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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CAROLYN JEWEL, TASH HEPTING, 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

JEWEL PLAINTIFFS' SUPPLEMENTAL BRIEF RE: *CLAPPER v. AMNESTY INTERNATIONAL USA*

Courtroom 11, 19th Floor
The Honorable Jeffrey S. White

TABLE OF CONTENTS

I. Introduction 1

II. *Clapper* Has No Application Here Because It Addressed Only The Question Of Standing For Future Injuries, Not Standing For Past Or Present Injuries 2

III. The Ninth Circuit's Ruling That The Jewel Plaintiffs Have Standing Remains The Law Of The Case And Is Binding On This Court 4

IV. The Dictum Of Footnote Four On Which The Government Relies Has No Application Here, Where Congress Has Directed *In Camera* Proceedings 4

V. Conclusion 9

TABLE OF AUTHORITIES

Cases

Barnes-Wallace v. City of San Diego,
530 F.3d 776 (9th Cir. 2008) 4

Barnes-Wallace v. City of San Diego,
704 F.3d 1067, 2012 U.S. App. LEXIS 26016 (9th Cir. Dec. 20, 2012) 4, 5

Clapper v. Amnesty International USA,
__ U.S. ___, 2013 WL 673253 (Feb. 26, 2013) ..... passim

Jewel v. NSA,
673 F.3d 902 (9th Cir. 2011) 1, 2, 3, 4

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 5

Statutes

18 U.S.C. § 2511(1) 6

18 U.S.C. § 2511(2) 6

18 U.S.C. § 2511(2)(e) 6

18 U.S.C. § 2511(f) 6

18 U.S.C. § 2518 6

18 U.S.C. § 2520 7

18 U.S.C. § 2702(a)(3) 6

18 U.S.C. § 2703(c) 6

18 U.S.C. § 2707 7

18 U.S.C. § 2712 ..... 5, 6, 7

18 U.S.C. § 2712(b)(4) 1, 5, 7, 8

50 U.S.C. § 1804 6

50 U.S.C. § 1805 6

50 U.S.C. § 1806(f) 1, 5, 7, 8

50 U.S.C. § 1810 7

50 U.S.C. § 1812 6

50 U.S.C. § 1881a 1, 3

Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 7

Legislative Materials

147 Cong. Rec. 19634-19649 (2001) 7

H. Rep. 107-236 7

H.R. 2975 7

H.R. 3108 7

H.R. 3162 7

I. Introduction

The Supreme Court's recent decision in *Clapper v. Amnesty International USA*, __ U.S. ___, 2013 WL 673253 (Feb. 26, 2013), addressing the circumstances in which a plaintiff who has suffered no present injury might have standing for potential *future* harms, has no bearing here. Plaintiffs' lawsuit is not based on potential future harms, but on concrete and particularized injuries that have already occurred and which are continuing. Indeed, the Ninth Circuit has already distinguished the *Clapper* litigation from plaintiffs' lawsuit on this very basis. *Jewel v. NSA*, 673 F.3d 902, 906, 911 (9th Cir. 2011).

The *Clapper* plaintiffs brought a facial challenge to a newly-enacted statutory provision not at issue here, 50 U.S.C. § 1881a, which authorizes surveillance targeted at foreigners outside the United States. They alleged that in the future they were likely to communicate with foreigners targeted for surveillance, making it possible that their future communications with those persons would be intercepted. The Supreme Court in *Clapper* held two things: (1) There is no Article III standing for *future* injuries unless the future injury is "certainly impending," not merely possible. *Clapper*, 2013 WL 673253 at *7-*8, *11, *15. (2) Actions a plaintiff has taken to avoid merely possible, but not certainly impending, future injuries do not count as present injuries-in-fact for purposes of standing. *Id*. at *11, *15. Neither holding affects the *Jewel* plaintiffs' standing. *Clapper* did not, and had no reason to, address the well-established body of standing law applicable to plaintiffs' claims here that holds that *past* or *present* harms inflicted on the plaintiff by the defendant are actual injuries-in-fact for purposes of standing.

