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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

CAROLYN JEWEL, *et al.*, Plaintiffs, v. NATIONAL SECURITY AGENCY, *et al.*, Defendants.	Case No. 4:08-cv-4373-JSW **SUR-REPLY IN SUPPORT OF THE GOVERNMENT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' STATUTORY CLAIMS** [No hearing date] Courtroom 5, 2nd Floor Hon. Jeffrey S. White

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Plaintiffs envision a trial of this case at which they would present public evidence of their standing, the Government would submit state secrets for *in camera* review, and the Court would issue a ruling, Pls.' Reply at 22-23, ECF No. 430, either validating Plaintiffs' allegations, revealing by implication the details of NSA intelligence activities, or both. Neither precedent nor the interests of national security permit such a result under any circumstances. *See* Gov't Reply at 19-25, ECF No. 421 (citing *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 412 n.4 (2013), and *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1083, 1087-89 (9th Cir. 2010)). As discussed below, moreover, Plaintiffs have failed to present admissible evidence of their standing that could defeat summary judgment, and require a trial, even in a routine case.

I. PLAINTIFFS' NEW EVIDENCE FAILS TO ESTABLISH THEIR STANDING.

A. Mr. Snowden's Testimony Is Not Competent or Presentable in Admissible Form.

Plaintiffs proffer the declaration of expatriate outlaw Edward Snowden, ECF No. 432, as authentication of the claimed NSA Draft OIG Report, a document they seek to rely on to prove a pivotal allegation on which they base their standing: that their telecommunication service providers assisted the NSA in conducting all three intelligence activities at issue in this case. Pls.' Reply at 5, 15, 17; *see* Gov't Reply at 5, 9, 14. This effort founders because (i) Mr. Snowden's testimony is not competent to authenticate the report; and (ii) Plaintiffs have not shown that his testimony can be presented in admissible form.

First, Mr. Snowden cannot competently testify that the purported NSA Draft OIG Report "is what it is claimed to be," Fed. R. Evid. 901(b)(1), because under the law of this Circuit a witness proffered to authenticate a document on the basis of "personal knowledge" must be one "who wrote [the document], signed it, used it, or saw others do so." *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 533 (9th Cir. 2011); *Hendon v. Baroya*, 2016 WL 70297, at *9 (E.D. Cal. Jan. 6, 2016) (same); *see also* Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602. Mr. Snowden, however, does not claim to have written, signed, or used this document, or seen anyone else do so. He claims only that he obtained "access" to the document and "became familiar with" it while still employed as an IT contractor with the NSA. *See* ECF No. 432 ¶¶ 3-5. That testimony is legally insufficient to authenticate this document.

Second, even if Mr. Snowden's testimony were based on the requisite personal knowledge, Plaintiffs have not shown that it could be presented "in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). In the face of this objection, it becomes Plaintiffs' burden to "show that the material is admissible as presented or to explain the admissible form that is anticipated." Fed. R. Civ. P. 56, 2010 Adv. Comm. Notes; *Progressive Solutions, Inc. v. Stanley*, 2018 WL 1989547, at *7 (N.D. Cal. Mar. 8, 2018). This Plaintiffs cannot do. The declaration is not admissible in its current form, because it is hearsay. *See* Fed. R. Evid. 801(c). And while Plaintiffs may argue that Mr. Snowden, for the reasons discussed *infra*, at 2-3, is an "unavailable" declarant, *see* Fed. R. Evid. 804(a)(5), none of the hearsay exceptions available under Rule 804 applies here. *See* Fed. R. Evid. 804(b).[1]

Barring admissibility of the declaration itself, there is no other form in which Mr. Snowden's testimony can be admissibly presented. Given that Mr. Snowden fled the United States and now resides at an undisclosed location in Russia, *see* ECF No. 433, at 2 n.1, Plaintiffs have three theoretical options for obtaining his testimony, none of which is viable. First, Plaintiffs may seek to depose Mr. Snowden in Russia. Fed. R. Civ. P. 28(b) identifies four options for taking depositions in a foreign country:

(1) "under an applicable treaty or convention";

(2) by a "letter of request, whether or not captioned a 'letter rogatory'";

(3) "on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination"; or

(4) before a commissioned person.

