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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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' OPPOSITION TO GOVERNMENT DEFENDANTS' REQUEST TO STAY LITIGATION** Courtroom 11, 19th Floor The Honorable Jeffrey S. White

INTRODUCTION

Currently under submission and awaiting decision by the Court is plaintiffs' motion for partial summary judgment, seeking a determination that the procedures of 50 U.S.C. § 1806(f) ("section 1806(f)") for handling national security evidence govern this lawsuit. Dkt. #83. Also under submission is the government defendants' motion seeking dismissal of plaintiffs' lawsuit or summary judgment on grounds of the state secrets privilege and sovereign immunity. Dkt. #102. The motions were heard and submitted on December 14, 2012.[1] Dkt. #132.

On June 7, 2013, without any prior notice to or discussion with plaintiffs, the government defendants filed a request that the Court stay indefinitely its decision of both motions currently under submission—plaintiffs' motion as well as the government defendants' motion.[2] Dkt. #142 ("Defendants' Notice And Request That The Court Hold The Pending Cross-Motions For Summary Judgment In Abeyance"). The basis for the government defendants' stay request is recent "media reports concerning alleged surveillance activities" and the government's resulting declassification of information relating to its electronic surveillance program. *Id*. at 2. The effect of granting defendants' request would be to stay the litigation entirely, for if both motions are stayed nothing will move forward in the lawsuit. Defendants do not propose any date certain by which the stay would end; the only future event they propose is the parties' submission of a status report on July 12, 2013. *Id*.

The government defendants' request for an open-ended stay lacks merit. It is only the latest step in the government's so-far entirely successful effort over the past seven years to evade any adjudication of the legality of the electronic surveillance it has been engaging in since October 2001.

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[1] On February 27, 2013 (Dkt. #138), the Court ordered the parties to submit supplemental briefs on the effect, if any, of the Supreme Court's decision in *Clapper v. Amnesty International USA*, __ U.S. __, 2013 WL 673253 (Feb. 26, 2013). The government defendants filed their brief on March 6, 2013 (Dkt. #139); plaintiffs filed theirs on March 13, 2013 (Dkt. #140).

[2] The Northern District Local Rules require that "[a]ny written request to the Court for an order must be presented by means of" either a noticed motion or a stipulation. N.D. Cal. Local R. 7-1. Defendants' stay request is neither.

The government defendants' filing leaves the Court in the dark as to the recent disclosures which it relies on as the basis for its stay request, providing only the webpage address of a statement by Director of National Intelligence James Clapper admitting the government's untargeted dragnet collection of communications records and authenticating an order of the Foreign Intelligence Surveillance Court (the "FISC Order") directing the suspicionless seizure of all Verizon call records. Plaintiffs, in the accompanying Declaration of Thomas E. Moore III, submit DNI Clapper's statement; the FISC Order; statements confirming and discussing the government's untargeted dragnet collection of the communications records of hundreds of millions of Americans made by President Barak Obama, former Director of the NSA General Michael Hayden, Senator Dianne Feinstein, Senator Saxby Chambliss, Senator Harry Reid, and Rep. James Sensenbrenner; and a government document confirming the interception of communications content from fiber-optic cables.

These disclosures, while significant evidence proving the merits of plaintiffs' claims, provide no basis or reason for delaying the decision of *plaintiffs'* section 1806(f) motion. The question of whether the procedures of section 1806(f) govern the use of national security evidence in this action is a legal question, and an easy one, for Congress has expressly so provided. The issue is a threshold one that must be decided before the state secrets issues raised by the government defendants' motion, for if it is determined that section 1806(f)'s procedures apply to plaintiffs' claims, the common-law state secrets privilege no longer applies and the government defendants' state secrets motion becomes moot. Judicial economy will thus be served by proceeding to decide the section 1806(f) issue without delay. If plaintiffs' motion is granted, the further proceedings related to the government defendants' state secrets motion that defendants' stay request contemplates will be unnecessary. The section 1806(f) issue is also one that plaintiffs first tendered for decision over seven years ago. Plaintiffs' present motion has been pending for almost a year. In the interests of justice, it should be decided as expeditiously as possible.

By contrast, the recent disclosures have greatly undermined the factual and legal basis for the *government defendants'* separate and distinct state secrets motion. The dragnet collection of communications records that plaintiffs allege and that the government claimed in its motion was

secret has now been publicly acknowledged and discussed in detail. The disclosures have also further confirmed the existence of the technical means for government surveillance underlying plaintiffs' content interception claims.

Once the Court decides plaintiffs' section 1806(f) motion, it will be in a position to sensibly determine what further proceedings, if any, are appropriate with respect to the government defendants' state secrets motion. If the Court grants plaintiffs' section 1806(f) motion, none will be necessary.

