IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY KLAYMAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 1:13-cv-851-RJL**
	)	
BARACK OBAMA, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF INDIVIDUAL FEDERAL DEFENDANTS IN OPPOSITION TO PLAINTIFFS' "MOTION FOR ENTRY OF DEFAULT"

The plaintiffs in this case have challenged the constitutionality of the United States' bulk collection of telephony metadata. Among others, they have named as defendants President of the United States Barack Obama, Attorney General Eric Holder, National Security Agency (NSA) Director Keith Alexander, and Senior U.S. District Judge Roger Vinson. Besides suing these defendants in their official capacity (along with various government agencies) for injunctive relief, the plaintiffs also seek to hold these four defendants individually liable for money damages, pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).[1] In the nearly nine months since they first filed suit, however, the plaintiffs

[1] Insofar as they are sued in their individual capacity, President Obama, Attorney General Holder, NSA Director Alexander, and Judge Vinson are collectively referred to as the "individual federal defendants." Insofar as they are sued in their official capacity, these defendants, along with the federal agency defendants, are collectively referred to as the "Government defendants." In conjunction with this motion, the undersigned is appearing on behalf of the individual federal defendants, but for the sole and limited purpose of opposing the plaintiffs' motion for entry of default. This appearance is neither a waiver of service nor a concession that the plaintiffs have properly effected personal service of process on the individual federal defendants. These defendants therefore reserve their right to file a motion to dismiss under Rule 12, Rule 56, or any other applicable rule, and to raise any and all available personal defenses, if and when they are served and properly before the Court. The Government

have yet to serve the individual federal defendants *personally*, as required by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 4(i)(3). Their recently-filed "Motion for Entry of Default," in which the plaintiffs seek a default judgment against the individual federal defendants, ECF No. 85, is therefore baseless and should be denied.

BACKGROUND

The plaintiffs have suggested that they served the individual federal defendants in their official *and* personal capacities in September 2013, and that, "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." *Id*. at 2. The record, however, plainly and repeatedly belies these statements.

The plaintiffs originally filed this action on June 6, 2013. ECF No. 1. As they do in their currently-operative third amended complaint, the plaintiffs in their original complaint sued (among others) the four individual federal defendants in both "their personal and official capacities, for violating Plaintiff's [sic] constitutional rights." Compl. at 2. Invoking *Bivens*, they requested money damages from the personal assets of the individual federal defendants. *See id*. ¶¶ 30, 36, 44. The plaintiffs also sued the NSA and the Department of Justice (DOJ). *Id*. ¶¶ 10, 11. On June 12, 2013, the undersigned entered an appearance in this case on behalf of the NSA and DOJ—and *only* the NSA and DOJ. ECF No. 5. That notice of appearance included all of the undersigned's contact information. *See id*. On October 4, 2013, exactly 120 days after filing suit, the plaintiffs served the U.S. Attorney's Office for the District of Columbia, as Rule 4 requires for serving the United States or one of its agencies. *See* Fed. R. Civ. P. 4(i)(1)(A); ECF No. 10 at 2 n.1.

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defendants will be filing their own, separate response to that portion of the plaintiffs' motion seeking to strike the Government defendants' answer to the plaintiffs' third amended complaint.

The Court held its first status conference in this case on October 31, 2013. Exh. 1, *Klayman v. Obama*, No. 13-cv-851-RJL, Tr. of Status Conference (Oct. 31, 2013). At that conference, the undersigned introduced himself as an attorney from the Department of Justice and stated: "I represent the individual Federal Defendants who have not been served, but I am still appearing today." *Id*. at 3:20-21. A different attorney with the Department of Justice introduced himself as "representing the Government Defendants as specified in our papers." *Id*. at 3:9-11. Although plaintiffs' counsel did not attend the October 31 hearing, the Court ordered that a copy of the transcript from that hearing be sent to him. *See id*. at 12:20-22; *Klayman v. Obama*, No. 13-cv-851-RJL, Minute Entry (Oct. 31, 2013).

The Government Defendants filed their partial motion to dismiss in this case on January 10, 2014. ECF No. 68. The brief in support of that motion stated explicitly:

> *This motion does not address the Plaintiffs' constitutional tort claims against the individual federal defendants in their personal capacities. Those defendants have not yet been served with process and so are not properly before the Court. . . .* Indeed, the Court may dismiss the individual federal defendants on the alternative ground that it has now been approximately 210 days since the Plaintiffs filed these actions, but they have yet to serve the individual federal defendants, *see* Fed. R. Civ. P. 4(i)(3), and have no good cause for their failure to do so, *see id*. 4(m).