The first option is not available here because the United States has not accepted Russia's

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[1]Exceptions (b)(1), (2), and (4) do not apply on their face. Exception (b)(3) does not apply because the declaration was shrewdly drafted in an apparent attempt to avoid making statements against interest concerning Mr. Snowden's unauthorized disclosures of classified information. The Court should not rely on exception (b)(5), the "rarely" used "residual exception" now transferred to Rule 807. *See 1337523 Ontario, Inc. v. Golden St. Bancorp, Inc.*, 163 F. Supp. 2d 1111, 1120 (N.D. Cal. 2001). It would not serve "the interests of justice" to let Plaintiffs exploit the willingness of a fugitive reposing in Russia to provide them testimony that the Government cannot put to the test of cross-examination. *Cf. Antonio-Martinez v. INS*, 317 F.3d 1089, 1091-93 (9th Cir. 2003) (discussing the fugitive disentitlement doctrine). (Rule 807(b) would also require Plaintiffs to provide the Government with Mr. Snowden's address in Russia.) Exception (b)(6) does not apply, as the Government did not "wrongfully cause[]" Mr. Snowden to flee to avoid him being a witness in this case.

accession to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, 847 U.N.T.S. 241. *See* Decl. of William P. Fritzlen ("Fritzlen Decl.") ¶¶ 3-4; Exh. 1 to Fritzlen Decl., Decl. of Edward A. Betancourt ("Betancourt Decl.") ¶ 3. Pursuing the second option (letters rogatory issued through diplomatic channels) would likely be futile, because in July 2003 "Russia unilaterally suspended all judicial cooperation with the United States in civil and commercial matters," *id.* ¶ 9, such that all letters rogatory submitted by the United States to Russia for the taking of evidence since then have been returned unexecuted. Fritzlen Decl. ¶¶ 3-4; Betancourt Decl. ¶ 11. The third and fourth options are also not available here because Russia has stated that foreign persons (such as American attorneys) have no authority to take voluntary depositions of willing witnesses located in Russia, which necessarily includes depositions taken in person, via video link, or by telephone. *See* Fritzlen Decl. ¶¶ 3-4; Betancourt Decl. ¶ 7.[2] Nor, the undersigned has been informed by the Department of State, can Government counsel participate without the formal consent of the Russian government.

Second, Plaintiffs could seek to take Mr. Snowden's deposition in a third country. But the viability of that option remains unproven without indication that Mr. Snowden is willing (and able) to leave Russia for a third country (one that would be willing to grant him entry).

Finally, Plaintiffs could ask the Court in its discretion to order Mr. Snowden to "appear[ ] as a witness before it" if the Court finds his testimony to be "necessary in the interest of justice" and "that it is not possible to obtain his testimony in admissible form without his personal appearance." 28 U.S.C. § 1783(a); *see also* Fed. R. Civ. P. 45(b)(3); *Johnson v. Bay Area Rapid Trans. Dist.*, 2014 WL 2514542, at *2 (N.D. Cal. June 4, 2014); *SEC v. Sabhlok*, 2009 WL 3561523, at *4 (N.D. Cal. Oct. 30, 2009). Setting aside the myriad thorny issues that would accompany such an order, there is no indication Mr. Snowden would return to this country under such compulsion when doing so necessarily would require him to face U.S. justice.

For all these reasons as well, Mr. Snowden's declaration is inadmissible.

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[2] For example, "Russia has advised it would deem taking depositions in Russia before a U.S. consular officer as a violation of Russia's judicial sovereignty" that "could result in the arrest, detention, expulsion, or deportation" of those involved. Betancourt Decl. ¶ 7. *See also* Dep't of State, Judicial Assistance Country Information (updated Nov. 15, 2013), https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/RussianFederation.html. .

B. The McCraw Declaration Cannot Overcome the Government's Claim of Privilege.

Plaintiffs proffer the declaration of counsel for the *New York Times*, David McCraw, ECF No. 431, as authentication of what purports to be a classified letter from the Department of Justice to the FISC, ECF No. 417-4, Ex. B, at 28, in a further effort to establish that one of their providers participated in the now-discontinued FISC-authorized bulk telephony metadata program. Pls.' Reply at 4-5; *see* Gov't Reply at 4-5.[3] Mr. McCraw does not claim to have any knowledge regarding the authenticity of the document, *see Las Vegas Sands, LLC*, 632 F.3d at 533; he says only that it was mistakenly produced to him by Government counsel in FOIA litigation, *see* ECF No. 431 ¶¶ 5-6. As the Government has explained, the identities of the providers in this program are classified, and the Government can neither confirm nor deny the authenticity of this purportedly classified document, a matter that is subject to the assertion of the state secrets privilege. *See* Gov't Br. at 10-11, 14-15, ECF No. 413; Gov't Reply at 6, 19-22. The Government has also addressed this issue in its classified submissions. *See* Notice of Lodging of Classified Submissions, ECF No. 422. More cannot be said on the public record.

