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' OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE GOVERNMENT DEFENDANTS' ANSWER TO PLAINTIFFS' THIRD AMENDED COMPLAINT

The Government Defendants[1] hereby oppose Plaintiffs' motion to strike the Government Defendants' Answer to Plaintiffs' Third Amended Complaint because Plaintiffs have failed to meet their burden of justifying that drastic and disfavored form of relief.

Plaintiffs move this Court, under Federal Rule of Civil Procedure 12(f), to strike the Government Defendants' Answer in its entirety, for various reasons, including the Government Defendants' responses to allegations that call for answers that may reveal or tend to reveal classified national security information that is subject to protection from disclosure by law. Pls.' Mot. at 3-4. This includes responses that neither admit nor deny allegations concerning the number of call-detail records produced under the April 2013 Secondary Order of the Foreign Intelligence Surveillance Court, whether particular individuals have been targets of or subject to intelligence collection activities, and whether certain private parties provided assistance to the

[1] The "Government Defendants" are 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.

Government (and what assistance, if any, was provided) in furtherance of its intelligence programs. *See* Gov't Defs.' Answer ¶¶ 3, 7, 9, 11, 12, 25, 28, 31.

Rule 12(f), which "does not authorize the striking of an entire Answer," *Agstar Fin. Servs., PCA v. Union Go-Dairy, LLC*, 2011 WL 772754, at *1 (S.D. Ind. Feb. 25, 2011), permits a district court "to strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "Motions to strike are disfavored" in this district. *Uzlyan v. Solis*, 706 F. Supp. 2d 44, 52 (D.D.C. 2010) ("striking portions of a pleading is a drastic remedy"). "[B]ecause courts view motions to strike with such disfavor, many courts will grant such motions only if the portions sought to be stricken are prejudicial or scandalous." *Nwachukwu v. Karl*, 216 F.R.D. 176, 178 (D.D.C. 2003) (collecting cases). Plaintiffs, as the movants, "bear the burden of showing a motion to strike is justified," *Bond v. U.S. Dep't of Justice*, 828 F. Supp. 2d 60, 72 (D.D.C. 2011), and in considering a motion to strike, "the court will draw all reasonable inferences in the pleader's favor and resolve all doubts in favor of denying the motion." *Nwachukwu*, 216 F.R.D. at 178.

Plaintiffs have failed to make the showing required for the drastic and disfavored relief they seek under Rule 12(f). First, Plaintiffs make no argument that "an insufficient defense" has been raised. Fed. R. Civ. P. 12(f); *see also, e.g.*, *SEC v. Gulf & W. Indus., Inc.*, 502 F. Supp. 343, 345 (D.D.C. 1980) (motion to strike affirmative defense could be granted "where it is clear that [it is] irrelevant and frivolous and its removal from the case would avoid wasting unnecessary time and money litigating the invalid defense"). Second, apart from a vague remark in a footnote, Pls.' Mot. at 4 n.1, Plaintiffs have not even suggested that the Answer contains "any redundant, immaterial, impertinent, or scandalous matter" that should be stricken. Fed. R. Civ. P. 12(f); *compare* Pls.' Mot. at 4 n.1 (arguing instead that the Government's "deliberate

flouting of this Court's process" is "scandalous given that material information is being withheld which bears on egregious violations of the Constitution"), *with In re Apollo Grp.*, 2007 WL 778653, at *4 (D.D.C. Mar. 12, 2007) (denying motion to strike where movant did "not even suggest[]" that pleading "contain[ed] any redundant, immaterial, impertinent, or scandalous" material). Plaintiffs' motion should be denied for these reasons alone.[2]

Beyond this, Plaintiffs' principal objection—that the Government Defendants' answer has identified allegations the response to which calls for classified national security information protected from disclosure by law—plainly lacks merit. Rule 12(f) does not preclude the Government, in responding to a complaint, from identifying the need to safeguard national security information protected by statute or the common law. Courts have recognized that the Government may identify potentially applicable privileges to prevent the disclosure of classified national security information in response to a complaint. *See, e.g.*, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080-81 (9th Cir. 2010) (en banc); *id.* at 1098 (Hawkins, Schroeder, Canby, Thomas, and Paez, JJ., dissenting); *Ellsberg v. Mitchell*, 709 F.2d 51, 54 & n.6 (D.C. Cir. 1983). *See also Nat'l Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 927-29 & n.5 (7th Cir. 1983) (permitting defendant not to respond to, or refuse to admit or deny, an allegation in his answer based on Fifth Amendment grounds); *cf. Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000).

