IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY KLAYMAN, *et. al* Plaintiffs, v. BARACK HUSSEIN OBAMA II, *et. al* Defendants.	Civil Action Nos. 13-CV-851 and 13-CV-881

PLAINTIFFS' OPPOSITION TO MOTION FOR STAY OF PROCEEDINGS AGAINST THE GOVERNMENT DEFENDANTS PENDING APPEAL OF PRELIMINARY INJUNCTION AND REQUEST FOR APPROPRIATE SUA SPONTE SANCTIONS

I. INTRODUCTION

Plaintiffs, Larry Klayman, Charles Strange, and Mary Ann Strange, hereby strongly oppose the Government Defendant's (hereinafter the NSA Defendant) motion as yet another attempt to delay adjudication of this case. Previously, during a status conference on October 31, 2013, the Court warned the NSA Defendant not to seek delays in this case as it is at the pinnacle of public national interest. Specifically, the Court emphasized:

> "We work 24/7 around this courthouse, my friend. 24/7. I don't want to hear anything about vacations, weddings, days off. Forget about it. This is a case at the pinnacle of public national interest, pinnacle. All hands 24/7. No excuses. You got a team of lawyers. Mr. Klayman is alone apparently. You have litigated cases in this courthouse when it is matters of this consequence and enormity. You know how this Court operates."[1]

[1] Despite the Court's order granting a preliminary injunction on December 16, 2013, the NSA Defendant did not file a notice of appeal until almost three (3) weeks later on January 3, 2014. A simple notice of appeal could have been filed forthwith consistent with the Court's direction to accelerate any appeals given the Court's stay of the preliminary injunction order. As set forth below, this delay is consistent with the NSA Defendant's and the Obama Justice Department's goal to delay adjudication of these cases.

Tr. of Status Conference on October 31, 2013 at pg. 7. Exhibit 1. Following the granting of a preliminary injunction in Case No. 13-851, the NSA Defendant, having previously covered up and then lied under oath to other courts, Congress, and the public over its secretive practice of collecting metadata on and thus spying on over 300 million American citizens without regard to there being probable cause of contacts with terrorists or terrorist groups overseas, predictably seeks to slow down the adjudication of this case as well as a related case (No. 13-881) in an attempt to throw a monkey wrench into this Court's judicial authority, hoping that appellate courts will vitiate this Court's ruling that Defendant NSA has violated the Fourth Amendment to the U.S. Constitution. Already, the NSA Defendant has sought to flout the authority of this Court by going back, *ex parte* in secretive star chamber proceedings, to the Foreign Intelligence Surveillance Court (FISC), and had it rubber stamp another ninety (90) days for it to continue to violate, in an "almost-Orwellian" fashion, the constitutional rights of all Americans, despite this Court's ruling of December 16, 2013 declaring this conduct unconstitutional. Obviously, the FISC was inclined to waste little time rolling over to the NSA Defendant and its enablers such as Director of National Security James Clapper, who previously perjured himself before Congress, to save face and thus to justify the FISC's prior secretive illegal rulings at the expense of hundreds of millions of American citizens who are not under legitimate investigation and have no connection to terrorism.

In this regard, this Court called the NSA Defendant's technology "almost-Orwellian" and ruled: "I cannot imagine a more 'indiscriminate' and 'arbitrary invasion' than this systematic and high-tech collection and retention of personal data on virtually every single citizen for the purposes of querying it and analyzing it without judicial approval." Memorandum Opinion of December 16, 2013 at pg. 64. The Court continued, " . . . [the public] interest looms larger in this

case, given the significant privacy interests at stake and the unprecedented scope of the NSA's collection and querying efforts, which likely violate the Fourth Amendment." *Id*. at 65.

II. STANDARD FOR STAY PENDING APPEAL

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, __ U.S. __ 129 S. Ct. 1749, 1761 (2009) (citing *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). It is instead "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id*. The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. *Id*.

The standard for a stay pending appeal is a difficult threshold to satisfy. The four factors that are traditionally considered when evaluating whether to issue a stay are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, __ U.S. __, 129 S. Ct. at 1761. Simply put, none of these factors weigh in favor of a stay and therefore the Court must deny the NSA Defendant's motion for stay.

