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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HUMAN RIGHTS WATCH,

Plaintiff,

v.

DRUG ENFORCEMENT ADMINISTRATION et al.,

Defendants.

NO. CV 2:15-2573 PSG (JPR)

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Hearing Date: August 17, 2015
Hearing Time: 1:30 p.m.
Courtroom: 880

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INTRODUCTION

Plaintiff seeks to challenge a purported Drug Enforcement Administration ("DEA") scheme involving bulk collection of telephony metadata, pursuant to 21 U.S.C. § 876, for calls originating in the United States and calling designated foreign countries, including Iran. In bringing its First and Fourth Amendment claims for declaratory and injunctive relief, however, Plaintiff ignores the fact that this alleged scheme, whatever its past contours may have been, is indisputably no longer in existence. Indeed, the very document on which Plaintiff relies to assert existence of this collection scheme – a declaration by a DEA special agent that was submitted in a criminal case – itself states that the metadata collection that it described had ceased in 2013. And a second declaration from the same special agent, attached hereto, confirms that the database where the metadata was stored had been purged before Plaintiff filed suit, and no longer exists. The Article III limits on standing do not allow a plaintiff to use litigation to try to stop something that is simply not occurring, nor does Article III permit advisory opinions regarding the constitutionality of past government action when there is no reason to assume such action will recur.

In the recent decision *Clapper v. Amnesty International, USA*, 133 S. Ct. 1138, 1147 (2013), the Supreme Court reaffirmed that only a "certainly impending" injury satisfies standing requirements when a plaintiff seeks only prospective relief, yet here even Plaintiff's allegations of past injury amount to pure speculation, not to mention Plaintiff's attempt to manufacture a future injury simply by stating – in bald contradiction of the DEA declaration that it cites – that the DEA continues to collect telephony metadata in bulk, including metadata associated with Plaintiff's calls. Plaintiff's further attempt to rely on the purported "chill" in the communications of its associates in other countries as a basis for injury must also be rejected under *Amnesty International*, which recognized that such a subjective chill, wholly untethered to any actual government conduct, is not

fairly traceable to the challenged metadata collection scheme – all the more so here, where no collection is actually taking place. And of course, an order by this Court enjoining or declaring unconstitutional a nonexistent collection scheme cannot redress Plaintiff's asserted injuries. To the contrary, such an order would have no effect whatsoever. This Court therefore lacks subject matter jurisdiction over Plaintiff's claims, and this action should accordingly be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

BACKGROUND

On December 14, 2014, the United States submitted a declaration under seal to a federal district court in a criminal proceeding, *United States v. Hassanshahi*, Cr. No. 13-274 (D.D.C.). A lightly redacted version of that declaration, by Robert Patterson, Assistant Special Agent in Charge at the DEA, was then filed on the public docket in that case in January 2015. *See* Compl. ¶ 27; Declaration of Robert Patterson ("Patterson Dec."), Compl. Ex. A.[1] Agent Patterson's declaration described a database, no longer in use at the time, that had held telecommunications metadata obtained by the DEA through administrative subpoenas, issued prior to September 2013 to unidentified telecommunications service providers under 21 U.S.C. § 876. Patterson Dec. ¶ 4. The metadata in the database related to international telephone calls from the United States to Iran, and to other unspecified foreign countries that "were determined to have a demonstrated nexus to international drug trafficking and related criminal activities." *Id.* The metadata "consisted exclusively of the initiating telephone number; the receiving telephone number; the date, time, and duration of the call; and the method by which the call was billed." *Id.* It did not include any "subscriber

[1] The court in *Hassanshahi* had ordered the United States to provide an ex parte declaration in order to describe the nature of the database previously identified as having been queried in August 2011 in connection with a law enforcement investigation conducted by Homeland Security Investigations. *See* Mem. Opinion of Dec. 1, 2014, *Hassanshahi*, Dkt. 45; Patterson Dec. ¶¶ 2, 5.

information or other personal identifying information," nor did it include the content of the communications. *Id.*

Prior to September 2013, this DEA database "could be used to query a telephone number" based on "a reasonable articulable suspicion that the telephone number at issue was related to an ongoing federal criminal investigation." Patterson Dec. ¶¶ 5, 6. The query that resulted in the identification of a telephone number that was later identified as belonging to Hassanshahi was based on "specific information indicating that the Iranian number [used for the query] was being used for the purpose of importing technological goods to Iran in violation of United States law." *Id.* ¶ 5.

