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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

CAROLYN JEWEL, TASH HEPTING, YOUNG BOON HICKS, as executrix of the estate of GREGORY HICKS, ERIK KNUTZEN and JOICE WALTON, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, *et al.*,

Defendants.

CASE NO. 08-CV-4373-JSW

PLAINTIFFS' SURREPLY

Pursuant To The Court's November 20, 2018 Order (ECF No. 436)

Courtroom 5, Second Floor
The Honorable Jeffrey S. White

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INTRODUCTION

Plaintiffs have presented a rich and extensive body of evidence demonstrating their standing and the Court's obligation to proceed to the merits as Congress has directed, using the procedures of 50 U.S.C. § 1806(f) to review the classified evidence. Focusing on only a tiny subset of plaintiffs' evidence, the government argues that subset of evidence is inadmissible and further argues that if the subset is excluded plaintiffs lack standing. Neither proposition is correct, as plaintiffs explain below and in their previous filings.

In reviewing the government's evidentiary objections, it is important to keep in mind three overarching principles that the government ignores.

First, plaintiffs' injuries need only be an identifiable trifle to establish standing—a standard the government's interference with their communications and records easily exceeds.

Second, the question on summary judgment is whether a factfinder looking holistically at the totality of the evidence and drawing all inferences in plaintiffs' favor could rationally conclude it is more likely than not that plaintiffs have suffered injury-in-fact. The question is *not* whether a single item of evidence considered in isolation conclusively proves injury beyond any doubt.

Third, there is much evidence to which the government has not objected that the Court must not lose sight of. [redacted]

ARGUMENT

I. The Snowden Declaration (ECF 432) Authenticates The NSA Draft OIG Report

In arguing that the Snowden declaration fails to authenticate the NSA Draft OIG Report (ECF 432, Ex. 1), the government ignores the low and flexible threshold for authenticity, which is satisfied by any evidence whatsoever "sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a); *U.S. v. Dhinsa*, 243 F.3d 635, 658 (2d Cir. 2001). It argues that Snowden did not use the document in his work, but that is not the only basis on which a witness may authenticate a document. "[T]he district court must consider alternative means of authentication." *Las Vegas Sands v. Nehme*, 632 F.3d 526, 533 (9th Cir. 2011).

The NSA Draft OIG Report is a public record, and Snowden's testimony authenticates it by showing it "is from the office where items of this kind are kept," i.e., from the files of the NSA. Fed. R. Evid. 901(b)(7)(B); *U.S. v. Estrada-Eliverio*, 583 F.3d 669, 673 (9th Cir. 2009) (Rule 901(b)(7)(B) requires "only personal knowledge that a document was part of an official file").

Independently, "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the [NSA Draft OIG Report], taken together with all the circumstances" are alone "sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a), (b)(4); *Orr v. Bank of America*, 285 F.3d 764, 778 n.24 (9th Cir. 2002). The government does not even attempt to argue that the NSA Draft OIG Report is not what it appears to be.

The government's attempt to foment uncertainty as to authenticity lacks good faith. The government well knows the NSA Draft OIG Report is authentic and has presumably confirmed its authenticity in its classified response to Plaintiffs' RFA No. 50. ECF 379-1, Ex. C.

The government rests a different challenge to the Snowden declaration on the mistaken assumption that a declaration may be excluded on summary judgment if there is a theoretical possibility that the witness may in the future be unavailable to testify at deposition or at trial. *Every* declaration submitted on summary judgment is subject to the possibility that the witness will die or otherwise be unavailable to testify, but no court has ever held that is any basis for exclusion.

In any event, Snowden's absence from the United States is no obstacle to his future testimony even if his absence continues. The Federal Rules provide for trial "testimony in open court by contemporaneous transmission from a different location" (Fed. R. Civ. P. 43(a)); they also provide procedures by which "a deposition [may] be taken by telephone or other remote means" (Fed. R. Civ. P. 30(b)(4)).[1] Either would be sufficient here.