The Supreme Court's dictum in footnote four of *Clapper* also has no bearing on this case, contrary to the government's assertion in its supplemental brief (Dkt. # 139). Footnote four speculates about a "hypothetical disclosure proceeding" in which the government might disclose who it is targeting for surveillance in a case where such information is an element of the plaintiff's standing. *Clapper*, 2013 WL 673253 at *9 n.4. Footnote four has no application here because it does not address the statutory procedures mandated by Congress for this case—18 U.S.C. § 2712(b)(4) and 50 U.S.C. § 1806(f)—that protect national security information while requiring the Court to use that information *in camera* to decide the merits of plaintiffs' claims. Those

provisions were not at issue in *Clapper*. Footnote four also has no application here because information about who the government is targeting for surveillance is not at issue in plaintiffs' claims, which arise out of the *untargeted*, dragnet acquisition of their communications and communication records. Unlike the *Clapper* plaintiffs, the *Jewel* plaintiffs' standing is not based on the theory that they are communicating with someone targeted for surveillance, and litigating this case will not require disclosure of who the government has targeted for surveillance.

II. *Clapper* Has No Application Here Because It Addressed Only The Question Of Standing For Future Injuries, Not Standing For Past Or Present Injuries

Plaintiffs' complaint alleges past and ongoing interception, acquisition, disclosure, and use by defendants of plaintiffs' electronic communications and communications records. *See, e.g.*, Complaint (Dkt. #1) at ¶¶ 9, 10, 11, 13, 73, 75, 90, 110, 120, 129, 148, 151, 161, 164, 173, 174, 175, 189, 190, 191, 203, 204, 205, 214, 223, 230, 237, 246, 253, 260, 264. Moreover, plaintiffs' allegations are supported by the witness declarations and other evidence they have submitted, including statements by government officials. *See* Dkt. # 35, # 85, # 86, # 87, # 88, # 89, # 113, # 116.

As noted above, in the prior appeal, the Ninth Circuit held that plaintiffs have standing because these past and ongoing acts allegedly committed by defendants were concrete and particularized injuries to plaintiffs that have already occurred. *Jewel*, 673 F.3d at 906, 908-11. The Ninth Circuit noted:

> Jewel's allegations are highly specific and lay out concrete harms arising from the warrantless searches. Jewel described these actions as a 'dragnet' and alleged that '[t]his network of Surveillance Configurations'—'the technical means used to receive the diverted communications'—'indiscriminately acquired domestic communications as well as international and foreign communications.' Specifically, Jewel alleged that '[t]hrough this network of Surveillance Configurations and/or other means, Defendants have acquired and continue to acquire the contents of domestic and international wire and/or electronic communications sent and/or received by Plaintiffs and class members.' In addition to capturing internet traffic, 'Defendants and AT&T acquire all or most long-distance domestic and international phone calls to or from AT&T long distance customers, including both the content of those calls and dialing, routing, addressing and/or signaling information pertaining to those calls.' [¶] . . . [¶] Significantly, Jewel alleged with particularity that *her* communications were part of the dragnet.

Id. at 910 (italics original).

In *Clapper*, by contrast, the Supreme Court addressed a facial constitutional challenge to a provision of FISA not at issue here, namely 50 U.S.C. § 1881a, which authorizes surveillance targeting foreigners outside of the United States. Unlike plaintiffs in this lawsuit, the *Clapper* plaintiffs did not allege any past or ongoing interception of their communications, only the possibility of *future* interception. At issue in *Clapper* was whether the possibility of future interception from future targeted surveillance was an injury-in-fact that was "imminent" and whether the burden and expense of actions the plaintiffs had taken to avoid possible future interceptions was an injury-in-fact that was "actual."[1] *Clapper*, 2013 WL 673253 at *3, *7-*8, *11.