II. PLAINTIFFS' NEW ARGUMENTS FAIL TO ESTABLISH THE ADMISSIBILITY OR SUFFICIENCY OF THEIR EVIDENCE.

A. Klein Exhibit C Is Inadmissible Hearsay.

Plaintiffs seek to rely on Klein Exhibit C to prove an essential allegation on which they base their standing to challenge NSA Internet content collection: that the SG3 Secure Room contained equipment used in the collection process. *See* Gov't Reply at 13. But Klein Exhibit C is inadmissible hearsay, *id.* at 16, Plaintiffs' arguments notwithstanding, *see* Pls.' Reply at 9-10.

[3] The D.C. Circuit has already considered and rejected Plaintiffs' argument that their providers, AT&T and Verizon, must have participated in the NSA phone records program because they are large carriers with many subscribers. *See* Pls.' Reply at 5-7; Gov't Reply at 7-8 (citing *Obama v. Klayman*, 800 F.3d 559, 565-69 (D.C. Cir. 2015)). Plaintiffs try to distinguish *Klayman* on the ground that it would be "mathematically [im]possible" to exclude both AT&T and Verizon from that program, because, according to a PCLOB estimate, the program included records involving over 120 million phone numbers, more than possessed, say Plaintiffs, by any other phone company in America. Pls.' Reply at 5-6, 7. This argument rests, however, on an assumption, and an assertion, for which Plaintiffs offer no proof. First, the PCLOB's estimate of 120 million numbers is based on assumptions, but not actual data, about the number of "seed" telephone numbers used to make queries, and the number of results each query generated. *See* PCLOB Section 215 Report (ECF No. 417-2, Exh. A) at 29, 30-31. Second, Plaintiffs offer no evidence to support their naked assertion that "no other phone compan[ies]," whether singly, or in aggregate, could have generated records involving 120 million numbers. *See* Pls.' Reply at 6.

1 Klein Exhibit C is not admissible under Fed. R. Evid. 801(d)(2)(D), because Plaintiffs
2 have adduced no evidence that, in December 2002, when Klein Exhibit C was written, AT&T
3 was acting as the Government's agent. *See United States v. Bonds*, 608 F.3d 495, 504 (9th Cir.
4 2000). The applicable definition, Restatement (Third) of Agency ("Restatement") § 1.01, *see*
5 *Bonds*, 608 F.3d at 506-07, 514, provides that "[a]gency is [a] fiduciary relationship" arising
6 when a "principal" and "agent" both "manifest[ ] assent" that "the agent [shall] act on the
7 principal's behalf and subject to the principal's control." In contrast to a "nonagent service
8 provider," the concept of agency "posits a consensual relationship in which one person … acts as
9 a representative of or … on behalf of another person with power ['actual authority'] to affect the
10 legal rights and duties of the other person." Restatement § 1.01 cmt. c.
11 Plaintiffs present no evidence of such a relationship between AT&T and the NSA. They
12 observe that providers today "[are] compelled to assist the [NSA] in acquiring communications"
13 pursuant to written "directives" issued under FISA Section 702. Pls.' Reply at 9; *see* 50 U.S.C.
14 § 1881a(h); *see also* ECF No. 417-2, PCLOB Section 702 Report, at 7, 32, 35, 37. But this is a
15 temporal sleight of hand. Section 702 was enacted in July 2008, *see id.* at 19-20, nearly six years
16 after Klein Exhibit C was drafted. Compulsion of provider assistance under Section 702 is not
17 competent evidence of an agency relationship between AT&T and the NSA almost six years
18 before the statute became law. *See Bonds*, 608 F.3d at 507 (making a similar temporal point). In
19 any event, agency is a relationship in which the principal obtains a right to control the agent's
20 conduct based on the agent's consent, not legal compulsion. Restatement § 1.01 cmts. c, f, g.
21 Nor is Klein Exhibit C an admissible business record under Rule 803(6)(B). Plaintiffs do
22 not dispute that Exhibit C is a "first issue" of a document purporting to identify equipment to be
23 installed, but not already installed, in the SG3 Secure Room. *See* Gov't Reply at 16. As such, it
24 does not qualify as a record of an "act" or "event" that had already occurred, or a "condition"
25 that already existed, when the document was created, as Rule 803(6) requires. And the AT&T
26 transparency report cited by Plaintiffs, Pls.' Reply at 10, far from showing that "operating
27 surveillance devices on behalf of the [NSA] is a regularly conducted activity of AT&T," *id.*, does
28 not specify whether AT&T has assisted the NSA at all. *See* Gov't Reply at 24 n.12.

