IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(Central Division)

MARY JOSEPHINE (JOSIE) VALDEZ, *et al.*, Plaintiffs, v. NATIONAL SECURITY AGENCY, *et al.*, Defendants.	Case No. 2:15-cv-00584-RJS-DBP Hon. Robert J. Shelby Hon. Dustin B. Pead

DEFENDANT NATIONAL SECURITY AGENCY'S MOTION AND SUPPORTING MEMORANDUM FOR JUDGMENT ON THE PLEADINGS

Date: March 3, 2017

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MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant National Security Agency ("NSA"), having filed its answer (Dkt. No. 40) to Plaintiffs' Amended Complaint for Constitutional, Common Law, and Statutory Violations, Seeking Damages, Declaratory, and Injunctive Relief (Dkt. No. 26) ("Amended Complaint," or "Am. Compl.") hereby moves pursuant to Federal Rule of Civil Procedure 12(c) for judgment on the pleadings.[1]

The grounds for this motion are that the Court lacks subject-matter jurisdiction to hear Plaintiffs' claims, because, as a factual matter, the allegation on which Plaintiffs premise their Article III standing to seek relief for alleged NSA interception and collection of information about their telecommunications (content and metadata) is wrong. Plaintiffs' claim that the NSA collected information about their communications turns on an allegation that the NSA conducted indiscriminate "blanket" surveillance of the contents of every e-mail and text message, and the metadata of every telephone call, to and from every person in Salt Lake City, Utah, and the vicinity of all 2002 Olympic venues, during the 2002 Salt Lake City Winter Olympic Games. As attested to in the accompanying Declaration of Wayne Murphy, NSA Director of Operations, that allegation is not true. The NSA has never, at any time, conducted indiscriminate "blanket" surveillance of all electronic communications sent or received in Salt Lake City or the vicinity of the 2002 Winter Olympic venues, whether during the 2002 Winter Olympic Games or otherwise.

[1] This motion is not brought on behalf of the individual defendants sued in their individual capacities: former President George W. Bush; former Vice President Richard B. Cheney; former Counsel and Chief of Staff to Vice President Cheney, David Addington; and former NSA Director Michael V. Hayden, who are separately represented by Department of Justice attorneys on the Civil Division's Constitutional Torts Staff. Nevertheless, the grounds for judgment on the pleadings set forth in this motion apply equally to Plaintiffs' individual-capacity claims, and necessitate dismissal of this case in its entirety.

Thus lacking a factual basis on which to maintain that they have been injured by NSA surveillance of their communications, Plaintiffs cannot demonstrate their standing, and their claims for relief must be dismissed for lack of subject-matter jurisdiction.

The relevant facts, authority, and arguments supporting the NSA's motion are set forth in detail in the memorandum below. For the reasons stated therein, Defendant NSA's motion for judgment on the pleadings should be granted, and Plaintiffs' Amended Complaint dismissed for lack of subject-matter jurisdiction.

MEMORANDUM IN SUPPORT

INTRODUCTION

The essence of this case remains Plaintiffs' allegation that the NSA conducted "blanket" surveillance of all e-mail, text message, and telephone communications in Salt Lake City, and the vicinity of all 2002 Olympic venues, during the 2002 Winter Olympic Games. Relying on that sole, unsupported allegation, Plaintiffs contend that the NSA must have intercepted and collected (and still retains) information about their communications, and on that basis they assert standing to litigate a variety of constitutional and statutory claims contesting the legality of the claimed surveillance. But the fact of the matter, striking at the heart of Plaintiffs' case, is that the claimed "blanket" surveillance in and around Salt Lake City never happened. That reality dispels the sole premise on which they have claimed both surveillance of their communications and injury that would confer standing on them to challenge NSA surveillance activities.

When the Government earlier moved to dismiss Plaintiffs' claims on the ground that they had not adequately pled their standing, the Court held that their allegation of blanket surveillance in and around Salt Lake City was entitled as a matter of pleading to a presumption of truth, and taken as true, supported their claims of injury. On the NSA's instant motion for judgment on the pleadings, which contests the Court's jurisdiction as a factual matter, the allegation of blanket surveillance on which Plaintiffs' claim of standing must rise or fall may no longer be presumed true, and is now refuted by the facts attested to in the accompanying declaration submitted by the NSA's Director of Operations. Thus lacking a basis in fact on which to assert interception of their communications, Plaintiffs can no longer claim injury due to NSA surveillance, and lack standing to seek the relief sought in the Amended Complaint. Accordingly, the Amended Complaint should be dismissed for lack of subject-matter jurisdiction.