Id. at 13 n.8 (emphasis added). The first page of that motion also notes that it was brought on behalf of "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." *Id*. at 1 n.1 (emphasis added). Indeed, the first page of *every* paper that the Government defendants have filed in this case—including notices of appearance—has clarified that it pertains only to the *official capacity* claims. *See* ECF Nos. 10, 16, 24, 25, 29, 35, 43, 47, 50, 51, 56, 64, 66, 78, 82, 83.

Despite these express representations, not once in the 259 days between the filing of their original complaint and the filing of their Motion for Entry of Default did the plaintiffs inform the Court, the undersigned, or counsel for the Government defendants that they believed they had in fact personally served the individual federal defendants. In their default judgment motion, however, the plaintiffs now argue, for the first time, that they served the individual federal defendants at the end of September 2013. ECF No. 85 Exh. A. But as explained below, the plaintiffs in fact have not effected *personal* service on the individual federal defendants as required by applicable law, whether in September 2013 or at any other time.

ANALYSIS

It is a fundamental and long-established precept of due process that, "[b]efore a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97,104 (1987); *see Mississippi Publ'g Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946) ("[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served."); *Mann v. Castiel*, 681 F.3d 368, 372 (D.C. Cir. 2012) ("Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant.") (internal quotations omitted). A judgment is therefore "void where the requirements for effective service have not been satisfied." *Combs v. Nick Garin Trucking*, 825 F.2d 437, 442 & n.42 (D.C. Cir. 1987).

These principles apply equally when the defendant is a federal employee sued in an individual capacity under *Bivens*. *See Simpkins v. District of Columbia Gov't*, 108 F.3d 366, 369 (D.C. Cir. 1997) (holding that defendants in *Bivens* action must be served as individuals pursuant to Rule 4); *Epps v. U.S. Attorney Gen.*, 575 F. Supp. 2d 232, 242 n.14 (D.D.C. 2008) (holding

that, "[i]f a plaintiff wants to pursue an action against a federal employee in his or her individual capacity, that individual must be served with process in accordance with Rule 4(e) of the Federal Rules of Civil Procedure," and that "the Court is without jurisdiction to render a personal judgment against an individually-sued defendant until s/he has been properly served in accordance with the applicable federal or state statutory requirements"). Indeed, Congress amended Rule 4 in 2000 to make it "explicit" that an employee or officer of the United States who is sued in an individual capacity for actions related to his or her federal employment "must be served as an individual defendant." Fed. R. Civ. P. 4, Advisory Committee's Notes (2000 Amendment).

Serving a federal employee "as an individual defendant" requires compliance with Rule 4(e). *See* Fed. R. Civ. P. 4(i); *Epps*, 575 F. Supp. 2d at 242 n.14. That provision permits service on an individual by (1) following the service rules of the forum where the suit was filed or where service is made, or (2) delivering a copy of the summons and complaint to the defendant personally or to an authorized agent, or leaving a copy of the summons and complaint at the defendant's usual place of abode with someone of suitable age and discretion who resides there. Fed. R. Civ. P. 4(e).

The Civil Rules of the D.C. Superior Court for serving an employee of the United States in an individual capacity mirror those of Federal Rule of Civil Procedure 4(e)(2), but also permit service on an individual "by mailing a copy of the summons, complaint and initial order to the person to be served by registered or certified mail, return receipt requested." D.C. Super. Ct. Civ. R. 4(i)(2)(B), 4(c)(3). Service by registered or certified mail, however, "must be made on the individual to be served" or an agent specifically authorized to accept service of process for that individual. *Wilson-Greene v. Dep't of Youth Rehab. Servs.*, No. 06-cv-2262, 2007 WL

2007557, *2 (D.D.C. July 9, 2007) (Leon, J.); *see Cruz-Packer v. District of Columbia*, 539 F. Supp. 2d 181, 186-87 (D.D.C. 2008).

The rules for serving an individual in Maryland (where the headquarters of the NSA are located) are similar to those of the District of Columbia, with the additional limitation that service by certified mail in Maryland must specifically request "Restricted Delivery—show to whom, date, address of delivery." Md. Rule 2-121(a). Like D.C., Maryland requires that such restricted delivery service be made on the individual defendant or an authorized agent. *See Little v. E. Dist. Police Station*, No. WDQ-13-1514, 2014 WL 271628, *3 (D. Md. Jan. 22, 2014); Md. Rule 2-124(b) ("Service is made upon an individual by serving the individual or an agent authorized by appointment or by law to receive service of process for the individual.").

