IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Larry Klayman, et. al. Appellees-Cross-Appellants, v. Barack Hussein Obama, et al., Appellants-Cross-Appellees.	Nos. 14-5004, 14-5016 14-5005, 14-5017

SUPPLEMENT TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN RESPONSE TO QUESTIONS ASKED AT ORAL ARGUMENT

Appellees/Cross-Appellants hereby move this honorable Court to take judicial notice of a recent development in a case being litigated by one of the amici, the Electronic Frontier Foundation ("EFF") wherein the Obama Justice Department lawyers have been forced to now admit that they misrepresented facts to the United States Court of Appeals for the Ninth Circuit during oral argument in an analogous case involving illegal National Security Agency surveillance. The oral argument took place on October 8, 2014. These misrepresentations involved false statements regarding whether companies could discuss the "quality" of National Security Letters ("NSLs"). The EFF argued that provisions in the USA PATRIOT ACT that prohibit service providers from discussing NSLs they have received violates the First Amendment. The Department of Justice attorney argued that the companies are free to discuss the "quality" of NSLs they received from

government agencies. This claim, however, contradicted the government's prior position. (See Exhibit 1, Confession of Obama Justice Department lawyer).

As set forth in Appellees/Cross-Appellants Corrected Supplemental Brief in Response to Questions Asked at Oral Argument, the Obama Justice Department lawyers in this case acted similarly by arguing to the Court that identities are not accessed unless there is probable cause.

Appellees/Cross-Appellants felt that there was an obligation to advise the Court of this continuing and pervasive pattern and practice of the Obama Justice Department to mislead this Court and mislead the American people about the nature, scope and implementation of its illegal and unconstitutional surveillance of American citizens who have no connection to terrorists or terrorism. See Exhibit 2, Charlie Savage, *Justice Dept. Apologizes for Inaccuracy in National Security Letters Case*, N.Y. Times (Nov. 14, 2014), available at: http://www.nytimes.com/2014/11/15/us/justice-apology-national-security-letters-case.html?smid=tw-share.

Dated: November 14, 2014

Respectfully Submitted,

/s/ *Larry Klayman*

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2014, I electronically filed the foregoing Supplement to Motion for Leave to File a Supplemental Brief in Response to Questions Asked at Oral Argument with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

Respectfully Submitted,

/s/ *Larry Klayman*

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Exhibit 1

U.S. Department of Justice
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Tel: (202) 353-0169
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November 6, 2014

Molly C. Dwyer, Clerk of Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526
Attn: Susan Soong

RE: In re National Security Letter, Nos. 13-15957, 13-16731, & 13-16732
[Argued before Judges Ikuta, N.R. Smith, and Murguia on October 8, 2014]

Dear Ms. Dwyer:

Oral argument in the above-referenced appeals was held before Judges Ikuta, N.R. Smith, and Murguia on October 8, 2014. Counsel for the NSL recipients in these cases has recently brought to our attention an inadvertent misstatement by government counsel during the rebuttal portion of the argument. We are submitting this letter to correct that error.

The misstatement occurred during a discussion regarding the disclosures that are permitted under the Government's discretionary enforcement decisions as set forth in a letter from the Deputy Attorney General dated January 27, 2014. That letter, which is attached hereto, states that a company may report in bands of 250 (starting with 0-249) its receipt of total national security processes during a specified period, or, alternatively, in bands of 1000 (starting with 0-999) its receipt of certain individual processes, including NSLs, during such a period. See Gov't Reply Br. Nos. 13-15957/13-16731, at 23 n.8. In the course of discussing disclosures described in this letter, approximately 49 minutes into the Court's recording of the argument, government counsel indicated that if a company

discloses that it is in one of these two bands starting with zero, it could publicly discuss the fact that it had received one or more NSLs and could discuss the quality of the specific NSL(s) that it had received.

That suggestion was mistaken. The district court correctly noted that "the NSL nondisclosure provisions . . . apply, without distinction, to both the content of the NSLs and to the very fact of having received one." ER 21 in No. 13-15957. This has always been the government's position. See, e.g., Gov't Opening Br. Nos. 13-15957/13-16731, at 14-15, 29; Gov't Answering Br. No. 13-16732, at 13-14, 27; Gov't Reply Br. Nos. 13-15957/13-16731, at 11-12, 20, 23. The NSL recipients here have likewise taken the position in this Court that § 2709(c) "permits the FBI to gag recipients about not only the content of the NSL but also as 'to the very fact of having received one.'" Appellee Answering Brief in No. 13-15957/Appellant Opening Brief in No. 13-16731, at 46 (quoting In re Nat'l Sec. Letter, 930 F. Supp. 2d at 1075); Appellant Opening Br. No. 13-16732, at 47 (quoting In re Nat'l Sec. Letter, 930 F. Supp. 2d at 1075). The fact that a company may disclose that it has received 0-249 national security processes or 0-999 NSLs in a given period does not, by itself, allow that company to disclose that it has actually received one or more NSLs; the lower end of these bands was set at 0, rather than 1, in order to avoid such disclosures. A company can, however, disclose that it has actually received NSLs if it employs one of the NSL-specific bands as described in the Deputy Attorney General's letter starting at 1000 or above.[1]