Agent Patterson also reported in his declaration in the *Hassanshahi* case that use of the DEA database was suspended in September 2013. *Id.* ¶ 6; Compl. ¶ 37. Thus, the database was "no longer being queried for investigatory purposes, and information [wa]s no longer being collected in bulk pursuant to 21 U.S.C. § 876." Patterson Dec. ¶ 6; Compl. ¶ 37.

Plaintiff nevertheless filed suit on April 7, 2015, seeking to enjoin the DEA, as well as the Federal Bureau of Investigation ("FBI"), Department of Justice ("DOJ"), Department of Homeland Security ("DHS"), and 100 other as-yet unidentified persons, officers, or entities "from continuing" what it calls "the Mass Surveillance Program," and "from future search, use, or dissemination of any of Plaintiff's call records obtained through the Mass Surveillance Program." Compl. at 16-17. Plaintiff also asks the Court to order that Defendants first "inventory" and then "purge all Plaintiff's call records obtained through the Mass Surveillance Program." *Id.* Plaintiff also seeks a declaration that "the Mass Surveillance Program violates Plaintiff's rights under the First and Fourth Amendments." *Id.* at 16.

A second declaration by Agent Patterson, attached hereto, explains that "[p]rior to April 7, 2015, the date of the Complaint in the above-captioned case, the

database had been purged of the collected data, and the database no longer exists." Declaration of Robert W. Patterson ("Second Patterson Dec.") ¶ 3, attached hereto as Exhibit A.

STANDARD OF REVIEW

Defendants move to dismiss Plaintiff's claims under Rule 12(b)(1) for lack of subject matter jurisdiction, on the ground that Plaintiff has failed to establish standing. In reviewing a motion to dismiss under Rule 12(b)(1), a court is guided by the principle that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Thus, a court is "presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears," *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir.1989), and the plaintiff bears the burden of establishing that such jurisdiction exists. *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936); *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001).

A court can review a Rule 12(b)(1) motion to dismiss for lack of standing as either a facial or a factual attack on subject matter jurisdiction. *City of Los Angeles v. Citigroup Inc.*, 24 F. Supp. 3d 940, 945 (C.D. Cal. 2014) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.2000)). When considering standing based on the face of the complaint, the standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), apply in full force. *See City of Los Angeles*, 24 F. Supp. 3d at 945 (citing *Perez v. Nidek Co.*, 711 F.3d 1109, 1113 (9th Cir. 2013); *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012)). Thus, a complaint must allege "sufficient factual matter [in support of Article III standing], accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U .S. at 570). "[C]onclusory and barebones" allegations in a complaint are insufficient to establish standing and cannot withstand a motion to dismiss. *Perez*, 711 F.3d at

1113.

Documents attached to the complaint, or whose contents are alleged in the complaint, are deemed part of the complaint for purposes of this review. *Hal Roach Studios v. Richard Reiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). Such documents may be examined in their entirety for purposes of assessing the plausibility of other assertions in a complaint, and a court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (internal quotation omitted); *cf. City of Roseville Employees' Retirement Sys. v. Sterling Fin. Corp.*, 963 F. Supp. 2d 1092, 1107 (E.D. Wash. 2013) (recognizing that, under the stricter 12(b)(6) standard, even documents that are not physically attached but are deemed incorporated by reference are "assumed to be true for purposes of a motion to dismiss, and both parties – and the Court – are free to refer to any of [the] contents" of such documents).