BACKGROUND

The President's Surveillance Program

Plaintiffs purport to trace the origin of the blanket surveillance allegedly conducted in and around Salt Lake City during the 2002 Winter Olympics to what is now known as the President's Surveillance Program. *See* Am. Compl. ¶¶ 3-5. Following the September 11, 2001, terrorist attacks on the United States, then-President Bush authorized the NSA to collect foreign intelligence information through electronic surveillance, to detect and prevent further attacks within the United States by foreign terrorist organizations. *See* Decl. of Wayne Murphy, attached as Ex. A. ("Murphy Decl."), ¶¶ 8-12. Specifically, beginning on October 4, 2001, the NSA was authorized by President Bush to collect: (1) the contents of certain international communications, a program that was later referred to as the Terrorist Surveillance Program ("TSP"); and (2) telephony and Internet non-content information (referred to as "metadata") in bulk, subject to various conditions. *Id.* ¶ 13. Collectively these now-terminated intelligence-gathering activities became known as the President's Surveillance Program ("PSP"). *Id.*

The first of these activities, the TSP, was targeted at collecting the contents of certain international telecommunications—that is, communications to or from, but not entirely within, the United States—involving persons reasonably believed to be associated with al Qaeda or other specified international terrorist organizations.[2] *Id.* ¶ 14. As such, the TSP did not involve blanket, indiscriminate surveillance of the content of all Americans' communications. *Id.* In January 2007, Presidentially authorized content collection under the TSP concluded, and NSA

[2] The term "content" is used herein to refer to the substance, meaning, or purport of a communication, as defined in 18 U.S.C. § 2510(8), as distinguished from the type of addressing or routing information referred to herein as "metadata."

collection activities targeting international communications of members of foreign terrorist organizations ultimately transitioned to the authority of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq.*, and carried out under orders issued by the Foreign Intelligence Surveillance Court ("FISC"). Murphy Decl. ¶ 15. Such content collection is presently conducted under Section 702 of FISA, 50 U.S.C. § 1881a, which authorizes the Government, for foreign intelligence purposes, to target for collection certain communications of non-U.S. persons reasonably believed to be located outside the United States, subject to approval and oversight by the FISC. Murphy Decl. ¶ 15.

The second activity authorized under the PSP, bulk collection of telephony metadata,[3] was developed as a means of identifying relationships between known or suspected terrorist operatives and others who may be in their networks, particularly those operating within the United States. *Id.* ¶ 16. NSA analysts conducted electronic searches of the uniquely organized, aggregated data to reveal information about communications with terrorist organizations and operatives, such as telephone numbers that had been in contact with the numbers of known or suspected terrorist operatives, and the dates, times, and durations of the calls made. *Id.* ¶ 17. In this way the program assisted the Government in identifying persons with whom known or suspected terrorists were communicating in the United States. *Id.* ¶ 17. Although it involved the collection and aggregation of a large volume of data, the collection of telephony metadata under the PSP did not capture information about all (or virtually all) calls made and/or received in the United States. *Id.* ¶ 18. Collection of bulk telephony metadata transitioned from Presidential to

[3] The term "telephony metadata" as used herein refers to data that are about telephone calls, such as the initiating and receiving telephone numbers, and the date, time and duration of calls, but does not include the substantive content of those calls.

FISA authorization in May 2006, under a provision enacted by Section 215 of the USA-PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), *see* 50 U.S.C. § 1861, and continued until November 2015, at which point the USA FREEDOM Act, Pub. L. No. 114-22, 129 Stat. 268, 272 § 103 (2015), ended the bulk collection of telephony metadata under Title V of FISA. *See* Murphy Decl. ¶ 19.

Finally, bulk Internet metadata collection and analysis under the PSP involved the collection of certain routing, addressing, and signaling information such as the "to" and "from" lines of an e-mail and the date and time the e-mail was sent, but not the subject line or content of an e-mail. *Id.* ¶ 21. Like the bulk collection of telephony metadata, the bulk collection and analysis of Internet metadata was designed as a means of identifying terrorist operatives and networks by detecting communications of known or suspected terrorists who may have been communicating with persons inside the United States. *Id.* Bulk collection of Internet metadata also operated on a large scale, but never captured all or nearly all Americans' online communications. *Id.* ¶ 22. The bulk collection of Internet metadata transitioned from Presidential to FISC-authorized collection, under the "pen register, trap and trace" provisions of the FISA, 50 U.S.C. § 1842. Murphy Decl. ¶ 22. In December 2011, the FISC-authorized program was discontinued and all accumulated metadata were destroyed. *Id*.