Moreover, a letter rogatory is another alternative in addition to remote transmission to obtain Snowden's testimony for trial. ECF 439-1, Ex. A (Frizlen Decl.), ¶ 6. It is unknown

[1] Contrary to the government's assertion (ECF 439 at 3:10-12), the 2006 Betancourt declaration (ECF 439-1, Ex. A at Ex. 1) does not say that Russia forbids depositions by remote means. It addresses instead in-person depositions in Russia before U.S. consular officers or conducted by American attorneys in Russia. In any event, remote trial testimony or a remote deposition, with attorneys present in the U.S., would not require Russian government approval.

whether Russia would respond favorably to a letter rogatory, but the declaration may not be excluded on the speculation that Russia might reject a future letter rogatory.[2]

II. The McCraw Declaration (ECF 431) Authenticates The NSA Letter

The government's production of the NSA Letter (ECF 417-4, Ex. B) in FOIA litigation with the *New York Times* is a judicial admission of its authenticity. *Orr*, 285 F.3d at 777 n.20.

The McCraw declaration further authenticates the NSA Letter on two different grounds. First, it confirms that the government produced the NSA Letter in FOIA litigation, removing any doubt about the government's judicial admission of authenticity. ECF 431 at ¶ 6. Second, because the declaration shows the FOIA litigation was against the NSA, requested only NSA documents, and the NSA was the entity that produced the NSA Letter (*id*. at ¶¶ 2-6), the declaration shows the NSA Letter "is from the office where items of this kind are kept." Fed. R. Evid. 901(b)(7)(B).

Moreover, even apart from the McCraw declaration, the NSA Letter is a document whose "appearance, contents, substance, internal patterns, or other distinctive characteristics . . . taken together with all the circumstances" are alone sufficient to authenticate it. Fed. R. Evid. 901(b)(4); *Orr*, 285 F.3d at 778 n.24. And, like the NSA Draft OIG Report, it is a government document whose authenticity the government has no basis for disputing in good faith.

III. Exhibit C To The Klein Declaration Is Admissible

Exhibit C to the Klein Declaration (ECF 84-5; 84-6; 85, Ex. C) is an AT&T document describing the spy equipment in the AT&T secure room and the cable connections between the splitter and the secure room. The Klein and Marcus Declarations also describe these spy devices. ECF 85 (Klein Decl.), ¶ 35; ECF 89 (Marcus Decl.), ¶¶ 39-40, 63, 68, 75-79, 86-89.

[redacted]

[2] The sterility of the government's argument is also demonstrated by its curious decision to rest its argument on the Betancourt declaration filed in 2006 in a completely unrelated lawsuit (*U.S. v. Stratievsky*). If the conditions existing in 2006 continue to persist now, one would expect a current government official to make a straightforward recitation of them under penalty of perjury, rather than the evasive maneuver of pointing to a stale declaration submitted 12 years ago in another case.

[redacted]

Exhibit C is admissible under multiple hearsay exceptions, as Plaintiffs' Reply explains at 9-10. It is admissible as statement of AT&T's plan or intent. Fed. R. Evid. 803(3). As a statement of plan or intent, it is also evidence that AT&T thereafter implemented Exhibit C and installed the spy equipment and connected it to the splitter. *U.S. v. Best*, 219 F.3d 192, 198 (2d Cir. 2000); *U.S. v. Astorga-Torres*, 682 F.2d 1331, 1335 (9th Cir. 1982). The government concedes that Exhibit C is a plan but speculates it might not be a "final plan." ECF 439 at 6:4. But there is no such "final plan" requirement in Rule 803(3).

[redacted]

Exhibit C is also admissible as a statement by AT&T as the government's agent in conducting surveillance at the time of Exhibit C's preparation in 2002 and thereafter. Fed. R. Evid. 801(d)(2)(D); Plaintiffs' Reply, 9-10. The NSA Draft OIG Report shows that AT&T was the government's agent in conducting surveillance under the Terrorist Surveillance Program (TSP) starting in 2001. ECF 417 at 9 n.6, 15, 19-20; ECF 432, Ex. 1 at 27-29, 31, 33-34. The PCLOB 702 Report makes clear that Internet backbone surveillance by telecommunications companies that continued after 2007 under FISA orders was the same program as "the collection that had been occurring under the TSP" beginning in 2001. ECF 417-2, Ex. B (PCLOB 702 Report) at 5, 16-20.