A court may also look beyond the complaint when a motion to dismiss under Rule 12(b)(1) presents a factual attack on standing. *White*, 227 F.3d at 1242–43 (affirming judicial notice of matters of public record in Rule 12(b) (1) factual attack). The court's review in such a case "is not restricted to the pleadings"; rather, the court "may review extrinsic evidence to resolve any factual disputes which affect jurisdiction." *Shloss v. Sweeney*, 515 F. Supp. 2d 1068, 1074 (N.D. Cal. 2007) (citing *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988)); *see also Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (recognizing that a district court may consider evidence presented regarding jurisdiction at the motion to dismiss stage). Moreover, the court "need not presume the truthfulness of the allegations in the complaint." *City of Los Angeles*, 24 F. Supp. 3d at 945 (citing *White*, 227 F.3d at 1242).

ARGUMENT

I. PLAINTIFF LACKS STANDING

A. The Requirements of Article III Standing

"The judicial power of the United States" is limited by Article III of the Constitution "to the resolution of 'cases' and 'controversies,'" *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982), and the demonstration of a plaintiff's standing to sue "is an essential and unchanging part of the case-or-controversy requirement," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The standing inquiry must be "especially rigorous" when reaching the merits of a claim would force a court to decide the constitutionality of actions taken by a coordinate Branch of the Federal Government. *Amnesty Int'l*, 133 S. Ct. at 1147. "A plaintiff must demonstrate standing 'for each claim he seeks to press' and for 'each form of relief sought.'" *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). Thus, to establish standing for its First and Fourth Amendment claims here, for which Plaintiff seeks only injunctive and declaratory relief, Plaintiff must identify for each an injury in fact, fairly traceable to the challenged actions of the Defendants and redressable by a favorable ruling, that is "concrete, particularized, and actual or imminent." *Id.*

Because Plaintiff does not seek damages, "it is not the presence or absence of a *past* injury that determines Article III standing." *Ervine v. Desert View Regional Med. Ctr. Holdings, LLC*, 753 F.3d 862, 868 (9th Cir. 2014) (emphasis added) (internal quotation omitted). Rather, it is "the imminent prospect of future injury." *Id.* (internal quotation omitted). Such a future injury "must be certainly impending to constitute injury in fact," whereas "allegations of *possible* future injury are not sufficient." *Amnesty Int'l*, 133 S. Ct. at 1147.

Applying this analysis in *Amnesty International*, the Supreme Court determined that plaintiffs making a facial challenge to Section 702 of the Foreign

Intelligence Surveillance Act, 50 U.S.C. § 1881a, lacked standing because they could "only speculate" that the National Security Agency ("NSA") might collect or review any of their communications, or that it would do so under the authority of Section 702. *Amnesty Int'l*, 133 S. Ct. at 1148-49. The Court recognized that a future injury that required a "highly attenuated chain of possibilities" could not be deemed "certainly impending," nor would such an injury be "fairly traceable" to the challenged statute. *Id.* at 1148.

As discussed below, as in *Amnesty International*, Plaintiff in this case has failed to assert plausible allegations of a certainly impending injury fairly traceable to the conduct it challenges, nor are its asserted injuries redressable, and it therefore fails to satisfy Article III standing, for either its First Amendment or its Fourth Amendment claim.

B. Plaintiff Has Not Established Standing

1. Plaintiff Cannot Identify a Certainly Impending Injury

First and foremost, Plaintiff lacks standing because it has failed to set forth plausible assertions of a certainly impending injury. Plaintiff asserts that its staff uses U.S. telecommunications services, including Verizon, Google Voice, and unidentified personal phone lines, to communicate with individuals in countries that the President has certified are major drug transit and/or major illicit drug producing countries. Compl. ¶¶ 44, 46. Plaintiff further asserts that, at some point in the past, Defendants "collect[ed]" metadata associated with those calls as part of what Plaintiff calls a "Mass Surveillance Program." Compl. ¶ 48. Plaintiff also asserts that Defendants have "aggregate[ed]" the metadata for these calls such that Defendants are able to identify "the network of" and "associational connections among" Plaintiff's "sources, colleagues, and associates." Compl. ¶¶ 48-49. And Plaintiff goes on to assert that Defendants "retain" metadata collected through the so-called Mass Surveillance Program, "will continue to search and use such information," and "will begin to collect" such information again in the future,

absent an injunction. Compl. ¶ 55. As explained in detail below, these assertions are insufficient to establish an injury-in-fact, even at the pleading stage.

