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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

HUMAN RIGHTS WATCH,

Plaintiff,

v.

DRUG ENFORCEMENT ADMINISTRATION, *et al.*,

Defendants.

Case No: 2:15-cv-2573-PSG-JPR

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR EXPEDITED DISCOVERY

Date: July 13, 2015
Time: 1:30 p.m.
Courtroom 880 – Roybal
Hon. Philip S. Gutierrez

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INTRODUCTION

Plaintiff Human Rights Watch ("HRW") seeks certain narrow and limited discovery concerning Defendants' operation of an untargeted and suspicionless surveillance program directed against Americans. The government opposes this modest request, arguing that HRW lacks standing to bring suit and that HRW has failed to establish "good cause" for the requested discovery.

The government is wrong.

HRW has standing. The allegations contained in the complaint amply demonstrate this. Regardless, the government's decision to introduce new evidence at the motion to dismiss stage opens the door for HRW to conduct the very discovery it seeks here.

The government's opposition to this Motion also demonstrates HRW's need for the requested discovery. The government's arguments suggest that it operated its Mass Surveillance Program (the "Program") for decades; that it lost track of the agencies and personnel that accessed the data; and that it is now difficult for the government to determine whether it retains any illegally collected Program data.

These are not grounds to deny HRW's Motion—they are grounds to grant it, and to allow Plaintiff to proceed with its preliminary injunction, as originally intended.

For the reasons that follow, HRW's Motion should be granted.

ARGUMENT

I. THE COURT HAS JURISDICTION TO HEAR PLAINTIFF'S CLAIMS.

Delaying consideration of HRW's Motion for Expedited Discovery is unnecessary for two reasons: (1) HRW's complaint, on its face, establishes its standing and, accordingly, this Court's jurisdiction; and (2) the Government's factual attack on Plaintiff's standing provides an additional justification for the Court to grant HRW's Motion.

The issue is thus ready for determination now. The Court can—and should—allow HRW to proceed with the requested discovery.

A. HRW's Complaint Adequately Alleges Standing.

Plaintiff's complaint, on its face, alleges the necessary facts to support standing. The government does not credibly argue otherwise.[1] Indeed, under Circuit precedent, Plaintiff's standing allegations are more than sufficient to survive the government's facial attack.

"To establish Article III standing, a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained

[1] In its opposition, the government fully incorporates by reference its motion to dismiss. *See* Defendants' Memorandum in Opposition to Plaintiff's Motion for Expedied Discovery ("Opp.") at 5 (ECF No. 25). Without the benefit of having filed Plaintiff's opposition, HRW does not have the same advantage. Nevertheless, Plaintiff submits that the following provides a sufficient basis on which the Court can determine Plaintiff's standing and proceed to decide this Motion.

of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, 573 U.S. __, 134 S. Ct. 2334, 2341 (2014) (internal citations and quotations omitted).

HRW's complaint contains all the requisite elements. First, HRW has alleged a concrete and particularized injury-in-fact: an ongoing "program of untargeted and suspicionless surveillance of Americans." Compl., ¶¶ 2-5 (ECF No. 1). This Program involves "Defendants' bulk collection, retention, search, use, and dissemination of call records for all, or substantially all, telephone calls originating in the United States and terminating in the Designated Countries," including the calls of HRW as it engages in its global human rights advocacy. Compl., ¶¶ 22-25. The Mass Surveillance Program, in turn, causes concrete injury to HRW's privacy and associational rights. Compl., ¶¶ 44-53, 58-60, 64-65; *see Jewel v. NSA*, 673 F.3d 902, 910 (9th Cir. 2011) (finding that "Jewel alleged a sufficiently concrete and particularized injury" through allegations of a surveillance "dragnet," including government acquisition and use of, among other things, "all or most" of the plaintiffs' call records).

Second, the injuries alleged by HRW—the collection and retention of information HRW considers "sensitive and private;" and the "substantial[] burden[]" placed upon HRW's "ability to effectively engage in its advocacy for global human rights"—are fairly traceable to the Program at issue here. Compl.,

¶¶ 25-28, 49-50, 58, 64; *see Jewel*, 673 F.3d at 912 (finding "invasion of privacy" fairly traceable to "acknowledged surveillance program"); *see also Presbyterian Church (USA) v. United States*, 870 F.2d 518, 523 (9th Cir. 1989) (finding allegations that government surveillance had "impaired the churches' ability to carry out their religious missions" were "[c]learly" traceable to surveillance program).

Third, and given the above, "[t]here is no real question about redressability." *Jewel*, 673 F.3d at 912. Prospective relief, like that sought by HRW, "is an available remedy" to curb the government's ongoing surveillance program, following a decision on the merits. *Id*. at 912; *see* Compl., at 16-17 (seeking declaratory and injunctive relief).