In their Motion for Entry of Default, the plaintiffs do not indicate that they served President Obama, Attorney General Holder, NSA Director Alexander, or Judge Vinson by delivering a copy of the summons and complaint to those individuals "personally" or to an agent "authorized by appointment or by law to receive service of process" for those individuals when they are sued in their personal capacity, or by leaving a copy of the summons and complaint at each individual's usual place of abode with someone of suitable age and discretion who resides there. Fed. R. Civ. P. 4(e)(2); *see* ECF No. 85. Instead, they apparently sent a copy of the summons and complaint by certified mail, with a return receipt requested, in September 2013 to each of these defendants at their respective places of employment—the White House in Washington, D.C., for President Obama (which of course also doubles as the President's current residence), the Department of Justice in Washington, D.C., for Attorney General Holder, the NSA in Fort Meade, Maryland, for NSA Director Alexander, and the Foreign Intelligence Surveillance Court at the Department of Justice's main address in Washington, D.C., for Judge

Vinson. *See* ECF No. 85 Exh. A. This, however, is insufficient under both D.C. and Maryland law to effect personal service of process on these defendants.

For starters, and by their own admission, the plaintiffs did not receive a return receipt of any kind as to Judge Vinson. *See* ECF No. 85 Exh. 1, Aff. of Naveed Mahboobian (Feb. 20, 2014) ¶ 3. Proof of service of process is therefore lacking with respect to Judge Vinson for that reason alone.

But service is lacking as to all of the individual federal defendants for the more fundamental reason that the plaintiffs have no evidence that their certified mailings were delivered to and accepted by the individual federal defendants themselves or an agent authorized by appointment to accept service for those defendants when they are sued in their personal capacity. In fact, the plaintiffs' own evidence establishes just the opposite, and shows that their attempts at service in September 2013 by certified mail were inadequate for purposes of serving the individual federal defendants personally under D.C. and Maryland law. Their return receipt for President Obama is generically stamped as received by "The White House." ECF No. 85 Exh. A. Similarly, their return receipt for NSA Director Alexander is generically stamped as received by the NSA's "Mail Center" and, what's more, this particular certified mailing was addressed to the NSA headquarters in Maryland but was not designated for "restricted delivery." *Id*. While their return receipt for Attorney General Holder is signed by an individual, *id*., the signature is not that of the Attorney General himself, and the plaintiffs offer no evidence that the Attorney General authorized that person to accept service of process for him. And again, they have no return receipt whatsoever from Judge Vinson, much less one that shows that he or an authorized agent signed for the certified mailing.

The case law under D.C. and Maryland law is clear that service by certified mail delivered to and signed for by somebody other than the defendant or the defendant's authorized agent—particularly when it is addressed to the individual defendant's place of employment—is ineffective. *See Wilson-Green*, 2007 WL 2007557, at *2 (Leon, J.) (finding service on individual defendants by certified mail inadequate under D.C. law where it was sent to the defendants' business address and the plaintiff "offered no evidence" that the third parties who signed the return receipts were authorized to accept service of process for the defendants); *Cruz-Packer*, 539 F. Supp. 2d at 187 (finding service on individual defendants by certified mail inadequate under D.C. law where plaintiff mailed papers to defendants' business addresses and presented no evidence that "the papers were delivered to any of the individual defendants" or that "the people who signed for the mailings were authorized to receive service of process, as distinct from authorized to receive mail"); *Cornish v. United States*, 885 F. Supp. 2d 198, 204-05 (D.D.C. 2012) (same); *Anderson v. Gates*, No. 12-1243-JDB, 2013 WL 6355385, *5 (D.D.C. Dec. 6, 2013) (same); *Toms v. Hantman*, 530 F. Supp. 2d 188, 191 (D.D.C. 2008) (same as to service under both D.C. and Maryland law); *Little*, 2014 WL 271628, at *3 (same as to service under Maryland law); *Gant v. Kant*, 314 F. Supp. 2d 532, 533 (D. Md. 2004) (finding service on multiple individual defendants by certified mail at the same residential address is effective under Maryland law "only as to the defendant signing the return receipt"). That goes double for service in Maryland via certified mail which is not designated for "restricted delivery." *See Little*, 2014 WL 271628, at *3 ("Service by certified mail, not designated for 'Restricted Delivery,' to an unauthorized agent at a Defendant's workplace is not sufficient."). Because the plaintiffs have no evidence—as there is none—that their certified mailings were delivered personally to the individual federal defendants themselves or an authorized agent of those

defendants (or that the one they sent to NSA Director Alexander in Maryland was designated as "restricted delivery"), they cannot establish that the individual federal defendants have been served in their personal capacity.

The plaintiffs argue "it is non-sensical [sic] to conclude that service occurred only in the[defendants'] official capacities," ECF No. 85 at 1, but the law flatly contradicts their position. "In a *Bivens* action, the defendants must be personally served as individuals in order for a court to have jurisdiction over them. . . . The failure to effect individual service is fatal to a *Bivens* claim." *Cornish*, 885 F. Supp. 2d at 205 (internal quotations and citations omitted) (internal alterations in original); *see* Fed. R. Civ. P. 4(i)(3) (requiring that federal employee sued in individual capacity for actions related to federal employment be served as an individual); *Maye v. Reno*, 231 F. Supp. 2d 332, 335 (D.D.C. 2002) ("In a *Bivens* action against a federal official in his or her individual capacity, the defendant must be served pursuant to rules that apply to individual defendants."). Needless to say, the failure to effect individual service is equally fatal to a motion to enter a default on a *Bivens* claim.