The government's classified responses to Plaintiffs' RFAs should also establish AT&T's role as the government's agent in preparing Exhibit C (RFA No. 61) and in conducting Internet

backbone surveillance (RFAs Nos. 10-22, 32-41).

The statements made by AT&T employees to Klein showing AT&T was conducting surveillance on behalf of the NSA, discussed in the next section, are additional evidence that AT&T was the government's agent in conducting surveillance.

The government further argues that AT&T does not "act subject to the [government's] control and instruction" in conducting surveillance on the government's behalf, and therefore is not an agent of the government. *U.S. v. Bonds*, 608 F.3d 495, 507 (9th Cir. 2010). This contention is ludicrous. AT&T does not conduct foreign intelligence surveillance as a freelancer beyond the government's control, doing what it thinks best in its sole discretion—as a so-called "nonagent service provider," as the government would have it. ECF 439 at 5:7-10. Instead, telecommunications companies like AT&T conduct Internet backbone surveillance under the government's control and direction: The government designs the collection devices the companies use and the government transmits to the companies the selectors used to search communications transiting the Internet backbone. PCLOB 702 Report at 36-37, 39; *see* ECF 417 at 11-12.

Exhibit C is also admissible as business record, as Plaintiffs' Reply explains at 9-10. Fed. R. Evid. 803(6). The spy devices in the AT&T secure room and the cable connections between the secure room and the splitter that are set forth in Exhibit C are part of AT&T's regularly conducted activity of performing surveillance on behalf of the government, which it has done since 2001 as explained above. AT&T's transparency reports also establish it regularly conducts foreign intelligence surveillance for the government.[3] ECF No. 417-4, Ex. C at 3, 5.

[redacted] Klein also confirms that the splitter connections to the AT&T secure room actually existed, for he was

[3]The government quibbles that the transparency reports do not identify the NSA as the agency for which AT&T regularly conducts foreign intelligence surveillance. ECF 439 at 5:25-28. But whether AT&T deals directly with the NSA or with some intermediary agency is irrelevant to whether it is regularly conducting surveillance.

responsible for maintaining those connections and for attaching new circuits to the splitter. Klein Decl., ¶¶ 15, 36. And Exhibit C, dated December 10, 2002, was made "at or near the time" (Fed. R. Evid. 803(6)) those conditions came into existence, for Klein describes seeing the AT&T secure room under construction in January 2003. Klein Decl., ¶¶ 10-14. The government's contention (ECF 439 at 5:24) that Exhibit C is inadmissible unless it was created after construction of the AT&T secure room is contrary to the plain language of Rule 803(6), which says "at or near the time" of the act, event, or condition, not "at or *after* the time." [redacted]

[redacted]

IV. Klein's Testimony Regarding The NSA's Involvement Is Admissible

Klein's testimony regarding the NSA's involvement in the splitter and the AT&T secure room is admissible. Although the government lumps Klein's testimony together, it falls into two distinct categories that must be separately analyzed, as plaintiffs did in their Reply at 10-13.

1. The first category is Klein's personal observations and experiences on the job, discussed in detail in Plaintiffs' Reply at 12:3-15. The AT&T secure room was a location Klein would otherwise have had, and needed, access to in order to maintain the cables running from the splitter. Klein Decl., ¶¶ 17, 20, 36. From performing his job duties Klein knew that he was physically excluded from the secure room only because as a matter of policy access was limited to persons cleared by the NSA. *Id*. at ¶¶ 17, 18. AT&T employee Long confirms access was restricted as a matter of policy. ECF 417-5, ¶ 21.

Klein also personally observed at his workplace the meetings of two co-workers with NSA representatives: "The NSA agent came and met with FSS #2;" "The NSA agent did come and speak to FSS #1." Klein Decl., ¶¶ 10, 16. The government's suggestion (ECF 439 at 6:14-18 & n.5) that these are not statements of direct personal observation lacks merit. It also is contrary to the rule that on summary judgment all inferences must be drawn in the nonmoving party's favor. *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011).