The complaint, on its face, thus establishes HRW's standing. *See ACLU v. Clapper*, 785 F.3d 787, 802 (2nd Cir. 2015).

The government suggests that its apparent decision to cease *collecting* call records in 2013 deprives HRW of standing. Not so. As noted above, HRW challenges the entire *program* of surveillance, including Defendants' ongoing "retention, search, use, and dissemination" of HRW's call records. Compl., ¶¶ 22-25. The fact that illegal *collection* has stopped is of no moment: HRW continues "to suffer a present, on-going injury due to the government's continued retention"

of material obtained or derived from the surveillance.[2] *See Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010) (internal citations and alterations omitted). Based on the allegations contained in the complaint, HRW "unquestionably" has standing to seek an "injunction requiring the government to return or destroy such materials." *See id.* at 972.

B. The Government's Factual Attack on HRW's Standing Provides an Independent Basis for the Requested Discovery.

HRW's requested expedited discovery is now more appropriate then ever. The government's submission of evidence at the motion to dismiss stage opens the door for HRW to submit evidence in opposition. Early discovery is necessary to allow HRW to gather that evidence.

The government introduced additional evidence with its motion to dismiss—a new declaration from a DEA agent, which purportedly establishes that all illegally collected records have been "purged." *See*, *e.g.*, Defendants'

[2] In *Mayfield*, the plaintiff challenged the constitutionality of past surveillance and physical searches that the government conducted against him and his family. 599 F.3d at 968 n.5. At the district court, and as part of a settlement, the government agreed "to destroy or return to Mayfield" material that it "acquired or seized pursuant to" the surveillance and searches. *Id*. at 973. Even with this settlement, the Ninth Circuit still held that Mayfield continued to suffer a concrete injury because the government refused "to identify and destroy all materials *derived*" from the illegal surveillance. *Id*. at 968 (emphasis added). The Court ultimately found that a declaratory judgment—the only form of relief available to Mayfield after his settlement—would not redress his injuries because it would not require the government to return or destroy materials derived from the surveillance. *Id*. at 972. That issue, however, is not present here.

Memorandum in Support of Motion to Dismiss ("MTD") at 11-12 (ECF No. 24-1). The declaration establishes no such thing. *See* Section II(B), *infra* at 8-9. But, under any circumstances, the submission of additional evidence creates a factual dispute concerning jurisdiction. That, in turn, entitles HRW to early discovery.

Defendants' motion to dismiss constitutes a "factual" attack on HRW's complaint. "A 'facial' attack asserts that a complaint's allegations are themselves insufficient to invoke jurisdiction, while a 'factual' attack asserts that the complaint's allegations, though adequate on their face to invoke jurisdiction, are untrue." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 780 n. 3 (9th Cir. 2014). Where factual disputes concerning jurisdiction are introduced at the motion to dismiss stage, this Court has broad discretion to allow discovery. *See Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence," the party opposing the motion is allowed the opportunity to provide evidence supporting subject matter jurisdiction. *Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cnty.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) (citation omitted).

The discovery sought here would afford HRW with that very opportunity. Indeed, the factual attack may warrant additional discovery—beyond that already requested—as well as an evidentiary hearing. *See Valentin v. Hospital Bella Vista*,

254 F.3d 358, 363 (1st Cir. 2001) ("[T]he court enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction."). However, as a preliminary step, the Court should grant this Motion.

II. GOOD CAUSE EXISTS FOR THE REQUESTED DISCOVERY.

As HRW established in its opening Motion, good cause exists for the narrow and expedited discovery it seeks here. *See* Plaintiff's Motion for Expedited Discovery ("Mot") at 5-10 (ECF No. 11); *see also Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275-76 (N.D. Cal. 2002).[3] The government's arguments to the contrary only bolster a finding of good cause.

A. HRW's Anticipated Preliminary Injunction Establishes Good Cause for the Requested Discovery.

HRW's decision to seek narrow and limited discovery prior to filing a preliminary injunction is no basis for denying this Motion. HRW chose to shore up the factual basis for its preliminary injunction prior to filing, rather than subjecting

[3] Contrary to the government's suggestion, "good cause" is the standard courts in this Circuit use to assess a motion for expedited discovery. *See Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275-76 (N.D. Cal. 2002) (rejecting "the rigid *Notaro* standard" and adopting "the conventional standard of good cause in evaluating Plaintiff's request for expedited discovery"); *accord Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 614 (D. Ariz. 2001).

the parties and the Court to a hastily filed round of briefing seeking extraordinary relief. That can hardly count as a strike against it.[4]