Thus, neither the PSP, nor the successor programs conducted under FISA, at any time involved "blanket," indiscriminate surveillance, interception, or analysis of all Americans' telephonic or Internet-based communications. *Id.* ¶ 23.

Plaintiffs' Allegations

The Amended Complaint nevertheless asserts that the PSP "evolved" into "blanket, indiscriminate" surveillance of communications in and around Salt Lake City during the 2002

Winter Olympic Games, Am. Compl. ¶¶ 3-5; *see also id.* ¶ 9; Pls.' Mem. in Opp. to Mot. to Dismiss for Lack of Subj. Matter Juris. (Dkt. No. 28) ("Pls.' Opp.") at 9.[4] Specifically, Plaintiffs allege that during the 2002 Salt Lake City Winter Olympic Games Defendant NSA conducted "blanket surveillance … over everyone utilizing email, text message and telephone communications within … Salt Lake City and … the vicinity of all Olympic venues," capturing "every" text message or email sent or received, and metadata pertaining to every telephone call placed or received, in the Salt Lake City region between February 8 and February 24, 2002. Am. Compl. ¶¶ 5, 9-10, *see also* Pls.' Opp. at 4-5 (alleging that the NSA intercepted and collected "*all* emails and telephone calls" originating or received in and around Salt Lake City during the 2002 Winter Olympics) (emphasis added).

Plaintiffs allege further that the communications subjected to the claimed surveillance and interception remain "presently … stored by the NSA, subject to unlawful access at any time in the future," "[c]onsistent with [an alleged] practice and philosophy of the NSA to horde everything obtained through surveillance," and also consistent, Plaintiffs opine, "with the unlawful storage of massive metadata [relating to] telephone calls . . . as recounted" in *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015). Am. Compl. ¶ 12. Plaintiffs also allege that they lived or worked in Salt Lake City during the 2002 Winter Olympic Games, and communicated during the Games in Salt Lake City, and the vicinity of Olympic venues, by e-mail, telephone, and/or text messaging. *Id.* ¶¶ 17-23. The Amended Complaint implicitly infers from these allegations that

[4] Plaintiffs advance this allegation despite having themselves described the PSP as a program of "widespread," not "blanket," surveillance of communications "in the United States." Am. Compl. ¶¶ 2, 3, 8.

Plaintiffs' communications must be among those intercepted and collected by the NSA during the alleged "blanket" surveillance, and still stored by the NSA today.

On the basis of these allegations, Plaintiffs ask the Court for declaratory relief pronouncing that the NSA violated and continues to violate their rights under the First and Fourth Amendments, the Stored Communications Act, 18 U.S.C. § 2703, the Privacy Act, 5 U.S.C. § 552a, the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and FISA. Am. Compl. ¶¶ 50, 128; *id.*, Prayer for Relief ¶ 1. Plaintiffs also seek an injunction barring the NSA "from continuing to store the communications of Plaintiffs and from making such communications accessible in the future." *Id.* ¶¶ 51, 65, 104, 112, 120, 129. Finally, Plaintiffs ask the Court to require the NSA "to disclose what has been stored, subject to future access, and provide assurance that the above-described communications by Plaintiffs have been deleted and permanently removed from any records and data stored by Defendant NSA, rendering them inaccessible for future access." *Id.* ¶¶ 51, 65, 112. *See also* Prayer for Relief ¶ 2.

Proceedings to Date

Plaintiffs initially filed this suit on August 18, 2015, naming the NSA, the Federal Bureau of Investigation ("FBI"), and various individuals sued in their personal capacities, as defendants responsible for the alleged "blanket" surveillance of communications conducted in and around Salt Lake City during the 2002 Winter Olympic Games. In their initial complaint Plaintiffs sought a variety of declaratory, injunctive, and monetary relief, including claims for damages, and injunctive relief barring "continued" surveillance in the region of Salt Lake City, against the NSA and FBI. *See generally* Compl. for Constitutional, Common Law, and Statutory Violations, Seeking Damages, Declaratory, and Injunctive Relief (Dkt. No. 1).