III. ARGUMENT

Respectfully, this Court must reject this effort of delay for the following straightforward reasons: First, it is clear that the NSA Defendant, despite this Court's ruling of gross unconstitutionality, is continuing to violate, in an egregious fashion, the Fourth Amendment rights of over 300 million Americans, and this case must proceed to discovery and ultimately to trial, as alluded to by the Court during the status conference of October 31, 2013.[2] Specifically,

[2] In any event, the First and Fifth Amendment claims have yet to be litigated as the Court deferred on these issues. Accordingly, even consideration for a stay would be inappropriate with regard to these counts of the Complaints, since the only issue on appeal is whether the NSA

the Court stated: "Now there is some other issues besides scheduling that . . . the Government is uniquely positioned . . . I don't know to what extent the Government's position is going to be based on classified information . . . but obviously if it is going to be in whole or in part based on classified information, then we got to start figuring out people getting clearances." Tr. of Status Conference at 5-6.

In this regard, contrary to the latest fabrications of the NSA Defendant, Plaintiffs have never claimed to want to know the so-called sources and methods of the NSA – indeed, whistleblower Edward Snowden and various publications such as *The Guardian* and *The Washington Post* have already disclosed much of this. Rather, Plaintiffs want to engage in reasonable fact-based discovery to determine the scope of the agency's surveillance and whether their metadata has in fact been directly accessed and reviewed. To try to counter this reasonable discovery, the NSA Defendant incredibly states that Plaintiffs may be the target of criminal anti-terrorism investigations under the relevant statutes. Such an outrageous assertion, made conveniently and transparently to try to thwart discovery, speaks volumes of the deceit if not outright lawlessness of the NSA Defendant and the Obama Justice Department, which will grab onto anything to avoid drowning in its own sea of dishonesty and corruption. In this regard, the Obama Justice Department – which has become the key tool of this administration's efforts to blunt if not bury a raft of what the President himself has called "phony scandals" including but not limited to the abuse of the IRS to audit and destroy perceived political adversaries – shamelessly proffers to this Court:

Defendant has violated the Fourth Amendment. Indeed, the order of December 16, 2013 only relates to the Fourth Amendment to the U.S. Constitution. Thus, at a minimum, this case must proceed expeditiously with regard to the other claims, notwithstanding the strength of Plaintiffs' arguments that no stay should be granted with regard to any issue.

> "Further litigation of this issue could risk or require disclosure of classified national security information, such as whether **Plaintiffs were the targets of or subject to NSA intelligence-gathering activities**, confirmation or denial of the identities of the telecommunications service providers from which NSA has obtained information about individuals' communications, and other classified information details of the challenged programs."

Defendants Motion for Stay of January 8, 2014 at pg. 7 (emphasis added). This outrageous assertion in effect amounts to a threat against Plaintiffs – suggesting that they are *now* under "criminal" investigation in obvious retaliation for Plaintiffs having succeeded with their motion for preliminary injunction. These threats are not only manufactured to try to shut down this case, but they also amount to an obstruction of justice, as they are intended to scare and coerce Plaintiffs into backing away from fully litigating these suits.[3]

Indeed, these principles have remained relatively immutable with regard to the NSA Defendant's tactics and others. In *Greene,* the petitioner, an aeronautical engineer and general manager of a private corporation engaged in developing and producing for the Armed Forces goods involving military secrets, was denied access to much of the information adverse to him and any opportunity to confront witnesses against him. *Greene v. McElroy*, 360 U.S. 474, 496

[3] In fact, federal law criminalizes this type of obstruction (both obstructing the execution of a court order and obstructing by attempting to influence an officer in a judicial proceeding or due administration) of justice by NSA Defendant. "Whoever, by threats or force . . . willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined under this title or imprisoned not more than one year, or both." 18 U.S.C. § 1509. *See also* 18 U.S.C. § 1503 ("Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States . . . shall be punished . . .").

Here, Plaintiffs' counsel, Larry Klayman, is indeed an officer of the court, Plaintiffs Charles Strange and Mary Ann Strange are also witnesses and thus NSA Defendant and the Obama Justice Department's intimidation tactics and threats, if not outright illegal criminal investigation of Plaintiffs for suggested ties to terrorists and terrorism, constitute criminal and civil obstruction of justice intended to thwart the due administration of justice in this case. The Court should respectfully address this misconduct and issue appropriate remedial sanctions, including but not limited to the summary denial of the NSA Defendant's Motion for Stay.