The government dismisses the cases cited in HRW's opening motion in which courts granted expedited discovery to facilitate the filing of a preliminary injunction. *See* Mot. at 6-7 (citing cases). The government distinguishes those cases because they involved "infringement and unfair competition," a purportedly "unique context where expedited discovery is more commonly allowed." Def. Opp. at 7 n.1. There is no reason why an ongoing infringement of Constitutional rights would not warrant similarly expedited treatment. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

[4] As described in HRW's opening Motion, the discovery requests are intended to establish certain specific facts related to the "scope of the Program and Defendants' ongoing access to information collected through the Program." Mot. at 7. HRW's Request for Production seeks the subpoenas sent to telecommunications providers requiring the production of calls to specific countries that HRW regularly calls; these subpoenas, in turn, will provide HRW with necessary information about the scope of the Program's record collection and the gravity of the harm HRW has suffered. *See* Plaintiff's First Request for Production (ECF No. 19-1, Ex. B). HRW's Request for Admission (ECF No. 19-1, Ex. A) seeks information about DEA's ongoing access to information illegally collected through the Program—an issue on which the government apparently bases its motion to dismiss. The single Interrogatory (ECF No. 19-1, Ex. C) seeks a list of all government agencies that accessed illegally collected records. *See* Section II(C), *infra* at 5-6.

B. The Government's Factual Attack Further Establishes Good Cause for HRW's Discovery.

The need for early discovery is even more compelling now because the government's evidence introduces a factual dispute.

As HRW's complaint establishes, DEA and other government Defendants continue to have access to illegally collected Program records. Defendants' motion to dismiss hinges on the claim, based on its newly introduced evidence, that the DEA has "purged" a "database" of call records, thus implying that DEA and other government agencies lack ongoing access to information collected through the Program, *see* MTD at 1, 9, 12, 17—a conclusion HRW vigorously disputes. Yet, in opposing *this* Motion, the government now argues that it would be unduly burdensome for it to make a "good faith effort to determine whether any DEA employee still has access" to illegally collected records. Opp. at 13-14.

The government cannot have it both ways. Defendants cannot, in the same breath, contend it would be "unduly burdensome" to identify whether all Program records have been destroyed, yet simultaneously label as "speculative (and indeed false)" HRW's allegations of ongoing access to illegally collected information. *Compare id.*, *with* MTD at 12. Similarly, the government cannot contend that it would be "unduly burdensome" to identify agencies that have accessed Program

data, while maintaining HRW does not plausibly allege other agencies participated in the Program.

Discovery is thus needed to clear up the government's doublespeak.

C. HRW's Need to Name Doe Defendants Establishes Good Cause for the Expedited Discovery.

None of the government's complaints about HRW's Interrogatory, seeking to identify additional agencies involved in the Program, has merit.

First, as HRW's opening motion made clear, the need to identify Doe defendants is time-sensitive because this Court's rules require naming unnamed defendants within 120 days. The limited discovery now sought represents a good faith attempt to comply with that requirement.

This Court should also reject the government's mischaracterization of HRW's Interrogatory as requiring the identification of every "individual employee" that had accessed Program data "at any time." *See* Opp. at 13. HRW seeks only a list of government *agencies* that have accessed Program data. *See* Mot. at 4 (describing Interrogatory as seeking the "names of all government agencies that have accessed, either directly or indirectly, the Program database(s)"), 9 (similarly describing scope of Interrogatory). Plaintiff's counsel is happy to meet and confer with the government in order to further explain the scope

of the Interrogatory. But the government's apparent misunderstanding provides no basis for denying HRW's motion.

D. The Requested Discovery Will Not Unduly Burden the Government.

The government has failed to demonstrate that the requested discovery would be unduly burdensome. As discussed above, *see* Section II(B) *supra* at 1-2, Defendants' burden argument is largely inconsistent with its factual assertions that all program records have been destroyed and that records were not shared widely throughout the government.

The government also fails to prove that it would be unduly burdensome for the DEA "to search [its] files" for subpoenas issued "over a time span of over twenty years." Opp. at 14. This argument suggests that either the number of subpoenas sent over the past twenty years is so voluminous that *producing* the records would be burdensome; or the government's recordkeeping practices are so shoddy that simply *locating* the subpoenas would be burdensome. Neither inspires confidence. The government cannot use its operation of a decades-long, mass surveillance program, or its poor record-keeping, to bolster a claim of undue burden.

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CONCLUSION

For the reasons set forth above, Plaintiff respectfully submits that its Motion should be granted.

Dated: June 29, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Central District of California by using the Court's CM/ECF system on June 29, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

Dated: June 29, 2015

s/ Mark Rumold
MARK RUMOLD