Klein's visits to the AT&T secure room while it was under construction and later are also matters of personal knowledge, as are his observations that it was FSS#2 who was installing the equipment in the AT&T secure room and that FSS#2 and FSS#3 were the only persons with access

to the room. Klein Decl., ¶¶ 12, 14, 17, 18. (The government's suggestion that Klein did not observe FSS#2 installing equipment is another instance in which it improperly draws inferences adverse to, rather than in favor of, plaintiffs.)

These statements are admissible because they are matters of direct observation and experience that Klein has personal knowledge of.

Furthermore, employees have wide latitude in testifying to matters they observe and learn of on the job, including actions of their coworkers and the relationship of their organization with outside entities, including the government, as Plaintiffs' Reply explains at 10-13 and footnote 4.

The government badly mischaracterizes one case plaintiffs cite, *U.S. v. Neal*, 36 F.3d 1190 (1st Cir. 1994). *Neal* was a bank robbery case. The fact the bank was insured by the government's Federal Deposit Insurance Corporation (FDIC)—an essential element of the crime—was not established by the introduction of the bank's business records under a hearsay exception, contrary to the government's suggestion. Rather, a bank employee testified to the bank's relationship with the FDIC based solely on hearsay statements in documents she reviewed, including documents created by the FDIC, not the bank. *Neal*, 36 F.3d at 1206. She had no independent knowledge of the relationship except what she learned by reading the hearsay in the documents. *Id*. She had no personal knowledge of facts in the documents and did not participate in the documents' creation. Nonetheless, her testimony regarding the bank's relationship with the FDIC was admissible. *Id*.

2. The second category is statements made to Klein by AT&T supervisors and coworkers evidencing AT&T's relationship with the NSA, discussed in detail in Plaintiffs' Reply at 12:16 to 13:9. These statements, found in paragraphs 10, 16, and 36 of the Klein Declaration, are admissible under two different hearsay exceptions.

First, they are admissible as statements by AT&T as the government's agent. As discussed in the preceding section, the NSA Draft OIG Report, AT&T's transparency reports, and the government's classified responses to plaintiffs' RFAs establish agency. Further, under Rule 801(d)(2), the contents of the statements are evidence of agency because they show the NSA was using AT&T employees to perform a "special job" for it. Klein Decl. ¶¶ 10, 16.

Second, the statements by Klein's superiors and coworkers regarding planned meetings

with the NSA and planned cooperation with the NSA's surveillance are admissible as statements of plan and intent, as Plaintiffs' Reply explains at 12-13.

Further, as statements of plan and intent, they are evidence that the intended meetings with NSA and the intended participation of AT&T in the government's surveillance did actually occur. *Best*, 219 F.3d at 198; *Astorga-Torres*, 682 F.2d at 1335.

The cases cited by the government in its footnote 6 have no application here. ECF 439 at 7 n.6. Those cases involve hearsay statements not subject to any exception (in some cases, the hearsay declarant or the testifying witness also failed to identify any source of personal knowledge), while the statements made to Klein are subject to two different exceptions.

The government's argument that the statements about meetings are statements of memory or belief, rather than statements of plan or intent, is erroneous, and the cases it cites do not support that proposition. ECF 439 at 8 & n.7. The government's position is that in the statement "I intend to meet with Joe," the identity of Joe is an inadmissible belief, and so all that is admissible is the paraphrase "I intend to meet with someone," and not the actual statement "I intend to meet with Joe." None of the cases the government cites supports this proposition. If the government's position were correct, it would make the hearsay exception for statements of intent meaningless, because it would mean that the object of the intended action could never be named. And the government's implicit suggestion that AT&T was conned into constructing a surveillance network by a bunch of NSA imposters lacks any credibility.

Finally, while the government's surveillance activities at Folsom Street certainly are evidence of plaintiffs' standing, plaintiffs' standing does not depend on showing that surveillance occurred at Folsom Street. There is independent evidence of the government's interference with plaintiffs' communications, including the PCLOB 702 Report's description of the government's Internet backbone surveillance, the NSA Draft OIG Report, and plaintiffs' expert reports.

CONCLUSION

The Court should overrule the government's evidentiary objections, deny the government's summary judgment motion, and grant plaintiffs' motion to proceed to the merits using 50 U.S.C. § 1806(f).

DATE: December 7, 2018

Respectfully submitted,

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