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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 ITS REQUEST FOR AN EVIDENTIARY HEARING AND DISCOVERY

Courtroom 880 – Roybal
Hon. Philip S. Gutierrez

In this case, the government has argued—sometimes in the same breath—that it would be too burdensome to produce the subpoenas it used to obtain billions of Americans' international call records, yet HRW cannot plausibly allege that *its* call records were among the billions collected; that it would be unduly burdensome to identify all the agencies that accessed the illegally collected records, yet HRW cannot plausibly allege that multiple agencies accessed the records; that it would be unduly burdensome to identify whether DEA has ongoing access to illegally collected records, yet HRW cannot plausibly allege *any* agency's ongoing access.

The government cannot have it both ways. The Court should grant HRW's Request for an Evidentiary Hearing and Discovery (ECF No. 33) to resolve these outstanding, disputed factual issues.

Distilled to its essence, this case currently presents only two relatively narrow and straightforward questions:

(1) Does the Complaint, on its face, allege sufficient facts to establish Plaintiff's standing? More specifically, are Plaintiff Human Rights Watch's allegations of the bulk collection, retention, search, use and dissemination of its call records—based on the government's own admissions of a bulk collection program targeting Americans' international call records—sufficiently "plausible"? *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As explained in detail in HRW's opposition, the answer is "yes," as courts in analogous situations have repeatedly

found. *See, e.g.*, *Jewel v. NSA*, 673 F.3d 902 (9th Cir. 2011); *Mayfield v. United States*, 599 F.3d 964 (9th Cir. 2010); *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015); *see also* Pl's Opposition to Defendants' Motion to Dismiss ("Pl's Opp.") 4-14 (ECF No. 32).

(2) Given the facial sufficiency of the Complaint, does the Government's introduction of additional evidence—statements concerning the purported "quarantine[]" and "purge[]" of "the DEA database," Declaration of Robert W. Patterson ("Second Patterson Decl.") ¶ 3 (ECF No. 24-2)—entitle HRW to discovery? Again, the answer is "yes." Discovery is warranted because the government has introduced a factual dispute at the motion to dismiss stage concerning its ongoing retention of records. Because it is undeniable that discovery will "provide a more satisfactory showing of the facts necessary," the discovery should be allowed. *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008).[1]

The government's opposition is largely grounded in a single premise: that it no longer retains any of the illegally collected data. HRW recognizes that it would

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[1] In *Boschetto*, the court ultimately upheld the district court's denial of jurisdictional discovery. *Boschetto*, 539 F.3d at 1020. The government relies on that denial in its opposition here; however, the difference between *Boschetto* and this case is stark. In *Boschetto*, the plaintiffs sought discovery to support jurisdiction on *different theories* than that alleged in the complaint. *Boschetto*, 539 F.3d at 1020. In contrast, the discovery HRW seeks here will yield facts directly relevant to the claims alleged in the complaint and the disputed areas of jurisdiction—the ongoing retention, search, and use of HRW's call records. *See infra*.

lack standing if the government, as a whole, no longer retains its call records. But the Second Patterson Declaration does not establish that fact, and it does not purport to do so.

The Second Patterson Declaration was introduced to address HRW's "allegation that DEA retains telephony metadata relating to Plaintiffs." Defs' Opposition to Pl's Request for Evidentiary Hearing and Discovery ("Defs' Opp.") at 2 (emphasis omitted). For all the reasons laid out in Plaintiff's opposition, *see* Pl's Opp. at 16-23, the Second Patterson Declaration does not establish *HRW's records* have been destroyed, either by DEA or by the other government agencies that accessed them. Indeed, in the absence of such a "specific denial[]" from the government, HRW is entitled to discovery concerning the ongoing status of illegally collected records. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir. 2006) (internal citation and quotation omitted).

The government complains that HRW's discovery request would not "have any bearing" on the issue of the "quarantine[]" and "purge[]" of call records described in the Second Patterson Declaration. Defs' Opp. at 3. But as HRW explained in its initial Request, all of the proposed discovery would provide relevant evidence concerning the nature and efficacy of DEA's purported actions. *See* Pl's Request at 2-3. HRW further explains the contribution of each request below:

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Copies of Program Subpoenas. The subpoenas HRW seeks will establish the scope of the government's collection program, which in turn will shed light on the efficacy of DEA's purported efforts to "quarantine[]" and "purge[]" records. For example, if the scope of collection was exceptionally broad (as all facts suggest), quarantining billions of call records, collected over the course of two decades, would likely be a difficult task. In light of that difficulty, neither HRW nor the Court should accept Agent Patterson's four-paragraph, summary declaration as conclusive proof that *HRW's records* have been destroyed.

Additionally, production of the subpoenas will also definitively establish that HRW's call records were collected—a fact that the government, conspicuously, does not dispute. Instead, the government argues HRW has not adequately alleged that its call records were collected. *See, e.g.*, Defs' Opp. at 3. HRW's allegations, however, could not be clearer: "Defendants obtained records of HRW's communications to the Designated Countries as part of the Mass Surveillance Program." Complaint, ¶ 47.[2]

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[2] If any doubt remained, the complaint is replete with allegations concerning the government's collection of HRW's call records. *See also id*, ¶ 5 ("The Mass Surveillance Program sweeps in the communication records of HRW and its staff as they advocate for human rights. HRW's records are collected, retained, searched, and disseminated without any suspicion of wrongdoing and without any judicial authorization or oversight."); ¶¶ 44-46; ¶ 48 ("The collection of Plaintiff's call records includes the numbers called by HRW and its staff; the date, time, and duration of the calls; and the method by which the calls were billed."); ¶ 53 ("Plaintiff's telephone communications information—collected, retained, and

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Other Agencies with Access to Collected Call Records. Like the production of subpoenas, the list of agencies that accessed the illegally collected call records will shed light on the efficacy of DEA's purported quarantine and purge. For example, if 30 different law enforcement and intelligence agencies had access to the illegally collected records, DEA's quarantine and purge of *its* copies of the records, again, cannot account for *all* illegally collected records—including those of HRW.

The Deposition of Agent Patterson. Defendant offers no legitimate objection to HRW's request to depose Agent Patterson, except to suggest that some aspects of the proposed deposition are "not *only* about the purging of the database." Defs' Opp. at 4 (emphasis added). As explained above, however, facts concerning the scope of collection; agencies with access to that collection; and the technical and legal circumstances under which agencies' accessed records bear *directly* on the likely efficacy of DEA efforts to quarantine and purge records. More specifically, the broader the collection, the more agencies with access to that collection, and the looser the technical and legal restrictions on access—the less

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searched pursuant to the Mass Surveillance Program—was at the time of collection, and at all times thereafter, not relevant" to an authorized government investigation); ¶ 54 ("Defendants' bulk collection, retention, search, and use of the telephone communications information of HRW and its staff are done without lawful authorization, probable cause, and/or individualized suspicion[.]").

probative Agent Patterson's conclusory statement becomes. And, finally, the government offers no objection to HRW's proposed deposition of Agent Patterson concerning the "steps DEA took to 'quarantine' and 'purge' its database" and "the date on which DEA purged its database." *See* Defs' Opp. at 3. Thus, at a minimum, Agent Patterson's deposition on those topics should be allowed.

For all these reasons, HRW's Request should be granted.

Dated: August 5, 2015

Respectfully submitted,

s/ Mark Rumold

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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 August 5, 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: August 5, 2015

s/ Mark Rumold
MARK RUMOLD