

**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. 1:13-cv-00851

**MOTION FOR ENTRY OF DEFAULT AND TO STRIKE GOVERNMENT
DEFENDANTS' ANSWER TO PLAINTIFFS' THIRD AMENDED COMPLAINT**

Plaintiffs, Larry Klayman, Charles Strange, and Mary Ann Strange, hereby move this honorable Court for an entry of default and to strike Government Defendants' Answer to Plaintiffs' Third Amended Complaint pursuant to Federal Rules of Civil Procedure ("FRCP") 55(a), 55(d) and 12(f).

I. MOTION FOR ENTRY OF DEFAULT

While the Third Amended Complaint sues the individual Government Defendants in their official and individual capacities under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) – as did the first Complaint filed on June 6, 2013 – for gross violations of the Fourth, First, and Fifth Amendments to the U.S. Constitution, and while the individual Government Defendants were served in both of these capacities (indeed it is nonsensical to conclude that service occurred only in their official capacities as service of the Complaint is service and the U.S. Justice Department entered an appearance after service occurred), the Answer filed by the individual Government Defendants' lawyers seeks to flout the

law and refuses to answer for the Government Defendants in their individual capacities. Thus, the individual Government Defendants are in default and this Court should so rule.

Indeed, the individual Government Defendants, as plead in the Third Amended Complaint, are liable for their tortious, unconstitutional acts under *Bivens*. The Supreme Court held in that case that a violation of the Fourth Amendment's command against unreasonable searches and seizures by a federal agent acting under color of federal authority – precisely what is occurring now by Government Defendants – gives rise to a federal cause of action for damages as a consequence of the agent's unconstitutional conduct. *Id.* at 395. Specifically, the Court ruled: “. . . petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.” *Id.* at 397. Consequently, the Fourth Amendment does not serve only as a limitation on federal defenses to a state-law tort claim against federal agents, but is an independent limitation upon the exercise of federal power. *Id.* at 394.

Finally, attached is an affidavit (Exhibit 1) confirming that service was made on the individual Government Defendants in all capacities, both official and personal. Indeed, the served Complaint sets forth that they are being sued in their individual and professional capacities, and each individual Government Defendant thus had additional notice of this when each was served. Further, when the Obama Justice Department entered its notice of appearance, they made no distinction about service in both capacities and subsequent pleadings also bear this out. It stands to reason that when an individual Government Defendant receives the complaint, he or she is served in both capacities, especially when the complaint specifically states so. The Obama Justice Department is playing its usual game, which has been to try to delay, obstruct and

throw a monkey-wrench into every aspect of this case, which as the Court has observed is a matter of “pinnacle” national importance.

It thus stands to reason, given the Court’s preliminary injunction order of December 16, 2013 which finds a clear cut violation of the Fourth Amendment concerning the unconstitutional collection of telephonic metadata, that not only a default judgment be entered, but that the Court enter judgment on liability against all of the individual Government Defendants pursuant to FRCP Rule 55(a) and 55(d), particularly given the flouting of this Court’s process. The issue of damages alleged against the individual Government Defendants can be tried later before the jury, after the parties have the opportunity to take discovery on damages.

II. MOTION TO STRIKE

The answer of the Government Defendants should also be stricken because it refuses to respond to the allegations of the Third Amended Complaint by attempting to hide behind claims of national security. Specifically, Government Defendants acknowledge that “[t]his answer is not submitted on behalf of Defendants Obama, Holder, and Alexander in their personal as opposed to their official capacities. They retain their rights, upon being served, to plead separately and to raise any defenses available to them.” Government Defendants’ Answer at Fn. 1 (“Gov’t Defs. Ans.”) They continue, “Government Defendants can neither admit nor deny allegations regarding the number of such records produced under the Secondary Order without revealing or tending to reveal classified national security information that is subject to protection from disclosure by law.” Gov’t Defs. Ans. at para. 3. While the Government Defendants’ “[a]dmit that the bulk telephony metadata program is carried out with the approval of the President, under authority of the FISC,” they simultaneously “deny that it is a ‘surveillance program.’” *Id.* at para. 5. In fact, in over eight places in the Government Defendants’ Answer, the Government’s

lawyers spurn this Court by hiding behind classified national security information claiming “Government Defendants can neither admit or deny” the many of Plaintiffs’ allegations, “without revealing or tending to reveal classified national security information that is subject to protection from disclosure of law.”

It seems that the Government Defendants conveniently forget that this Court has a security clearance and that if indeed there are legitimate national security issues, the Government Defendants should have responded to the Court with an in camera answer, in addition to the public one.

By avoiding a complete answer to the Third Amended Complaint with this obvious subterfuge, the Government Defendants are withholding vital information necessary for this case to move forward and are again showing a disrespect not just to this Court, but the entire judicial system. Apparently, they think they can make up, as it suits them, the Federal Rules of Civil Procedure, and ignore the admonitions of this Court at the status conference/hearing of February 3, 2014. See Transcript at Docket entry 84 at pg. 2. Accordingly, the answer should be stricken¹, unless the Government Defendants in a separate, in camera submission file within five (5) calendar days an answer with the required information withheld under their obviously tactical claims of national security under seal with this Court. That they may not trust or respect the Court given its prior preliminary injunction ruling, and thus continue to play games as it suits them with Court process, cannot absolve them from the consequences of their lawless, obstructionist actions.

¹ FRCP Rule 12(f) provides, “[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” The Government Defendants’ deliberate flouting of this Court’s process is at a minimum insufficient, and indeed it is scandalous given that material information is being withheld which bears on egregious violations of the Constitution.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their motion for entry of default and to strike Government Defendants' Answer to Plaintiffs' Third Amended Complaint be granted² by this honorable Court.

Dated: February 20, 2014

Respectfully submitted,

/s/ Larry Klayman

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² The Government Defendants oppose this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of February, 2014, a true and correct copy of the foregoing Motion for Entry of Default And To Strike Government Defendants' Answer To Plaintiffs' Third Amended Complaint (Civil Action No. 13-cv-851) was submitted electronically to the District Court for the District of Columbia and served via CM/ECF upon the following:

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Respectfully submitted,

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