On December 18, 2015, the NSA and FBI moved to dismiss the Complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), *see* Dkt. No. 28, in response to which Plaintiffs filed their Amended Complaint, abandoning various requests for relief they had prayed for in their initial pleading. The Amended Complaint withdrew Plaintiffs' claims for damages and prospective injunctive relief against the NSA, and withdrew their claims against the FBI altogether. *See* Am. Compl., Prayer for Relief; Pls.' Opp. at 5, 6; July 13, 2016, Letter to Hon. Richard J. Shelby from Ross C. Anderson ("Anderson Letter"), attached as Ex. B. *See also Valdez v. NSA*, 2017 WL 87025, at *4 n.15 (D. Utah. Jan. 10, 2017). Notwithstanding that the Government's motion to dismiss was directed at the original Complaint, the parties agreed to complete briefing on that motion, such that Plaintiffs' opposition to the motion and the Government's reply addressed the claims and allegations in the Amended Complaint. *See id.*

On January 10, 2017, the Court denied the Government's motion to dismiss as to the remaining non-monetary claims against the NSA. *See Valdez*, 2017 WL 87025, at *12.[5] In assessing Plaintiffs' claims of injury, the Court noted that "Plaintiffs do not allege that their specific communications were targeted by the NSA, only that they were swept up in the NSA's *extremely broad* surveillance program." *Id.* at *2 (emphasis added). Thus, the Court recognized that "Plaintiffs' assertion that the NSA collected their communications turns on their allegation that the NSA conducted blanket surveillance of every email, text message, and the metadata from every telephone call … in Salt Lake City and the surrounding Olympic venues during the 2002 Winter Olympic Games." *Id.* at *8; *see also id.* at *1 (summarizing Plaintiffs' claim that "their

[5] The Court granted the motion as to the claims for damages against the NSA, and all claims asserted against the FBI, consistent with Plaintiffs' stated intention to withdraw those claims. *Valdez*, 2017 WL 87025, at *12 n. 69; *see id.* at *4 n.15.

communications . . . were necessarily intercepted" because the NSA engaged in a "sweeping warrantless surveillance program" during the 2002 Winter Olympics).

Although the Court described Plaintiffs' allegations as "extraordinary," *id.* at *9, and suggested that they "may strike some as incredible," *id.* at *11, it nevertheless held that Plaintiffs had sufficiently alleged their standing under the pleading standards announced in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555 (2007). *See id.* at *5, *7, *11-12. The Court stressed that it is not "the role of trial courts at the motion to dismiss stage to pass on the plausibility of otherwise well-pled factual allegations in pleadings," *id.* at *2; rather, a court must assume the truth of well-pleaded factual allegations "so long as the allegations do not 'defy reality as we know it' . . . even if, in the court's own judgment, those facts seem at the outset incredible, unbelievable, or highly unlikely to be true." *Id.* at *6. Because the Court determined that Plaintiffs' allegations of injury due to the alleged blanket surveillance of communications during the 2002 Winter Olympic Games were "neither legal conclusions nor bare recitations of the elements of standing," and did not "defy reality," it concluded they were entitled under *Twombly* and *Iqbal* to a presumption of truth. *Id.* at *9. As to redressability, the Court similarly concluded that Plaintiffs had not merely recited the elements of standing but had "affirmatively stated that the NSA is presently storing their communications," and thus has pled a continuing injury capable of redress. *Id.* at *11. Accordingly, the Court held that Plaintiffs had plausibly alleged standing. *Id.* at *12**.**

Defendant NSA's Motion for Judgment on the Pleadings

Following the Court's ruling on the Government's motion to dismiss, Defendant NSA filed its answer to the Amended Complaint, on February 21, 2017, in which the NSA categorically denies conducting "blanket" surveillance in and around Salt Lake City as alleged

by Plaintiffs, either during the 2002 Winter Olympic Games, or at any other time. Def. [NSA's] Answer to Pls.' Am. Compl. (Dkt. No. 40).[6] On February 23, 2017, the Court issued an Interim Scheduling Order jointly proposed by Plaintiffs and Defendant NSA (Dkt. No. 42); *see* Joint Mot. for an Interim Scheduling Order (Dkt. No. 41), according to which Defendant NSA now files this motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c).[7]

Although the Court held that Plaintiffs adequately pled their standing on the face of the Amended Complaint (a ruling with which the NSA respectfully continues to disagree), the NSA's motion for judgment on the pleadings does not contest the sufficiency of Plaintiffs' allegations on their face. Rather, the NSA seeks dismissal of the Amended Complaint because Plaintiffs' allegation that the NSA conducted mass surveillance in the region of Salt Lake City in early 2002 is wrong as a factual matter. As the NSA's Director of Operations attests in support of the NSA's motion, Plaintiffs' allegations that the PSP involved or "evolved" into "blanket, indiscriminate surveillance … of the contents of every email and text message and the metadata of every telephone call" sent or received in Salt Lake City, or the vicinity of Olympic venues, during the 2002 Salt Lake City Winter Olympic Games, are not true. Murphy Decl. ¶ 24. The NSA has never, at any time, conducted "blanket" surveillance of all electronic communications