The plaintiffs also seem to argue that this failure can be overlooked because the Department of Justice has entered an appearance in this case, and because the individual federal defendants have "actual notice" of the lawsuit (or so the plaintiffs speculate). *See* ECF No. 85 at 1-3. The law once again says otherwise. *See Mann*, 681 F.3d at 373 (stating that "a defendant's knowledge that a complaint has been filed is not sufficient to establish that the district court has personal jurisdiction over the defendant"); *Epps*, 575 F. Supp. 2d at 242 n.14 (noting that actual notice of a *Bivens* suit "does not substitute for technically proper service under Rule 4" as to the *Bivens* defendants); *Whitehead v. CBS/Viacom, Inc.*, 221 F.R.D. 1, 3 (D.D.C. 2004) (holding that "notice alone cannot cure an otherwise defective service") (internal quotations and citation

omitted); *United States ex rel. Cody v. Computer Scis. Corp.*, 246 F.R.D. 22, 26 (D.D.C. 2007) (observing that "federal courts have firmly established that a court appearance does not waive an otherwise valid Rule 12(b)(5) defense"); *Doggett v. Gonzales*, No. 06-575-RBW, 2007 WL 2893405, *3 (D.D.C. Sept. 29, 2007) ("The fact that defendants are represented by counsel from the United States Department of Justice amounts to neither a waiver of service nor a concession that plaintiffs properly effected service of process.").

In short, the plaintiffs have not achieved personal service on the individual federal defendants. The evidence they have submitted in support of their Motion for Entry of Default does nothing to demonstrate otherwise. The Court therefore lacks jurisdiction to enter any kind of judgment against the individual federal defendants and the plaintiffs' Motion for Entry of Default should be denied.

* * *

In light of the foregoing, the Court should not only deny the plaintiffs' Motion for Entry of Default, but it also should dismiss the individual federal defendants from this action altogether, after giving notice to the plaintiffs, due to the plaintiffs' failure to serve those defendants within 120 days from the filing of the original complaint. *See* Fed. R. Civ. P. 4(m). It has now been more than twice that long, but the plaintiffs have not effected personal service on the individual federal defendants, or requested an extension of time to do so. Nor can the plaintiffs "show good cause" for delaying so long. *Id.*

As recounted above, the plaintiffs' attorney in this case has had the undersigned's name and contact information for all but six of the preceding 266 days that this case has been pending; he even called the undersigned directly to discuss other matters in this case in September 2013; he was aware at least as early as the status conference on October 31, 2013, that the undersigned

represented the individual federal defendants (and that other attorneys from the Department of Justice represented the Government defendants); and he was notified more than once that the individual federal defendants had not been served personally. But the plaintiffs nevertheless appear to have made no effort to ensure that the individual federal defendants were served personally and in a timely manner under applicable law. Under these circumstances, the plaintiffs cannot show any cause, much less good cause, for failing to serve the individual federal defendants personally in the preceding 266 days. *See Mann*, 681 F.3d at 374 ("Good cause exists when some outside factor[,] rather than inadvertence or negligence, prevented service . . . .") (internal quotations, citation, and alteration omitted); *Whitehead*, 221 F.R.D. at 3 ("Mistake of counsel or ignorance of the rules of procedure usually does not suffice to establish good cause.") (internal quotations and citation omitted); *Prunte v. Universal Music Group*, 248 F.R.D. 335, 338-39 (D.D.C. 2008) ("[A] plaintiff must employ a reasonable amount of diligence in determining who to serve and how to effect service [before good cause may be found.]"). Given the plaintiffs' lengthy and inexcusable failure to serve the individual federal defendants personally, the Court should invoke its authority under Rule 4(m) to begin the process of dismissing the individual federal defendants for a lack of timely service of process.[2]

[2] Dismissal on this basis would be particularly appropriate in this case, as the plaintiffs' *Bivens* claims face other formidable legal obstacles. Most obviously, various forms of absolute and qualified immunity protect the individual federal defendants from personal civil damages liability here: President Obama enjoys absolute presidential immunity, Judge Vinson enjoys absolute judicial immunity, and Attorney General Holder and NSA Director Alexander are entitled to qualified immunity. *See generally Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (establishing absolute presidential immunity); *Stump v. Sparkman*, 435 U.S. 349 (1978) (reaffirming absolute judicial immunity); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (establishing qualified immunity from constitutional tort claims for most executive officials).

CONCLUSION

For the reasons stated above, the individual federal defendants respectfully request that the Court deny the plaintiffs' Motion for Entry of Default.

Respectfully submitted this 28th day of February 2014,

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