Clapper has no application here because the *Jewel* plaintiffs do not base their standing on either theory at issue in *Clapper*: they do not allege they have not yet been surveilled but only face the threat of possible future surveillance, and they do not allege that their standing arises from expenses incurred to avoid possible future surveillance. Instead, plaintiffs' claims are based on past and ongoing interception of their own communications and records.

The Ninth Circuit recognized this crucial distinction between *Clapper* and this lawsuit in its decision. Discussing the Second Circuit's decision in *Clapper*, the Ninth Circuit distinguished the standing allegations of *Clapper* (which it referred to as *Amnesty International*) from the standing allegations of plaintiffs here: "Jewel has much stronger allegations of concrete and particularized injury than did the plaintiffs in *Amnesty International*. Whereas they anticipated or projected future government conduct, Jewel's complaint alleges past incidents of *actual* government interception of her electronic communications, a claim we accept as true." *Jewel*, 673 F.3d at 911 (italics original).

[1] Moreover, the *Clapper* plaintiffs could not have alleged past or present harms from the government's implementation of 50 U.S.C. § 1881a because they filed suit the day after section 1881a was signed into law. Because the *Clapper* plaintiffs were mounting a facial constitutional challenge to a newly-enacted statute, the *Clapper* Court found the plaintiffs' allegations about how the statute might be implemented to be speculative and conjectural. *Clapper*, 2013 WL 673253 at *8 to *11. Here, by contrast, the *Jewel* plaintiffs do not rely on conjectures about possible future conduct by the government or third parties to establish standing, but on defendants' past and ongoing conduct in violation of long-established statutory and constitutional prohibitions.

Likewise, the four justices in dissent in *Clapper*, in a statement the majority did not dispute, noted: "No one here denies that the Government's interception of a private telephone or e-mail conversation amounts to an injury that is 'concrete and particularized.' " *Clapper*, 2013 WL 673253 at *15.

III. The Ninth Circuit's Ruling That The Jewel Plaintiffs Have Standing Remains The Law Of The Case And Is Binding On This Court

Because *Clapper* did not address, much less alter, the law establishing that a past or present harm inflicted by the defendant on the plaintiff is an actual injury-in-fact sufficient to confer standing, and because the Ninth Circuit has already distinguished *Clapper* from plaintiffs' lawsuit, the doctrine of law of the case requires this Court to adhere to the Ninth Circuit's holding that plaintiffs have demonstrated standing by alleging actual injuries-in-fact. The recent Ninth Circuit decision in *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 2012 U.S. App. LEXIS 26016 (9th Cir. Dec. 20, 2012) illustrates the point. In an earlier appeal in that litigation, the Ninth Circuit had found that the plaintiffs had standing. *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 785-86 (9th Cir. 2008). The defendants, however, again challenged the plaintiffs' standing in the subsequent appeal, relying on an intervening Supreme Court decision. The Ninth Circuit held that its prior standing decision remained law of the case and law of the circuit because the intervening Supreme Court decision had not changed the legal standard the Ninth Circuit had applied in its earlier determination of standing. *Barnes-Wallace v. City of San Diego*, 2012 U.S. App. LEXIS 26016 at *18 to *21.

IV. The Dictum Of Footnote Four On Which The Government Relies Has No Application Here, Where Congress Has Directed *In Camera* Proceedings

The government defendants direct the Court's attention to footnote four in *Clapper*, but that footnote has no bearing on this case. Responding to a suggestion made at the *Clapper* oral argument, the *Clapper* Court in footnote four addresses a hypothetical: whether the *Clapper* plaintiffs might be able to cure the deficiencies of their standing allegations if the government were to disclose, perhaps in an *in camera* proceeding, facts that would show whether or not the plaintiffs' communications were actually intercepted and who the government is targeting. *Clapper*, 2013 WL 673253 at *9 n.4 (hypothesizing government disclosure of "(1) whether it is

intercepting respondents' communications and (2) what targeting or minimization procedures it is using"). The footnote further speculated that a terrorist could use such a procedure to discover whether he was under surveillance.