1 Nor, finally, is Klein Exhibit C admissible under Rule 803(3) as a statement of "plan" or
2 "intent" by AT&T. The "declarant" here is the document's author, *see* Fed. R. Evid. 801(b),
3 described by Mr. Klein as a "consultant" for "AT&T Labs." Klein Decl. ¶ 28. Plaintiffs present
4 no evidence that this "first issue" document represents a final plan adopted by AT&T
5 management, as opposed to a mere consultant's proposal. Indeed, there is no evidence that the
6 document's list of devices purportedly to be installed in the SG3 Secure Room is based on the
7 consultant's own personal knowledge, raising double hearsay issues. Fed. R. Evid. 805.[4]

8 **B. Critical Portions of Mr. Klein's Testimony Are Not Based on Personal Knowledge.**

9 Plaintiffs also rely on the Klein declaration itself as evidence of their allegations
10 regarding equipment located in, activities conducted in, and NSA "control" of, the SG3 Secure
11 Room. *See* Gov't Reply at 13, 14-15, 16-17. This Court has already determined that Mr. Klein's
12 statements on these subjects lack foundation in personal knowledge, *Jewel*, 2015 WL 545925,
13 at *4, and Plaintiffs offer no valid basis for reconsidering that conclusion.

14 Mr. Klein's assertions that it was the NSA that met with AT&T employees at Folsom
15 Street, and that the NSA controlled access to the SG3 Secure Room, Pls.' Reply at 12—matters
16 with which he had no evident involvement—do not constitute testimony "based on his personal
17 observations and experiences on the job," *id.* at 10. Rather, they rest entirely on oral and written
18 statements made to him by other AT&T employees. *See* Klein Decl. ¶¶ 10-17; Gov't Reply at
19 14-15, 17.[5] The cases are legion that the truth of co-workers' statements made at the office do
20

[4] Plaintiffs cite the Declaration of James Russell ("Russell Decl.") as "direct evidence" [redacted] Pls.' Reply at 8. However, in the
22 only paragraph of his declaration referring to Exhibit C, Russell Decl. ¶ 22, ECF No. 84-1, Mr. Russell makes no mention of any particular devices, and states only that [redacted] *Id.* Thus, Mr.
24 Russell's testimony supplies no basis on which to conclude that the equipment Plaintiffs claim was used for surveillance purposes was actually installed in the SG3 Secure Room. Moreover,
25 as the Court has observed, Plaintiffs have not presented competent evidence of "by whom" or for "what purpose" data were processed in the secure room, regardless of the equipment located
26 there, still leaving a fatal gap in the proof of their standing claim. *Jewel v. NSA*, 2015 WL 545925, at *4 (N.D. Cal. Feb. 10, 2015).

27 [5] Although Plaintiffs attempt to graft onto Mr. Klein's visits to the room his sighting of an AT&T employee, "FSS #2," Pls.' Reply at 12, Mr. Klein does not attest to such a sighting in
28 his affidavit. *See generally* Klein Decl. Nor does Mr. Klein say, as Plaintiffs claim, Pls.' Reply at 12, that he "observed" FSS #2 meeting with an NSA agent or installing equipment in the secure room. *See generally* Klein Decl. Rather, Mr. Klein asserts that the meeting occurred, and that FSS #2 "was the person working to install equipment in the SG3 Secure Room." *Id.* ¶¶ 10,

1 not constitute personal knowledge to which an individual may testify.[6] Plaintiffs cite no contrary
2 authority. In *United States v. Neal*—on which Plaintiffs principally rely, *see* Pls.' Reply at
3 11-12—a bank employee simply testified to the contents of business records that she had
4 personally reviewed in the course of performing her assigned job duties, not to information
5 conveyed to her by other bank employees concerning activities with which she was not involved.
6 *See* 36 F.3d 1190, 1206 (1st Cir. 1994). Nor do the other cases upon which Plaintiffs rely, *see*
7 Pls.' Reply at 10-11, exempt the workplace from the fundamental requirement that individuals
8 must have personal knowledge of the facts to which they testify.

9 **C. Statements Made to Mr. Klein Concerning Alleged NSA Involvement at Folsom**
10 **Street Are Inadmissible Hearsay.**

As proof that their communications were copied for purposes of NSA surveillance, *see*
11 12 Gov't Reply at 15, Plaintiffs attempt to rely on oral and written statements made to Mr. Klein by
13 AT&T personnel about supposed NSA "activities" at Folsom Street. Pls.' Reply at 12-13 (citing
14 Klein Decl. ¶¶ 10, 14, 16). First, however, these hearsay statements are not admissible as
15 "knowledge learned by Klein on the job," *id.* at 12, as discussed in § II.B, above. Second, they
16 are not admissible non-hearsay under Rule 801(d)(2)(D), *see id.*, because Plaintiffs have not
17 shown that AT&T was the NSA's agent. *See* § II.A, above.