a. Plaintiff Has Not Shown that Metadata Associated with Its Calls Was Collected in the Past or Will Be Collected in the Future

Far from identifying a certainly impending *future* injury, Plaintiff merely speculates that telephony metadata associated with its calls might have been collected by Defendants at some point in the past. Indeed, Plaintiff's assertions as described above amount to nothing but "conclusory statements" and "bare assertions" of fact that "are not entitled to the presumption of truth" and must be "discount[ed]" in "determining whether [its] claim is plausible." *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1129 (9th Cir. 2013) (internal quotation omitted).

The full extent of Plaintiff's speculation is plain when Exhibit A of Plaintiff's Complaint is taken into account.[2] Plaintiff's Exhibit A consists of the declaration of DEA employee Robert Patterson that, as described above, was posted on the public docket of the *Hassanshahi* criminal proceeding in January 2015. *See* Patterson Dec., Compl. Ex. A. Plaintiff acknowledges that, other than unspecified "[n]ews reports," Agent Patterson's declaration is its only source of information regarding the alleged surveillance program that it seeks to challenge in this action. Compl. ¶¶ 26-27. However, that declaration did not identify any specific telecommunications company as the recipient of a DEA administrative subpoena issued pursuant to 21 U.S.C. § 876, nor did it identify any such subpoena. *See* Patterson Dec., Compl. Ex. A. Nor did the declaration identify any foreign countries, other than Iran, whose communications had been targeted by such a subpoena. *See id.* ¶ 4. The declaration also did not identify any specific time

[2] As described above, because Plaintiff attached Exhibit A to its Complaint, and relies on it extensively, this document in its entirety is considered part of the Complaint for purposes of this Motion to Dismiss and can be used to evaluate the plausibility of Plaintiff's assertions. *Sprewell*, 266 F.3d at 988.

period covered by such a subpoena, other than to explain that no metadata had been collected since September 2013. *See id.* ¶ 6.

Plaintiff's claims regarding the past collection of its telephony metadata are thus nothing more than bald conjecture. Indeed, Plaintiff fails even to allege that any member of its staff made calls from the United States to Iran – the only country specifically identified in Agent Patterson's declaration – during a time period covered by an administrative subpoena.

But even if the Court were to assume – despite an utter lack of any foundation to do so – that the database described by Agent Patterson contained telephony metadata relating to calls by Plaintiff's staff in the past, that assumption would not suffice to identify a *future* injury that is certainly impending. Following the Supreme Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), courts have uniformly recognized that a past injury alone – even where that injury was undisputed – is insufficient to show that the same harm is likely to recur in the future. *See Gordon v. City of Moreno Valley*, 687 F. Supp. 2d 930, 938 (C.D. Cal. 2009) (recognizing *Lyons* as establishing that the "likelihood of a future injury cannot be based solely on the defendant's conduct in the past").

Here, the very source that Plaintiff relies on to assert a past injury – Agent Patterson's declaration – belies any notion of a certainly impending future injury on this basis. Rather, the declaration states that telephony metadata "is no longer being collected in bulk pursuant to 21 U.S.C. § 876." Patterson Dec. ¶ 6, Compl. Ex. A; *see also* Second Patterson Dec. ¶ 3 (attached hereto) ("As of [September 2013], the data collection described above ceased, the data was quarantined, and no further queries of the data were made."). Thus, the bulk metadata collection that Plaintiff seeks to challenge ended over a year before this suit was filed. Plaintiff's reference to the possibility that "Defendants may still be collecting call record information in bulk under other authorities," Compl. ¶ 38, is by its own terms nothing but a guess. And Plaintiff's bald statement that, absent an injunction,