[1] The Deputy Attorney General's letter also addresses the disclosure, in bands of 1000, of "[t]he number of customer accounts affected by NSLs." These disclosures are similar to the banded disclosures of the actual number of NSLs received; a company's disclosure that 0-999 of its customer accounts were affected by NSLs would not, by itself, allow that company to disclose that it has actually received one or more NSLs, but a company's disclosure, as described in the Deputy Attorney General's letter, that 1000 or more of its customer accounts were affected by NSLs would necessarily disclose the receipt of one or more NSLs.

We regret this inadvertent inaccuracy and apologize for any confusion that may have been caused. Please bring this letter to the prompt attention of the panel.

Sincerely,

/s/ Jonathan H. Levy
Jonathan H. Levy
Attorney, Appellate Staff
Civil Division

CC: Cindy Cohn (ECF and email)

Office of the Deputy Attorney General
Washington, D.C. 20530

January 27, 2014

Sent via Email

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Dear General Counsels:

Pursuant to my discussions with you over the last month, this letter memorializes the new and additional ways in which the government will permit your company to report data concerning requests for customer information. We are sending this in connection with the Notice we filed with the Foreign Intelligence Surveillance Court today.

In the summer of 2013, the government agreed that providers could report in aggregate the total number of all requests received for customer data, including all criminal process, NSLs,

and FISA orders, and the total number of accounts targeted by those requests, in bands of 1000. In the alternative, the provider could separately report precise numbers of criminal process received and number of accounts affected thereby, as well as the number of NSLs received and the number of accounts affected thereby in bands of 1000. Under this latter option, however, a provider could not include in its reporting any data about FISA process received.

The government is now providing two alternative ways in which companies may inform their customers about requests for data. Consistent with the President's direction in his speech on January 17, 2014, these new reporting methods enable communications providers to make public more information than ever before about the orders that they have received to provide data to the government.

Option One.

A provider may report aggregate data in the following separate categories:

1. Criminal process, subject to no restrictions.

2. The number of NSLs received, reported in bands of 1000 starting with 0-999.

3. The number of customer accounts affected by NSLs, reported in bands of 1000 starting with 0-999.

4. The number of FISA orders for content, reported in bands of 1000 starting with 0-999.

5. The number of customer selectors targeted under FISA content orders, in bands of 1000 starting with 0-999.

6. The number of FISA orders for non-content, reported in bands of 1000 starting with 0-999.[1]

7. The number of customer selectors targeted under FISA non-content orders, in bands of 1000 starting with 0-999.

A provider may publish the FISA and NSL numbers every six months. For FISA information, there will be a six-month delay between the publication date and the period covered

[1] As the Director of National Intelligence stated on November 18, 2013, the Government several years ago discontinued a program under which it collected bulk internet metadata, and no longer issues FISA orders for such information in bulk. See http://icontherecord.tumblr.com/post/67419963949/dni-clapper-declassifies-additional-intelligence. With regard to the bulk collection of telephone metadata, the President has ordered a transition that will end the Section 215 bulk metadata program as it currently exists and has requested recommendations about how the program should be restructured. The result of that transition will determine the manner in which data about any continued collection of that kind is most appropriately reported.

by the report. For example, a report published on July 1, 2015, will reflect the FISA data for the period ending December 31, 2014.

In addition, there will be a delay of two years for data relating to the first order that is served on a company for a platform, product, or service (whether developed or acquired) for which the company has not previously received such an order, and that is designated by the government as a "New Capability Order" because disclosing it would reveal that the platform, product, or service is subject to previously undisclosed collection through FISA orders. For example, a report published on July 1, 2015, will not reflect data relating to any New Capability Order received during the period ending December 31, 2014. Such data will be reflected in a report published on January 1, 2017. After data about a New Capability Order has been published, that type of order will no longer be considered a New Capability Order, and the ordinary six-month delay will apply.

The two-year delay described above does not apply to a FISA order directed at an enhancement to or iteration of an existing, already publicly available platform, product, or service when the company has received previously disclosed FISA orders of the same type for that platform, product, or service.

A provider may include in its transparency report general qualifying language regarding the existence of this additional delay mechanism to ensure the accuracy of its reported data, to the effect that the transparency report may or may not include orders subject to such additional delay (but without specifically confirming or denying that it has received such new capability orders).