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[6] Pursuant to a stipulation between Plaintiffs and the individual-capacity defendants, the individual defendants' obligation to answer or otherwise respond to Plaintiffs' Amended Complaint is stayed until sixty days after the filing of the Court's January 10, 2017, decision on the Government's motion to dismiss. Under this stipulation, the individual defendants are currently obligated to answer or otherwise respond to Plaintiffs' Amended Complaint on March 13, 2017.

[7] The Interim Scheduling Order also tolls the time under District of Utah Civil Rule 7-1(b)(3)(A) for Plaintiffs to respond to the NSA's motion, and directs the parties by March 24, 2017, to submit a proposed schedule for further proceedings on the motion, including a timetable for discovery proceedings related to the motion and the completion of briefing afterward. *See* Interim Scheduling Order, ¶¶ 3-4.

sent or received in Salt Lake City, or the vicinity of the 2002 Winter Olympic venues, whether during the 2002 Winter Olympic Games, or otherwise. *Id.* ¶¶ 3-4, 24. Accordingly, the NSA seeks dismissal because the allegation on which Plaintiffs exclusively base their claim of injury, and their entitlement to invoke the Article III jurisdiction of the federal courts, is false.

ARGUMENT

I. LEGAL STANDARDS

A. The Requirements of Standing

"The judicial power of the United States . . . is not an unconditioned authority to determine the [validity] of legislative or executive acts," but is limited by Article III of the Constitution "to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State., Inc.*, 454 U.S. 464, 471 (1982). A demonstration by plaintiffs of their 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); *see also Morgan v. McCotter*, 365 F.3d 882, 887 (10th Cir. 2004), and as such is a threshold jurisdictional requirement, "determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The Supreme Court emphasized in *Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138 (2013), that the standing inquiry must be "especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government," particularly "in the fields of intelligence gathering and foreign affairs," "was unconstitutional." *Id*. at 1147.[8] *See also Schaffer v. Clinton*, 240 F.3d

[8] *Amnesty International* is the single case in the Supreme Court's standing jurisprudence that most resembles this one. In that case, various human-rights, labor, and media organizations challenged the constitutionality of the Government's surveillance authority under the FISA Amendments Act of 2008. 133 S. Ct. at 1144. The plaintiff organizations "fail[ed] to offer any

878, 882-83 (10th Cir. 2001); *State of Utah v. Babbitt*, 137 F.3d 1193, 1202 (10th Cir. 1998).

To establish Article III standing, Plaintiffs must seek relief from an injury that is "'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Amnesty Int'l*, 133 S. Ct. at 1147. The alleged injury must be "real and immediate," not "conjectural or hypothetical," *State of Utah*, 137 F.3d at 1212; speculative claims of injury will not support Article III standing. *Amnesty Int'l*, 133 S. Ct. at 1150. As the "part[ies] invoking federal jurisdiction," Plaintiffs "bear[ ]the burden of establishing the[ ] elements" of standing. *State of Utah*, 137 F.3d at 1202; *see also Am. Forest & Paper Ass'n v. EPA* ("*AFPA*"), 154 F.3d 1155, 1159 (10th Cir. 1998). "Plaintiff[s] must support each element 'with the manner and degree of evidence required at the successive stages of the litigation.'" *Loving v. Boren*, 133 F.3d 771, 772 (10th Cir. 1998) (quoting *Defenders of Wildlife*, 504 U.S. at 561).

B. Motions for Judgment on the Pleadings for Lack of Subject-Matter Jurisdiction

Federal Rule of Civil Procedure 12(c) permits a party, "[a]fter the pleadings are closed … [to] move for judgment on the pleadings." Rule 12(c) "serves [both] as a vehicle for disposing of cases on the merits when there is no dispute in the pleadings," and "as a vehicle for launching Rule 12(b) procedural challenges," including a Rule 12(b)(1) challenge to the court's subject-