Footnote four has no application here for multiple independent reasons. Initially, footnote four is dictum. Footnote four is unnecessary to the Supreme Court's holding that the plaintiffs' allegations of possible future harm are insufficient to create standing; because the allegations were deficient, there was no need to proceed further to consider "hypothetical disclosure proceedings" (*Clapper*, 2013 WL 673253 at *9 n.4) that might reveal facts that would support *different* standing allegations—allegations of actual, not potential future, surveillance. Indeed, once the Court decided that the plaintiffs' allegations of standing were constitutionally insufficient, it had no jurisdiction to proceed further. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998).

In any event, the dictum of footnote four has no application here because Congress has provided expressly for *in camera* review by this Court for the claims made by plaintiffs. 18 U.S.C. § 2712(b)(4); 50 U.S.C. § 1806(f). These congressionally-mandated procedures are not "hypothetical disclosure proceedings." *Clapper*, 2013 WL 673253 at *9 n.4. Footnote four does not address either section 2712(b)(4) or section 1806(f), each of which independently applies here.

First, plaintiffs bring claims under 18 U.S.C. § 2712. Complaint (Dkt. #1), Counts IX, XII, XV. Section 2712 creates damages claims for *any* willful violation of the Wiretap Act or the Stored Communications Act ("SCA"). 18 U.S.C. § 2712(a) (providing a cause of action against the United States for "any willful violation of this chapter [i.e., chapter 121, the SCA] or chapter 119 of this title [i.e., the Wiretap Act]").

Congress has provided that for claims under section 2712, the *in camera* review procedures of 50 U.S.C. § 1806(f) shall apply to "materials governed by" section 1806(f). 18 U.S.C. § 2712(b)(4). The materials governed by section 1806(f) are "materials relating to electronic surveillance" whose "disclosure . . . would harm the national security." 50 U.S.C. § 1806(f). Thus, Congress has directed that this Court decide the lawfulness of the surveillance alleged by plaintiffs, using section 1806(f)'s procedures to protect national security evidence.

In deciding plaintiffs' section 2712 claims, the Court will reach all of the unlawful conduct alleged by plaintiffs, since plaintiffs' section 2712 claims arise from the same facts that underlie plaintiffs' other claims. Moreover, because the Wiretap Act and the SCA prohibit the interception of communications and acquisition of communication records unless specifically authorized by the Wiretap Act, the SCA, or FISA, *any* interceptions and acquisitions contrary to the Wiretap Act, the SCA, or FISA are also Wiretap Act or SCA violations actionable under section 2712.[2] *See*, *e.g.*, 18 U.S.C. § 2511(2)(e) (exempting from the Wiretap Act's prohibitions any electronic surveillance conducted by a government officer, employee, or agent if the surveillance has been "authorized by [the Foreign Intelligence Surveillance] Act"). So in deciding plaintiffs' section 2712 claims, the Court will also be deciding whether the surveillance was authorized under the Wiretap Act, the SCA, or FISA.[3]