Option Two.

In the alternative, a provider may report aggregate data in the following separate categories:

1. Criminal process, subject to no restrictions.

2. The total number of all national security process received, including all NSLs and FISA orders, reported as a single number in the following bands: 0-249 and thereafter in bands of 250.

3. The total number of customer selectors targeted under all national security process, including all NSLs and FISA orders, reported as a single number in the following bands, 0-249, and thereafter in bands of 250.

* * *

I have appreciated the opportunity to discuss these issues with you, and I am grateful for the time, effort, and input of your companies in reaching a result that we believe strikes an appropriate balance between the competing interests of protecting national security and furthering transparency. We look forward to continuing to discuss with you ways in which the

government and industry can similarly find common ground on other issues raised by the surveillance debates of recent months.

Sincerely,

James M. Cole
Deputy Attorney General

Exhibit 2

The New York Times | http://nyti.ms/1vdlOtR

U.S.

Justice Dept. Apologizes for Inaccuracy in National Security Letters Case

By CHARLIE SAVAGE NOV. 14, 2014

WASHINGTON — The Justice Department has apologized to a federal appeals court for providing inaccurate information about a central issue in a case challenging the constitutionality of a disputed law-enforcement power known as national security letters.

The letters are a kind of subpoena that the F.B.I. can issue without court oversight. The case centers on the constitutionality of a gag rule that forbids companies from disclosing whether they have received such letters.

The Justice Department said it had misled the court by incorrectly saying that telecommunications companies were permitted to disclose that they had received at least one such letter seeking records about a customer. In a letter unsealed this week, the department said that the misstatement was “inadvertent.”

It is the latest in a series of inaccurate statements that the executive branch has made to other branches of government about surveillance rules and practices, many of which have come to light during the scrutiny on data collection that came after the leaks last year by the former intelligence contractor Edward J. Snowden.

Even before Mr. Snowden’s leaks, the Electronic Frontier Foundation filed a lawsuit challenging the constitutionality of the letters on behalf of an unnamed telecommunications provider. In March 2013 a Federal District Court judge in San Francisco struck them down, ruling that the gag

provision violated the First Amendment.

The Obama administration appealed to the Court of Appeals for the Ninth Circuit, which heard oral arguments last month. In the arguments, Kurt Opsahl, a lawyer for the foundation, emphasized that recipients of such letters could not participate with authority in the public debate because they could not describe their experiences, because that would reveal that they had received at least one letter.

The Justice Department recently began permitting companies to say how many national security letters they had received, but only in broad bands like "between 0 and 999." As a result, they cannot confirm that they have received any, because even those in the lowest band might have received zero.

But during the oral arguments, a Justice Department lawyer, Douglas Letter told the appeals court that Mr. Opsahl's claim that companies could not fully participate in public debate was not true because a firm could say that it was in the lowest band, and go on to say "and we think the government is asking for too much in many of the N.S.L.'s we have received."

While providers are limited in commenting about the quantity they received, Mr. Letter added, "There is absolutely no ban on them commenting on the quality of those they received."

After the arguments, Cindy Cohn, the legal director of the Electronic Frontier Foundation, wrote a letter to the Justice Department saying that it appeared to be changing its rule, and listed a variety of comments her client would like to make in public in light of what Mr. Letter said was permissible.

But the Justice Department wrote to the Ninth Circuit saying that Mr. Letter had inadvertently misstated the rule. In fact, so long as a firm has received fewer than 1,000 national security letters, it may not disclose whether it had received any at all, the letter said.

"We regret this inadvertent inaccuracy and apologize for any confusion that may have been caused," wrote Jonathan H. Levy, a Justice Department lawyer, in the letter.

In a once-secret ruling in October 2011 by the Foreign Intelligence Surveillance Court, which the Obama administration declassified after Mr. Snowden's leaks, Judge John D. Bates chastised the executive branch for having misled the court on at least three occasions about how various N.S.A. surveillance and data-collection programs worked.

In 2012, during another lawsuit challenging the N.S.A.'s warrantless surveillance program under the FISA Amendments Act, the Justice Department successfully urged the Supreme Court to dismiss the case because the plaintiffs could not prove they had been wiretapped.

The department told the justices that doing so would not prevent judicial review of the law because prosecutors would tell criminal defendants that they faced evidence derived from such eavesdropping, and they would have standing to challenge it. But it emerged last summer that prosecutors' actual practice had been to conceal the origins of such evidence from defendants.

And during Senate testimony in March 2013, the director of national intelligence, James R. Clapper, said the National Security Agency did not deliberately collect records of any type about millions of Americans. Three months later, Mr. Snowden's leaks brought to light the fact that the agency was systematically collecting calling records of Americans in bulk.