Finally, the government defendants' sovereign immunity motion is unaffected by the recent disclosures, and the Court should proceed to decide it in conjunction with plaintiffs' section 1806(f) motion.

THE GOVERNMENT DEFENDANTS' REQUEST TO INDEFINITELY STAY THE LITIGATION MUST BE REJECTED

I. Judicial Economy And Fundamental Justice Require That The Court Proceed To Decide Plaintiffs' Section 1806(f) Motion

The government defendants fail to demonstrate good cause for indefinitely staying the Court's decision of plaintiffs' section 1806(f) motion. Indeed, defendants fail to present any argument at all as to why the recent disclosures would justify staying plaintiffs' section 1806(f) motion.

Plaintiffs' section 1806(f) motion seeks a ruling that the procedures of section 1806(f) govern the use in this lawsuit of evidence whose disclosure the government asserts would harm national security, i.e., evidence as to which the government asserts the state secrets privilege. Section 1806(f) is Congress' displacement of the common-law state secrets privilege in cases involving electronic surveillance. The procedures of section 1806(f) govern this action for two independent reasons: *First*, plaintiffs bring claims under 18 U.S.C. § 2712. Subdivision (b)(4) of section 2712 mandates that the procedures of section 1806(f) govern state-secret evidence in cases like plaintiffs asserting claims under section 2712. Dkt. #112 at 5-6; #140 at 5-6. *Second*, section 1806(f) by its own force applies to lawsuits asserting claims for unlawful electronic surveillance. Dkt. #83 at 12-22; #112 at 3-13; #140 at 7.

The section 1806(f) issue presented by plaintiffs' motion is essentially a question of law: Do the procedures of section 1806(f) govern the use of national security evidence for the electronic surveillance claims raised by plaintiffs in their lawsuit? The recent disclosures, while further demonstrating the merits of plaintiffs' claims, do not speak to that discrete legal issue and provide no reason for delaying a decision of it.

Judicial economy will be served by the Court proceeding to decide the section 1806(f) issue raised by plaintiffs' motion. As plaintiffs explained in their opposition last year to the government's previous stay motion: "As a matter of logic and judicial efficiency, the section 1806(f) issue is a threshold one that must be decided before the Court can reach the question of whether the state secrets privilege requires dismissal of plaintiffs' claims . . . . If the Court concludes that section 1806(f) displaces the state secrets privilege, then it would have been a waste of time and effort for the parties to have briefed how the state secrets privilege impacts the case." Dkt. #97 at 11 (filed July 23, 2012).

All of that remains true today. If plaintiffs' section 1806(f) motion is granted, it will moot the government defendants' state secrets motion. The further briefing or other proceedings on the government defendants' motion that the stay request contemplates will be unnecessary, saving the time and efforts of the parties and the Court. If plaintiffs' motion is denied, the Court's order is likely to provide guidance for the parties in subsequent proceedings.

The open-ended delay requested by the government defendants, in addition to disserving judicial economy, would be highly prejudicial to plaintiffs. It was *seven years ago*, in the related case of *Hepting v. AT&T* (to which the United States was a party), that plaintiffs first tendered the section 1806(f) issue to the Court for decision. Dkt. #192 in *Hepting v. AT&T*, No. 06-CV-0672-VRW (N.D. Cal., filed June 8, 2006). The issue was never decided in *Hepting*.

It was *four years ago* in this lawsuit that plaintiffs presented the section 1806(f) issue to the Court for decision. Dkt. #29 (filed June 3, 2009). Since that time, one plaintiff, Mr. Gregory Hicks, has died awaiting justice from this Court. Dkt. #123.

The present motion has been pending for almost a year. Dkt. #83 (filed July 2, 2012). Shortly after plaintiffs filed their present motion, the government defendants moved to stay

plaintiffs' motion on the ground that in the pending *Al-Haramain v. Obama* appeal the Ninth Circuit might rule on the applicability of section 1806(f) to electronic surveillance claims. Dkt. #94 (filed July 11, 2012).

Over plaintiffs' strong objections (Dkt. #97), the Court granted the government defendants' stay motion and stayed plaintiffs' motion. Dkt. #98. As plaintiffs correctly predicted in their opposition (Dkt. #97 at 6-7), the stay proved a waste of time, for the Ninth Circuit said nothing at all about section 1806(f) in *Al-Haramain v. Obama*, 705 F.3d 845 (9th Cir. 2012).

It is long past time for a decision of the section 1806(f) issue presented by plaintiffs' motion. Any further stay would be unjust and unconscionable. Accordingly, the government defendants' request to stay decision of plaintiffs' section 1806(f) motion should be denied.