"Defendants . . . will begin to collect the information again, if Defendants have not already," Compl. ¶ 55, is conclusory, and the Complaint contains no supporting factual allegations that make this hypothesis plausible. Plaintiff's allegations regarding the bulk collection of telephony metadata therefore fail to identify a nonspeculative injury-in-fact.

b. Plaintiff Has Not Shown that Any Telephone Number Associated with Its Calls Was Ever Queried in the Past or Will Be Queried in the Future

Agent Patterson explains in his declarations that the DEA database that held the collected telephony metadata could be used to query a telephone number based on "a reasonable articulable suspicion that the telephone number at issue was related to an ongoing federal criminal investigation." Patterson Dec. ¶ 5, Compl. Ex. A; Second Patterson Dec. ¶ 2 (attached hereto). However, Plaintiff does not allege that any telephone number associated with it or its staff was ever queried or appeared in the results of such a query in the past. Indeed, Plaintiff's Complaint is devoid of any suggestion that any of its staff or its contacts overseas might have been a target of a federal criminal investigation, nor does Plaintiff suggest that its staff or associates had telephone contact with anyone who was such a target. Thus, Plaintiff has not even attempted to show a past injury on that basis.

Plaintiff also fails to show a certainly impending injury based on the prospect of such queries in the future. Indeed, Agent Patterson has explained that use of the DEA database "was suspended in September 2013," and that the database "is no longer being queried for investigatory purposes." Patterson Dec. ¶ 6, Compl. Ex. A; *see also* Second Patterson Dec. ¶ 3 (attached hereto) ("As of [September 2013], the data collection described above ceased, the data was quarantined, and no further queries of the data were made.").

While Plaintiff acknowledges Agent Patterson's statement in its Complaint, Plaintiff simply proceeds to assert the opposite, stating that "Defendants continue

to use and disseminate information obtained through the Mass Surveillance Program." Compl. ¶ 37. In a similar situation, a court recognized that a plaintiff's "attached documents render implausible the [plaintiff's] bare assertion" that the conduct that it sought to challenge "'continu[es] to the present,'" and thus dismissed the plaintiff's claim as barred by the applicable statute of limitations. *Figures v. Szabo*, No. 14-cv-4685, 2015 WL 2062709, at *3 (N.D. Cal. May 4, 2015). Here as well, Plaintiff's conclusory statement cannot be presumed true in the face of Agent Patterson's clear statements to the contrary. In the context of the entire Complaint, including Exhibit A, Plaintiff's assertion is implausible on its face.

Plaintiff's further assertion that "Defendants have not stated that all information" in the DEA database "has been purged," Compl. ¶ 37, contributes nothing to the plausibility of its claims. To the extent Plaintiff seeks to suggest that any speculative notion that Agent Patterson failed to refute in his first declaration must, as a result, be presumed true, such a contention flies in the face of the Supreme Court's analysis of plausibility in *Twombly* and *Iqbal*. The mere absence of a particular statement in Agent Patterson's declaration cannot possibly give rise to a "reasonable inference" of the opposite. *See Iqbal*, 556 U.S. at 678 (requiring that a plaintiff affirmatively set forth "sufficient factual matter" to establish plausibility). In any event, Agent Patterson's second declaration plainly states that "[p]rior to April 7, 2015, the date of the Complaint in the above-captioned case, the database had been purged of the collected data, and the database no longer exists." Second Patterson Dec. ¶ 3 (attached hereto).

Agent Patterson's statements defeat Plaintiff's standing to seek prospective relief. Even if there were otherwise some basis to expect that Plaintiff, its staff, or its associates are likely to be targets of or otherwise involved in a future federal law enforcement investigation (and, as mentioned above, Plaintiff provides no basis for such an expectation), there can be no certainly impending injury arising

from the prospect that the bulk telephony metadata previously stored in the DEA database might be queried in the future when that database has been purged and no longer exists.[3]

c. Plaintiff Has Not Shown that Defendants Have "Aggregated" Information Relating to Plaintiff, or Will Do So in the Future

The speculative (and indeed false) nature of Plaintiff's claim that Defendants retain bulk telephony metadata in the DEA database also suffices to dispense with Plaintiff's further assertion that Defendants' alleged collection of such metadata somehow allows them to "aggregate" this information so as to identify a "network" of Plaintiff's "sources, colleagues, and associates," and the "associational connections" among them. *See* Compl. ¶¶ 48-49. In other words, since it is at best speculative that Defendants have any telephony metadata associated with Plaintiff's staff in the first place, it is necessarily speculative that Defendants might somehow use such metadata to identify connections between Plaintiff, its staff, and others.