(1959). The Supreme Court ruled, " . . . where a governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. *Id*. at 496.

It has *already* been ruled here that the NSA Defendant's massive spy program violates the Fourth Amendment to the U.S. Constitution. And, if the *Mills* case, which holds " . . . the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury," *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)) is accepted as binding law, as it should be and as this Court relied on in its December 16, 2013 Memorandum Opinion, the evidence used to prove the Government's case must be disclosed to Plaintiffs. This principle has ancient roots and finds expression in the Sixth Amendment which provides that the "accused" shall enjoy the right to be confronted with the witnesses against him." U.S. CONST. amend. XI.

Second, Plaintiffs' counsel is entitled to a security clearance, as he is not a security risk – despite the newly minted, convenient, and outrageous suggestion that he and his clients are under criminal investigation for ties to terrorists and terrorism. Indeed Plaintiffs' counsel, Larry Klayman, had a security clearance when he was a prosecutor for the U.S. Department of Justice on the trial team which broke up AT&T. Should it refuse to grant one to Plaintiff Klayman, the Obama administration would transparently be showing its hand at yet another attempt to stonewall the adjudication of this case. In any event, this Court can not only review any such denial under the abuse of discretion legal standard, but it also has the authority to itself review discovery materials *in camera* with or without a security clearance being granted to Plaintiffs' counsel. At a minimum, discovery of classified information could proceed in this way. And,

given the blatant lawlessness of the NSA Defendant, discovery would likely have a salutary effect on future misconduct by the agency, as it would be under the Court's continuing scrutiny and watch.

In short, it would be a gross abuse of discretion, if not an obstruction of justice, not to grant a security clearance to Plaintiffs' counsel, particularly since this Court can fashion limitations and procedures to protect national security, which Plaintiffs all favor. Indeed, this was one of the reasons Plaintiffs recently moved the Court for a status conference – to discuss, with judicial guidance, the best and most expeditious means to work out and fashion these limits and procedures.

Third, the NSA Defendant and the Obama Justice Department, both huge and well-financed and staffed government agencies, are hardly short on resources. That Plaintiffs are able and more than willing to litigate this case fully as the preliminary injunction order is addressed on appeal will also work no prejudice to these agencies, particularly given the safeguards that can and will be put into effect to protect national security, which Plaintiffs endorse. Indeed, there is no time to delay as the NSA Defendant's illegal and unconstitutional conduct amounts to the greatest violation of the constitutional rights of American citizens in the nation's history and it is incumbent upon all parties to litigate these cases with all due speed under these egregious and exigent circumstances. As this Court has previously stated, there simply is no time to waste.

Finally, it is telling that while trying to throw a monkey wrench into and effectively shut down Plaintiffs' cases, the NSA Defendant has the audacity to argue that the Court should allow these cases to go forward only as the NSA Defendant sees fit so the Court can rule on its motions to dismiss to gut these cases in the interim by removing the non-government Defendants from the litigation. How convenient. This is the Obama Justice Department's equivalent of "heads I

win tails you lose." Tellingly, this Court stated at oral argument on November 18, 2013 that, "The Department of Justice seems to like it both ways." The Court continues by observing that the "Government holds all the cards." Transcript of Oral Argument on November 18, 2013 at pg. 34. Exhibit 2.[4]

IV. CONCLUSION

For all of these reasons, the Court must respectfully see through NSA Defendant's motion and deny it. These cases should thus move forward in the ordinary course and with all due speed as they are at the "pinnacle" of public importance and the stakes for Plaintiffs and the American people are unprecedented in the history of this nation.

Dated: January 15, 2014

Respectfully submitted,

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[4] Not granting a stay of this entire case will likely speed up the appellate process, as the NSA Defendant and Obama Justice Department will have incentive to move expeditiously on appeal. (See footnote 1).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of January a true and correct copy of the foregoing Plaintiffs' Opposition to Defendants' Motion to Stay (Civil Action Nos. 13-cv- 851 and 13-cv-881) was submitted electronically to the District Court for the District of Columbia and served via CM/ECF upon the following:

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