18 Finally, these are not admissible statements of plan or intent under Rule 803(3). On close
19 inspection, they do not qualify as statements of intent by the respective declarants to "meet with
20 the NSA." Pls.' Reply at 13; *see* Klein Decl. ¶¶ 10, 16. Most critically, though, by its express
21 terms Rule 803(3) disallows "statement[s] of memory or belief to prove the fact[s] remembered
22 or believed." Therefore, while statements of intent by AT&T personnel to meet with a particular
23 person may be admissible as evidence that they in fact met with that person, those statements are

24 25 14. Since Mr. Klein did not personally participate in the meeting or the alleged installation of the equipment, he could only have based those statements on hearsay or his own conjecture. Neither would make his statement admissible.

26 27 28 [6] *See, e.g.*, *Skillsky v. Lucky Stores, Inc.*, 893 F.2d 1088, 1092 (9th Cir. 1990) (affirming exclusion of deponent's testimony regarding a coworker's statements for lack of personal knowledge); *Morshed v. Cty of Lake*, 2014 WL 1725830, at *9 (N.D. Cal. May 1, 2014) (excluding as hearsay proffered testimony of what plaintiff heard about poor performance of a promoted co-worker). *See also*, *e.g.*, *New Show Studios LLC v. Needle*, 2014 WL 12495640, at *12 (C.D. Cal. Dec. 29, 2014); *Medina v. Multaler, Inc.*, 547 F. Supp. 2d 1099, 1122 (C.D. Cal. 2007); *Sheply v. E.I. DuPont De Nemours and Co.*, 722 F. Supp. 506, 514 (C.D. Ill. 1989).

1 not admissible "to prove the truth of [their] belief[ ]" that the person they planned to meet was a
2 representative of the NSA. *See, e.g.*, *Bains v. Cambra*, 204 F.3d 964, 973 (9th Cir. 2000).[7]

3 **D. Plaintiffs Cannot Show Standing Without Admissible Evidence of NSA**
4 **Involvement at Folsom Street.**

5 To establish their standing, Plaintiffs must show, *inter alia*, that their injuries are "fairly
6 traceable to the challenged conduct" of the NSA. *Jewel v. NSA*, 673 F.3d 902, 908 (9th Cir.
7 2011). That means they must proffer admissible evidence that AT&T conducted the activities to
8 which they attribute their injuries as part of the NSA's surveillance process. Gov't Reply at 12.

9 Initially, the Plaintiffs attempted to meet this requirement by asserting that the NSA
10 "control[led]" the SG3 Secure Room. Pls.' Reply at 13, 19. Now that the Government has
11 shown that there is no competent evidence of such control, *see* Gov't Reply at 16-17, Plaintiffs
12 contend a showing of control is not necessary, Pls.' Reply at 13. To be sure, it is of no moment
13 who literally "holds the keys" to the SG3 Secure Room; the crux of the matter is whether
14 Plaintiffs have admissible evidence of a nexus between the activities in that room, and the NSA
15 programs they seek to challenge. They do not. Plaintiffs point to the Ninth Circuit's ruling that
16 they had adequately pled traceability, Pls.' Reply at 13-14, but that decision addressed only the
17 sufficiency of Plaintiffs' allegations, *see Jewel*, 673 F.3d at 907. Now, at the summary judgment
18 stage, Plaintiffs must come forward with competent evidence supporting those allegations. *See*
19 Gov't Br. at 7-8. For all the reasons explained above and in the Government's prior briefs, they
20 have not done so.

21 * * *

22 Because Plaintiffs have not presented admissible evidence of their standing, and because,
23 regardless of what evidence they possess, the standing issue cannot be tried without risking or
24 requiring disclosures that would place national security at risk, summary judgment should be
25 awarded to the Government Defendants on Plaintiffs' remaining statutory claims.

26

27 [7] *See also United States v. Sayakhom*, 186 F.3d 928, 937 (9th Cir. 1999); *United States v. Fontenot*, 14 F.3d 1364, 1371 (9th Cir. 1994) (citing *United States v. Emmert*, 829 F.2d 805,
28 809-10 (9th Cir. 1987)); *United States v. Astorga-Torres*, 682 F.2d 1331, 1335 (9th Cir. 1982) (cited in Pls.' Reply at 10, 13) (observing that a statement of a declarant's intent may not be admitted as "a narrative of facts communicated to the declarant by others").

Dated: November 30, 2018

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