But even if, despite Agent Patterson's statements to the contrary, it were

[3] Plaintiff acknowledges that DEA is the "primary agency" that carried out the bulk metadata collection described in Agent Patterson's declaration. Compl. ¶ 11. However, Plaintiff also asserts that defendants the FBI and DHS "search[], use[], disseminate[], and retain[] information obtained through" the DEA's metadata collection. Compl. ¶¶ 13, 17. While Agent Patterson has explained that DEA conducted a query of its database in August 2011 in connection with an investigation conducted by Homeland Security Investigations, *see* Patterson Dec. ¶ 3, Compl. Ex. A; Second Patterson Dec. ¶ 2 (attached hereto), nothing in Agent Patterson's declarations supports the notion that these agencies have independent access to the bulk metadata that was in the DEA database, particularly now that the database has been purged. Plaintiff's assertions are thus again pure conjecture that relies on the same kind of "attenuated chain of possibilities" that the Court rejected in *Amnesty Int'l*, 133 S. Ct. at 1148. Indeed, as indicated above, Plaintiff fails to establish that metadata relating to its calls was ever collected by DEA in the first place.

presumed that Defendants did actually retain the previously-collected bulk telephony metadata in the DEA database, the notion of aggregation as described by Plaintiff is far-fetched, at best. As Plaintiff acknowledges, Agent Patterson indicated in his first declaration that the database he identified "is no longer being queried for investigatory purposes," since September 2013, and that the database was only queried for a specific telephone number "where federal law enforcement officials had a reasonable articulable suspicion that the telephone number at issue was related to an ongoing federal criminal investigation." Compl. ¶ 37 & Ex. A ¶¶ 5-6; *accord.* Second Patterson Dec. ¶¶ 2-3 (attached hereto). Plaintiff's Complaint contains no well-pleaded, non-conclusory allegations, much less has Plaintiff adduced any evidence, that DEA or any other agency ever accessed or reviewed metadata relating to telephone calls of Plaintiff's staff in the past, or is likely to do so in the future. Thus, it is sheer speculation to suggest that metadata records of calls to or from Plaintiff's staff or associates are likely to be retrieved or reviewed through queries of the DEA database, even if it continued to exist, much less mined by DEA or any other agency to identify Plaintiff's staff or associates or the "associational connections" among them. *See Amnesty Int'l*, 133 S. Ct. at 1148 (holding that a plaintiff cannot establish standing to challenge a Government surveillance program when it is "speculative whether the Government will imminently target communications to which [the plaintiff is a] part[y]"). This notion depends on a "highly attenuated chain of possibilities" similar to that rejected by the Supreme Court in *Amnesty Internationa*l. *See id.* For all these reasons, Plaintiff simply fails to identify a certainly impending injury, and its claims are subject to dismissal on that ground alone.

2. The "Chill" that Plaintiff Posits Is Not Fairly Traceable to Defendants

Plaintiff's Complaint also suggests that its communications with individuals in other countries are burdened by the mere existence of the DEA database (assuming that the database continues to exist, which of course it does not) because these third party individuals "often fear for their physical safety," and "the mere fact of contacting an international human rights organization," like Plaintiff, "can put them in harm's way." Compl. ¶ 45. Due to these fears, Plaintiff suggests, such individuals will refuse to communicate with Plaintiff's staff if Plaintiff's staff fails to assure them "that their communications records will not be shared with American law enforcement or the government of another country." Compl. ¶ 51. Essentially, the alleged injury that Plaintiff describes here is a "chilling effect" of the DEA database on third party individuals overseas, which in turn allegedly prevents its staff from communicating with those individuals. *Cf. ACLU v. NSA*, 493 F.3d 644, 665 & n.25 (6th Cir. 2007) (opinion of Batchelder, J.) (analyzing similar claim regarding "the unwillingness of the plaintiffs' overseas contacts to communicate due to their fear that the NSA is eavesdropping").