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[2] In more detail, the laws protecting electronic communications and communications records are framed as general prohibitions found in, respectively, the Wiretap Act and the SCA. The Wiretap Act, in 18 U.S.C. § 2511(1), generally prohibits the interception, disclosure, and use of the contents of communications; the SCA, in 18 U.S.C. § 2702(a)(3), prohibits any disclosure of communication records to the government. These general prohibitions of the Wiretap Act and the SCA are then subject to detailed exceptions set forth in the Wiretap Act (*see* 18 U.S.C. §§ 2511(2), 2518), the SCA (*see* 18 U.S.C. § 2703(c)), and in FISA (*see* 50 U.S.C. §§ 1804, 1805). For example, the Wiretap Act, the SCA, and FISA authorize court orders for obtaining communications and records otherwise protected by the Wiretap Act or the SCA. Finally, the Wiretap Act and FISA each contain parallel catch-all provisions additionally prohibiting any interception of electronic communications or "electronic surveillance" (which includes acquisition of communication records) not affirmatively authorized by the Wiretap Act, the SCA, or FISA. 18 U.S.C. § 2511(f); 50 U.S.C. § 1812. Thus, any government interception of domestic electronic communications or acquisition of communications records, or disclosure or use of that information, that is not authorized by one of the express exceptions found in FISA, the Wiretap Act, or the SCA violates the general prohibitions found in the Wiretap Act and the SCA and is therefore actionable under section 2712 as a Wiretap Act or SCA violation.

[3] Previously, the government has argued that, contrary to its plain language, section 2712 does not include "any willful violation" of the Wiretap Act or the SCA, but extends only to those violations involving the use or disclosure of information. The government's rewriting of section 2712 would exclude violations involving the interception or acquisition of information. Dkt. #102 at 8-9. As plaintiffs explained at the hearing, the government's contention not only contradicts section 2712's plain language but is based on its fundamental misreading of the Patriot Act's legislative history, which in fact does not address section 2712.

In particular, the government is wrong in its claim that Rep. Barney Frank proposed section 2712 and intended it to reach only the use and disclosure of intercepted communications and records. Dkt. #102 at 8-9. Rep. Frank did *not* propose the language that became section 2712; instead, he

(*footnote continued on following page*)

Second, the plain language of section 1806(f) itself reaches plaintiffs' claims even apart from section 2712(b)(4). As explained in detail in plaintiff's briefs, the *in camera* procedure of section 1806(f) applies whenever the government asserts that disclosure of information relating to electronic surveillance might harm national security, regardless of the nature of the underlying claims at issue. *See* Dkt. # 83 at 12-22; Dkt. # 112 at 3-13.

Because the *Clapper* dictum in footnote four does not, and had no reason to, address claims or procedures under section 2712 or section 1806(f), that footnote has no relevance here. *Clapper's* failure to address section 2712 and section 1806(f) is unsurprising, as the *Clapper* plaintiffs brought no claim under section 2712 and those provisions were beyond the scope of the question presented in the certiorari petition and were not briefed by the parties.

(*footnote continued from previous page*)
proposed a quite different amendment that would not only have created new prohibitions against the unlawful use or disclosure of information but also would have waived sovereign immunity for claims against the United States—including interception claims—under the pre-existing civil liability provisions of 18 U.S.C. § 2520 (the Wiretap Act), 18 U.S.C. § 2707 (the SCA), and 50 U.S.C. § 1810 (FISA). *See* H. Rep. 107-236 at pp. 10-13, 42, 95-96, 100-101, 304-307 (reproduced as Ex. B to Dkt. # 131).

The version of the Patriot Act that the House Judiciary Committee considered and debated was a bill known as H.R. 2975. Rep. Frank's amendment was included in the version of H.R. 2975 that the House Judiciary Committee approved and that was the subject of H. Rep. 107-236, an item of legislative history upon which the government relies. *See* H. Rep. 107-236 at pp. 10-13 (reproduced as Ex. B to Dkt. # 131). However, the Judiciary Committee version of H.R. 2975 that included Rep. Frank's amendment had nothing similar to section 2712 in it. (Because H.R. 2975 did not include section 2712, the Judiciary Committee report (H. Rep. 107-236) said nothing about section 2712.)