II. Because The Recent Disclosures Have Undermined The Government Defendants' State Secrets Motion, The Court Should Address The Question Of Further Proceedings On The Government Defendants' Motion After It Has Decided Plaintiffs' Motion

By contrast, the recent disclosures relate directly to the government defendants' motion. Those disclosures have greatly undermined the factual and legal basis for defendants' state secrets privilege arguments. The government defendants essentially acknowledge this by bringing their stay request.

The government defendants' motion contends that the state secrets privilege, not section 1806(f), governs national security evidence in this lawsuit. It seeks to dismiss plaintiffs' action on the ground that the state secrets privilege applies here and will preclude plaintiffs from proving their standing, will prevent the government from proving an unspecified defense, and extends so broadly that any litigation will inevitably disclose secret matters. Dkt. #102 at 18-28; #119 at 6-12. Plaintiffs contend that section 1806(f) displaces the state secrets privilege in their lawsuit and, even if it did not, that the government has not meet its burden of showing, before any discovery has occurred, that it is impossible for plaintiffs to prove their standing and other elements of their claims using non-secret evidence, including the Klein and Marcus declarations and other public disclosures; that the government's privilege assertion is procedurally defective and substantively insufficient; that the government has not shown as it must that it has a *valid* defense that the state secrets privilege prevents it from proving; and that because plaintiffs' claims are

based on *untargeted* surveillance they can safely be litigated without disclosing the identities of persons or threats targeted for surveillance. Dkt. #112 at 14-30.

The recent disclosures and admissions set forth in the Moore Declaration show that the communications records program alleged by plaintiffs is no longer secret and that the government has waived any state secrets privilege as to it:

1. The FISC Order authorizing the wholesale acquisition of *all* call data records, communications metadata, and other communications records from calls transiting Verizon's network. Moore Declaration, Ex. A. Subsequent reports have confirmed that other carriers, including AT&T, are subject to similar dragnet orders for their communications records. Moore Declaration, Exs. B, C, D, E, F, I, J, K.

2. DNI Clapper's statement confirming the authenticity of the FISC Order and the existence and scope of the communications records collection dragnet. DNI Clapper said "[t]he judicial order that was disclosed in the press is used to support a sensitive intelligence collection operation" that is "broad in scope."[3] Moore Declaration, Ex. B; *see also id*., Ex. C.

[3] DNI Clapper's statement, in addition to admitting the existence and scope of the untargeted dragnet of communications records, also contradicts his testimony on these matters just three months ago before Congress. Moore Declaration, Ex. B. On March 12, 2013, DNI Clapper testified at a hearing before the Senate Select Committee on Intelligence. Senator Ron Wyden asked DNI Clapper point blank: "Does the NSA collect *any type of data at all* on millions or hundreds of millions of Americans?" DNI Clapper responded: "***No sir***." Senator Wyden: "It does not?" DNI Clapper: "Not wittingly. There are cases where they could inadvertently perhaps collect but not—not wittingly." *Id*., ¶ 10 (emphasis added). DNI Clapper's new admission to the contrary that the NSA collects the communications records of millions of Americans reveals his testimony before Congress to have been false. *Id*., Ex. B (admitting the untargeted communications records dragnet is an "intelligence collection operation").

DNI Clapper's self-serving attempt in a TV interview a few days ago to explain his testimony by saying he answered Senator Wyden's question by applying his own private understanding to Senator Wyden's use of the word "collect" is itself hard to credit. Moore Declaration, Ex. C. From the context of Senator Wyden's question it is clear that that Senator Wyden was using "collect" in its ordinary, everyday meaning. *Id*., ¶ 10. Indeed, in describing the communications records program in his June 6, 2013 statement, DNI Clapper used the very same word—"collection." *Id*., Ex. B ("intelligence collection operation;" "The collection is broad in scope;" "The FISA Court specifically approved this method of collection"). In any event, Senator Wyden has subsequently explained that he told DNI Clapper before the hearing that he would be asking the question and then offered DNI Clapper the opportunity after the hearing to correct his answer but DNI Clapper chose not to. *Id*., Ex. L. DNI Clapper had every opportunity to make his meaning clear at the time of the hearing.

3. President Obama's statement confirming the existence of the untargeted dragnet collection of communications records. "[W]hat the intelligence community is doing is looking at phone numbers and durations of calls;" "this so-called metadata." Moore Declaration, Ex. I.

4. Statements by members of Congress confirming the ongoing dragnet acquisition of communications records. Senator Feinstein, Chairman of the Senate Select Committee on Intelligence, Vice-Chairman Senator Chambliss, and Senate Majority Leader Reid each confirmed that similar FISC orders directing the dragnet collection of communications records have been renewed every three months for the past seven years. Moore Declaration, Exs. D, E. (Before that, the records dragnet lacked any authorization from the FISC and was conducted by order of President Bush as part of the President's Surveillance Program.)