As Judge Batchelder explained in her *ACLU* opinion, this kind of "chill" is a mere "subjective apprehension and a personal (self-imposed) unwillingness to communicate," which cannot qualify as a concrete, actual, or immediate injury even for purposes of a First Amendment claim. *Id.* at 662 (citing *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)). However, even if this allegation identified a certainly impending injury for purposes of Plaintiff's First Amendment or Fourth Amendment claims, the Supreme Court has already rejected the notion that such an injury could be deemed fairly traceable to the government. An injury "that results from the independent action of some third party not before the court" cannot fairly be traced to the challenged action of a defendant and thus fails to satisfy the causation prong of standing. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-

42 (1976). Thus, in *Amnesty International*, the plaintiffs similarly argued "that third parties might be disinclined to speak with them due to a fear of surveillance." 133 S. Ct. at 1152 n.7. However, the Court held that this assertion, even if factual, "d[id] not establish an injury that [was] fairly traceable" to the challenged statute because it was "based on third parties' subjective fear of surveillance." *Id.* (citing *Laird v. Tatum*, 408 U.S. 1, 10-14 (1972)).

The same analysis is controlling here. The burdens that Plaintiff describes "do not establish injury that is fairly traceable" to the DEA database "because they are based on third parties' subjective fear of surveillance," not on the actual operation of the bulk metadata collection program that Plaintiff seeks to challenge. *See id.*; *see also Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 950 (9th Cir. 2013) (injury cannot be "result of the independent action of some third-party not before the court") (internal quotation omitted). Indeed, the attenuated nature of such fears is even clearer here where, in fact, there is no plausible allegation that the DEA is currently conducting any bulk metadata collection; nor that the DEA continues to possess a database containing any such metadata; nor that any Defendant possesses metadata that was collected by DEA prior to September 2013 and that pertains in any way to Plaintiff, its staff, or its associates; nor that such metadata will ever be used in the way that, according to Plaintiff, these third parties might imagine. The subjective fears of these third parties (and the concomitant effect on Plaintiff) therefore furnish insufficient grounds on which to base Plaintiff's standing.

3. Plaintiff's Asserted Injuries Are Not Redressable Through This Action

Plaintiff also fails to meet the third prong of standing – the redressability requirement. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). A

plaintiff "must show a substantial likelihood that the relief sought would redress" the asserted injury. *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010) (internal quotation omitted).

Here, Plaintiff asks the Court to "[p]ermanently enjoin Defendants from continuing the Mass Surveillance Program," "[p]ermanently enjoin Defendants from future search, use, or dissemination of any of Plaintiff's call records obtained through the Mass Surveillance Program," "[o]rder Defendants to provide an inventory of all Plaintiff's call records obtained through the Mass Surveillance Program," and [o]rder Defendants to purge all Plaintiff's call records obtained through the Mass Surveillance Program." Compl. at 16-17. Plaintiff also asks the Court to "[d]eclare that the Mass Surveillance Program violates Plaintiff's rights under the First and Fourth Amendments." Compl. at 16. There is no likelihood that any of this relief would redress any concrete injury plausibly alleged in Plaintiff's Complaint.