The Judiciary Committee version of H.R. 2975 was never enacted. Instead, on the House floor, it was gutted and the text of H.R. 3108, a different bill that did include the language of section 2712, was substituted for the Judiciary Committee's version of H.R. 2975 in its entirety. 147 Cong. Rec. 19635-19636, 19649 (2001). Rep. Frank objected to the substitution and voted against it. 147 Cong. Rec. 19634, 19649 (2001) (at 19634: "[I]t turned out we were engaged in a game of bait and switch, because once the committee bill came forward, it was dumped; and we have today an outrageous procedure: a bill drafted by a handful of people in secret, subjected to no committee process, comes before us immune from amendment.") Ultimately, it was yet another House bill, H.R. 3162, which also included the language of section 2712, that was enacted as the Patriot Act, Pub. L. No. 107-56, 115 Stat. 272.

The government's unfounded assertion, Dkt. # 139 at 4, that the *Clapper* Court in footnote four "rejected" section 1806(f) is wholly fanciful. Nor, contrary to the government's suggestion, Dkt. # 139 at 5, does footnote four "confirm" that the common-law state secrets privilege supersedes section 1806(f). *Clapper* says nothing about section 1806(f) or the state secrets privilege. In section 2712(b)(4) and section 1806(f), Congress unequivocally mandated that courts use *in camera* proceedings in electronic surveillance cases to protect evidence whose disclosure might harm national security, while using that evidence to decide those cases on the merits. The *Clapper* dictum cannot, and was not intended to, override the will of Congress expressed in these statutes.

The government's argument that plaintiffs will never be able to prove up their standing allegations ignores not only section 2712(b)(4) and section 1806(f) but also plaintiffs' non-secret evidence establishing the interceptions, including the Klein and Marcus declarations and accompanying documents. For seven years, counsel for the government has been dismissively disparaging plaintiffs' evidence, particularly the Klein and Marcus declarations. Aspersions are not evidence, however, and lawyers are not witnesses. The government has never come forward with any *evidence* rebutting the detailed and specific facts set forth in those declarations. The government defendants likewise ignore in their supplemental brief plaintiffs' Rule 56(d) declaration (Dkt. # 114) and the fact that plaintiffs have not yet had the opportunity to take any discovery.

Finally, the *Clapper* dictum is inapplicable here for yet another reason. The *Clapper* Court hypothesized in footnote four that if, in a case like *Clapper* where standing depends on whether the plaintiff or someone they communicate with is a target of surveillance, the government had the burden of disclosing who it was targeting in order to resolve the issue of standing, then a terrorist could determine whether he is a target of surveillance simply by bringing suit. Plaintiffs' claims raise no such concerns and fall outside the hypothetical addressed in the *Clapper* dictum because they are claims alleging *untargeted* surveillance that do not require any proof that anyone was targeted or any proof of whose communications the government may have later selected out of the

millions caught in the dragnet. Unlike the *Clapper* plaintiffs, the *Jewel* plaintiffs' standing is not based on the theory that they are communicating with someone targeted for surveillance.

As explained in plaintiffs' briefs and at the hearing, plaintiffs do not need to and do not seek to prove who is a target. The violations plaintiffs allege are complete upon the government's initial, *untargeted* mass acquisition of the communications and records of plaintiffs and millions of others of Americans. What the government does with those communications and records *after* acquisition is not an element of plaintiffs' claims, and a ruling on the merits in plaintiffs' favor would reveal nothing about who the government is targeting or require the government to "reveal[] details of its surveillance priorities." *Clapper*, 2013 WL 673253 at *9 n.4. This fact also explains why the government's state secrets declarations are irrelevant to the extent they assert the privilege over evidence that would reveal the identities of the targets of government surveillance and then seek to justify dismissal on the basis of potential harms that might occur from that revelation. No such information is at issue in this lawsuit. Quite simply, a terrorist could not use a lawsuit like plaintiffs'—alleging only untargeted surveillance—to discover whether he was the target of surveillance.

V. Conclusion

Plaintiffs' motion for partial summary judgment should be granted and the government defendants' motion to dismiss and for summary judgment should be denied.

DATE: March 13, 2013

Respectfully submitted,

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