-881
and
Civil Action No. 13-CV-851

**BENCH BRIEF IN SUPPORT OF ADMISSIBILITY OF DECLARANT, EDWARD
SNOWDEN, STATEMENTS AGAINST INTEREST**

Plaintiffs hereby submit this bench brief to assist the Court with its evidentiary ruling on the "declaration against interest" exception to the hearsay rule pursuant to Federal Rule of Evidence Rule 804(b)(3).

STATEMENT OF FACTS

On June 5, 2013, through an interview with The Guardian, NSA whistleblower, Edward Snowden, revealed highly classified information regarding the NSA's mass, warrantless, and illicit surveillance programs, providing the NSA access to, and collection of, vast amounts of communication records of ordinary U.S. citizens. Tr. of Edward Snowden Interview ("Tr. of Snowden") Specifically, Snowden made the following pertinent statements:

- a. "When you're in positions of privileged access like a systems administrator for the sort of intelligence community agencies, you're exposed to a lot more information on a broader scale than the average employee and because of that you see things that may be disturbing but over the course of a normal person's career you'd only see one or two of these instances. When you see everything you see them on a more frequent basis and you recognize that some of these things are actually abuses..." See, Tr. of Snowden at pp. 1.
- b. "Now increasingly we see that it's happening domestically and to do that they, the NSA specifically, targets the communications of everyone. It ingests them by default. It collects them in its system and it filters them and it analyzes them and it measures them and it stores them for periods of time... so while they may be intending to target someone associated with a foreign government or someone they suspect of terrorism, they're collecting your communications to do so." See Tr. of Snowden at pp. 1.

- c. "Any analyst at any time can target anyone, any selector, anywhere... I sitting at my desk certainly had the authorities to wiretap anyone from you or your accountant to a Federal judge to even the President if I had a personal e-mail." *See*, Tr. of Snowden at pp. 1. "...Even if you're not doing anything wrong you're being watched and recorded. And the storage capability of these systems increases every year consistently by orders of magnitude to where its getting to the point where you don't have to have done anything wrong...and [the NSA] can use this system to go back in time and scrutinize every decision you've ever made, every friend you've ever discussed something with..." *See*, Tr. of Snowden at pp. 2.

As an agent of the NSA, Snowden was exposed to, and had access to, privileged information regarding the intelligence community agencies and their course of illegal conduct. Tr. of Snowden at pp. 1. Snowden worked as an infrastructure analyst for the NSA and had previously held numerous positions within the intelligence community, including a position as a senior adviser for the Central Intelligence Agency. Tr. of Snowden at pp. 1.

DISCUSSION

Rule 804(b)(3) states, in pertinent part that the following is not excluded by the hearsay rule if declarant is unavailable as a witness and the "...statement which was at the time of its making, so far contrary to the declarant's pecuniary or proprietary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability...that a reasonable person in declarant's position would not have made the statement unless believing it to be true." Statements against interest are considered sufficiently trustworthy to be admitted without benefit of cross-examination since rational persons do not ordinarily jeopardize their own positions by telling falsehoods.

(1) Unavailability of Declarant

Rule 804(a) provides that "a declarant is considered to be unavailable as a witness of the declarant "...is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure...the declarant's attendance or testimony, in the

case of a hearsay exception under [Rule 804(b)(3)]." Snowden is clearly an unavailable declarant as defined under Rule 804(a). Despite his fugitive status in the United States, Russia has granted Snowden temporary asylum for a year. According to his lawyer in Russia, Snowden has gone to a secure location, which would remain secret.

(2) Statements Against Interest

Snowden's statements were clearly declarations against interest because they constitute clear admission of his own insider knowledge of highly classified information he obtained during the course of his employment with the NSA, which he willfully disseminated to the public, and, thus, tended to expose him to criminal liability. In fact, following Snowden's revelations, the U.S. has filed espionage charges against Snowden and, more specifically, with theft of government property, unauthorized communication of national defense information and willful communication of classified communication intelligence information to an unauthorized person. The latter two charges carry penalties of fines and up to ten (10) years in prison. At the time he made the statements, Snowden was undoubtedly aware that his willful communications of classified information would subject him to criminal liability, clearly evidenced by the fact that Snowden, very soon after revealing his identity, fled the U.S. and is currently hiding in Russia.

(3) Snowden Was An Employee of the NSA and Thus His Admissions Are Admissible Against The NSA

Edward Snowden's statements qualify as an exception to the hearsay rule because he was an agent of the NSA. "To qualify as an exception to hearsay rule as a statement against interest, employee's declarations must be against employee's interest, not just employer's interest; since trustworthiness of declaration is insured only by the accompanying threat of loss or liability, statement must be to the declarant's immediate prejudice[.]" *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F. Supp. 190 (E.D. Pa. 1980). Here, Snowden was an

analyst working for the NSA, and had previous experience working for the CIA as well. Snowden gave up his career, his home, and his entire life in the United States in order to make the statements that were released in *The Guardian* and now throughout the world. There can be no greater statement against a person's interest, since he is now a fugitive of his own country. The trustworthiness of the declaration is insured because Snowden knew of the accompanying threat of loss, and he in fact did suffer a substantial loss and is now in hiding in Russia. Snowden's statements thus fall directly under the hearsay exception for declarations against interest.

Dated: November 18, 2013

Respectfully submitted,

/s/ Larry Klayman

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