Plaintiff primarily seeks injunctive relief, which is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). The relevant question, for injunctive relief, "is what effect an order from this Court would have *now*. An injunction must remedy present harm, not prior injuries." *Sierra Club v. U.S. Dep't of Energy*, 825 F. Supp. 2d 142, 150-51 (D.D.C. 2011). Thus, in *Steel*, the Supreme Court held that the plaintiff lacked standing to seek injunctive relief where, at the time the suit was filed, there was no basis for alleging anything but past injury. *Steel Co.*, 523 U.S. at 108-09. In its decision, the Court emphasized that "initial standing" must be based on a plausible allegation of present or threatened injury as of the date the complaint was filed, and that the redressability analysis cannot rest on the possibility that a defendant might restart an activity at some point in the future that it had already ceased by the time suit was brought. *Id.*

The injunctive relief that Plaintiff seeks – which includes its requests to enjoin bulk telephony metadata collection and querying of that metadata, and its request to require purging of any metadata relating to telephone calls of its staff – would do nothing to remedy any plausibly alleged concrete injury that existed or was certainly impending as of April 7, 2015, when Plaintiff filed its Complaint. No bulk telephony metadata collection pursuant to 21 U.S.C. § 876 was occurring at the time suit was filed, and the DEA database that had housed the metadata previously collected had already been purged. *See* Patterson Dec. ¶ 6, Compl. Ex. A ("Use of the [] database [that contained the metadata] was suspended in September 2013," and as of the date, more than a year later, when Agent Patterson's declaration was first filed in a different case, "[t]his database [] [wa]s no longer being queried for investigatory purposes, and information [wa]s no longer being collected in bulk pursuant to 21 U.S.C. § 876."); Second Patterson Dec. ¶ 3 (attached hereto) ("Prior to April 7, 2015, . . . the database had been purged of the collected data, and the database no longer exists."). As discussed in detail above, though Plaintiff does make conclusory assertions to the contrary in its Complaint, those assertions plainly lack any plausible basis and are not entitled to a presumption of truth from this Court. *See Sprewell*, 266 F.3d at 988. Thus, even if telephony metadata relating to Plaintiff had at one time been part of the DEA database, there is no longer any bulk collection or querying to enjoin, nor is there any database to purge.

Plaintiff's request for declaratory relief similarly fails to meet the redressability requirement. Absent a certainly impending injury, a declaratory judgment would amount to nothing but an advisory opinion. *See S. Cal. Painters & Allied Trades, Dist. Council No. 36 v. Rodin & Co.*, 558 F.3d 1028, 1035 (9th Cir. 2009) (declaratory relief regarding a company that has been out of business for over four years "would constitute an advisory opinion and does not evidence a live dispute"); *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1099 (9th Cir.

2001) (declaration that a policy prohibiting registration of certain domain names was unconstitutional would amount to advisory opinion when the policy no longer existed).

The Ninth Circuit discussed the redressability requirement in connection with claims for declaratory relief in *Mayfield*. There, it was undisputed that the government retained in its possession "materials derived from . . . FISA searches and surveillance of [the plaintiff's] property." *Mayfield*, 599 F.3d at 972. However, the plaintiff had entered into a settlement agreement whereby he waived any claims for injunctive relief. *See id.* The court held that declaratory relief would not redress the plaintiff's asserted injury because, even if the plaintiff obtained a declaratory judgment that the government's retention of the materials was in violation of the Fourth Amendment, such a judgment would not require the government to destroy or return the materials that it retained. *Id.* at 973.

Here, the redressability analysis is far simpler. The absence of any plausible allegation of ongoing or imminent harm means that a declaratory judgment would have no conceivable impact on Defendants, but would simply stand as the Court's advisory opinion on hypothetical future action, the prospect of which is nothing more than pure speculation on Plaintiff's part. Moreover, even if the chill that Plaintiff alleges on the willingness of its associates to communicate by telephone were a cognizable injury-in-fact fairly traceable to the bulk metadata collection described in Agent Patterson's declarations, Plaintiff offers no plausible assertion that a declaratory judgment by this Court, concerning telephony metadata collection that is, in any event, not taking place, would in any way alleviate that chill. *See ACLU*, 493 F.3d at 671 (opinion of Batchelder, J.) (rejecting as speculative "the premise that the NSA's compliance with FISA's warrant requirements will entice the plaintiffs and their contacts to 'freely engage in conversations and correspond via email without concern'"). Accordingly, Plaintiff fails to meet the redressability prong of standing, and for that reason as well, its

claims must be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss this action.

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Respectfully submitted,

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