[2] Plaintiffs' few specific challenges to the contents of the Answer are also meritless. They insist that the Government Defendants' Answer should be stricken because "[w]hile the Government Defendants[] '[a]dmit that the bulk telephony metadata program is carried out with [the] approval of the President, under the authority of the FISC,' they simultaneously 'deny that it is a "surveillance program."'" Pls.' Mot. at 3 (quoting Gov't Defs.' Answer ¶ 5). However, the bulk telephony metadata program does not constitute "electronic surveillance" as defined by FISA. *See* 50 U.S.C. § 1801(f). Plaintiffs' attempt to find fault in the Government Defendants' responding only as to those defendants who have been properly served, Pls.' Mot. at 2, is likewise meritless. *See* Fed. R. Civ. P. 4(e), (i)(3); *see also* ECF No. 88 (Individual Fed. Defs.' Mem. in Opp. to Pls.' Mot. for Entry of Default).

The Government has not yet invoked any particular privilege in this matter. *See In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (explaining that the government is under no "obligation to formally invoke [executive] privileges in advance of the motion to compel"); *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 134 (D.D.C. 2005) (same). The law clearly permits the Government to protect national security information in litigation in an appropriate manner at each stage of the case. *See, e.g.*, *Ellsberg*, 709 F.2d at 54 & n.6 (state secrets privilege); *see also In re Sealed Case*, 494 F.3d 139, 145 (D.C. Cir. 2007).[3] The Government's approach here—identifying a potentially applicable privilege at the pleading stage without yet invoking the privilege—is entirely appropriate. *See Jeppesen*, 614 F.3d at 1080-81 (pleading stage); *In re Sealed Case*, 121 F.3d at 741; *cf. United States v. Reynolds*, 345 U.S. 1, 10 (1953) (invocation of privilege upon motion to compel).

In addition, courts have recognized that where a case can be resolved on other non-privilege grounds, consideration of the need to address a privilege assertion should appropriately be deferred. *See, e.g.*, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 53 (D.D.C. 2010). Here, the Government Defendants have moved to dismiss for lack of subject matter jurisdiction, discovery has yet to commence, and the parties are awaiting guidance from the Court of Appeals on the remaining merits issues in the case. In these circumstances, the Government has properly reserved its right to protect national security information, without invoking a privilege, in an answer to a complaint that raises allegations implicating such information.[4]

---

[3] Statutory protections also foreclose the disclosure of national security information concerning intelligence matters. *See* National Security Agency Act of 1959, 50 U.S.C. § 3605 (protecting information concerning NSA functions), *and* 50 U.S.C. § 3024(i) (granting the Director of National Intelligence authority to protect intelligence sources and methods).

[4] Moreover, Plaintiffs cite no authority for the proposition that, where privileged information may be at issue in response to the allegations of a complaint, a separate *in camera* answer must be filed.

For all of these reasons, Plaintiffs' motion to strike the Government Defendants' Answer should be denied.

Dated: March 10, 2014

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

JOSEPH H. HUNT
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Branch Director

/s/ Bryan Dearinger
JAMES J. GILLIGAN
Special Litigation Counsel

MARCIA BERMAN
Senior Trial Counsel

BRYAN DEARINGER
Trial Attorney

RODNEY PATTON
Trial Attorney

U.S Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 7334
Washington, D.C. 20001
Phone: (202) 514-3358
Fax: (202) 616-8202

Counsel for the Government Defendants