5. Statements by House Judiciary Committee Chairman Rep. James Sensenbrenner, co-author of the Patriot Act amendments to FISA which the FISC Order rests upon. He stated: "I do not believe the released FISA order is consistent with the requirements of the Patriot Act. How could the phone records of so many innocent Americans be relevant to an authorized investigation as required by the Act?" Moore Declaration, Ex. G. He also said: "Seizing phone records of millions of innocent people is excessive and un-American." *Id*., ¶ 6. "[B]oth the administration and the Fisa court are relying on an unbounded interpretation of the [Patriot] act that Congress never intended." *Id*., Ex. H.

6. Statements by former NSA Director General Hayden confirming the existence and scope of the untargeted dragnet collection of communications records. "[W]hat happens there has been made now very clear by Director Clapper that the United States government—the National Security Agency—is acquiring as business records, not collecting on a wire anywhere, but acquiring as business records the metadata of foreign and domestic phone calls here in the United States. And that constitutes billions of events per day." He continued: "So, NSA gets these records and puts them away, puts them in files." Moore Declaration, Ex. J; *see also id*., Ex. K.

The recent disclosures have also substantiated the existence of the technical means for government surveillance underlying plaintiffs' content interception claims. The disclosures include a government document discussing the government's surveillance capability for the

"Collection of communications on fiber cables and infrastructure as data flows past." Moore Declaration, Ex. P. The AT&T splitter operations in San Francisco and other American cities described in the Klein Declaration (Dkt. #84, #85, #122) and its exhibits and in the Marcus Declaration (Dkt. #89) collect communications on fiber-optic cables as data flows past.

In light of the recent disclosures, there is no longer any argument that the massive communications records dragnet is a secret. Similarly, the government's claims of secrecy in the content interception program are undermined by the government document admitting that the government engages in the "[c]ollection of communications on fiber cables and infrastructure as data flows past." Moore Declaration, Ex. P.

Although the recent disclosures eviscerate the government's state secrets motion, that is no reason for staying the entire litigation. To the contrary, as explained in the preceding section, judicial economy, and justice itself, are best served by proceeding forward with deciding plaintiffs' section 1806(f) motion because it may obviate the need to ever address the state secrets privilege issues raised by defendants. Once the Court decides plaintiffs' 1806(f) motion, it can make a reasoned judgment as to what, if any, further briefing or other proceedings are necessary on the state secrets privilege issues raised by the government.[4]

Finally, the government defendants' motion makes a meritless sovereign immunity argument for dismissal of plaintiffs' claims. The recent disclosures are irrelevant to defendants' sovereign immunity argument, and the Court should go forward with deciding that issue as well.

CONCLUSION

The Court should decisively reject the government defendants' gambit to plunge plaintiffs' motion, and the entire lawsuit, into a state of suspended animation simply because *their* motion now lies in tatters. For the past five years, this lawsuit has inched forward at less than a snail's pace. Defendants have yet to answer plaintiffs' complaint. Meanwhile, the abuses and illegal

[4] It is worth noting that the recent disclosures are all of facts long known to the government. This is not a situation where a party is surprised by the disclosure of facts it never knew existed and needs time to digest reality.

invasions of the privacy of plaintiffs and millions of other Americans continue unabated and unadjudicated. It is time to end the delay, not extend it.

The recent disclosures reaffirm that the essential issues in this lawsuit are legal ones—profound questions regarding the rights of Americans to be free from untargeted, unwarranted, and unlawful government surveillance—that can be safely debated by the parties and resolved by this Court without any access to, much less any revelation of, the identities of the government's surveillance targets or the nature and details of the threats the government is seeking to thwart. *See* Dkt. #112 at 21-22, 24, 26-27; #140 at 8-9. Plaintiffs are entitled to their day in court to pursue the judicial remedies Congress has created for unlawful surveillance and to challenge the shifting secret legal theories, untested by any adversary proceedings, used over the past 12 years to justify the dragnet surveillance program within the echo chamber of the Executive Branch.

Notably, the President of the United States stated in his remarks on the recent disclosures that he "welcome[s] this debate" about the legality of the government's dragnet surveillance activities. Moore Declaration, Ex. I. This full and open debate should go forward as expeditiously as possible, and the first matter to be decided is plaintiffs' section 1806(f) motion. The government defendants' request to stay plaintiffs' motion should be denied. The Court should proceed to decide plaintiffs' section 1806(f) motion, as well as the sovereign immunity issue raised by defendants' motion. Once the Court has decided plaintiffs' motion and the sovereign immunity issue, it should thereafter address the question of whether supplemental briefing or other proceedings on defendants' state secrets motion are necessary. Plaintiffs have submitted herewith a proposed order to this effect.

DATE: June 13, 2013

Respectfully submitted,

s/ Richard R. Wiebe

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