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evidence that their communications ha[d] been monitored" under the challenged statute, *id.* at 1148, and instead claimed it was likely that communications of theirs would be acquired because they regularly engaged in communications with persons whom they considered likely targets of Government surveillance. *See id.* at 1145-46, 1148. The Supreme Court held that these assertions were insufficient to confer standing, because the plaintiffs' claim of injury rested on a "speculative chain of possibilities," including "that the Government [would] target the communications of non-U.S. persons with whom they communicate," that the Government would succeed in intercepting those communications, and that the plaintiffs would be parties to the particular communications the Government intercepts. *Id.* at 1148; *see also id.* at 1148-50.

matter jurisdiction. *Hartford Cas. Ins. Co. v. Mtn. Sts. Mut. Cas. Co.*, 158 F. Supp. 3d 1183, 1196 (D.N.M. 2015) (citing 5C Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Fed. Prac. & Proc. Civ.* § 1367 (3d ed.)). "Depending on the substance and issues involved in a [Rule] 12(c) motion … the [c]ourt will either treat it as a [R]ule 12(b)(6) motion or a [R]ule 12(b)(1) motion." *SWEPI, L.P. v. Mora Cty., N.M.*, 81 F. Supp. 3d 1075, 1146 (D.N.M. 2015). Where, as here, a defendant invokes Rule 12(c) to present a challenge to the court's subject-matter jurisdiction following its answer to the complaint, the court applies "the same standards … as it would have employed had the motion been brought prior to the defendant's answer under Rule[ ] 12(b)(1) …." *Hartford Cas. Ins. Co.*, 158 F. Supp. 3d at 1197 (citing 5C Wright, Miller & Kane, *Fed. Prac. & Proc. Civ.* § 1367). *See also United States v. Bd. of Comm'rs of Otero Cty.*, 184 F. Supp. 3d 1097, 1107 (D.N.M. 2015), *aff'd* 843 F.3d 1208 (10th Cir. 2016); *SWEPI*, 81 F. Supp. 3d at 1146-47 (citing cases); *Snow v. Astrue*, 2011 WL 1642520, at *2 (D. Kan. May 2, 2011).

"Motions to dismiss under Rule 12(b)(1) may take one of two forms. First a party may make a facial challenge to the plaintiff's allegations concerning subject matter jurisdiction, thereby questioning the sufficiency of the complaint." *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 547 (10th Cir. 2001) (internal citations omitted). This was the nature of the jurisdictional challenge presented in the Government's earlier motion to dismiss, which "focused exclusively on the sufficiency of the allegations in Plaintiffs' Amended Complaint" to establish their standing. *Valdez*, 2017 WL 87025, at *5. Second, a defendant may "go[ ] beyond the factual allegations of the complaint and present[ ] evidence in the form of affidavits or otherwise to challenge the court's jurisdiction." *Rural Water Dist. No. 2 v. City of Glenpool*, 698 F.3d 1270, 1272 n.1 (10th Cir. 2012) (citation omitted). Such is the nature of the

NSA's instant motion for judgment on the pleadings, which relies on the Murphy Declaration to contest the factual basis of Plaintiffs' claim of Article III injury.

Whereas a district court, "[i]n reviewing a facial attack … must accept the [well pled] allegations of the complaint as true," *Stuart v. Colo. Interst. Gas Co.*, 271 F.3d 1221, 1225 (10th Cir. 2001), when presented with a factual challenge "a district court may not presume the truthfulness of the complaint's factual allegations," and instead "has wide discretion to allow affidavits [and] other documents …." *Rural Water Dist. No. 2*, 698 F.3d at 1272 n.1 (*quoting Holt v. United* States, 46 F.3d 1000, 1003 (10th Cir. 1995)). The Court's consideration of evidence "outside the pleadings," such as the Murphy declaration, "does not convert the motion into a Rule 56 motion" for summary judgment. *Stuart*, 271 F.3d at 1225; *Holt*, 46 F.3d at 1003. *See also Valdez*, 2017 WL 87025, at *5 n.24; *El Fajri v. Napolitano*, 2015 WL 500816, at *2 (D. Utah. Feb. 5, 2015); *Bigpayout, LLC v. Mantex Enters., Ltd.*, 2014 WL 5149301, at *2 (D. Utah Oct. 14, 2014). That is the case whether the jurisdictional challenge is presented by way of a motion under Rule 12(b)(1), or Rule 12(c). *See Hartford Cas. Ins. Co.*, 158 F.3d at 1196-97 (holding that Rule 12(d) does not require treatment of a factual jurisdictional challenge under Rule 12(c) as a motion for summary judgment); *see also Bd. of Comm'rs of Otero Cty.* 184 F. Supp. 3d at 1107; *SWEPI*, 81 F. Supp. 3d at 1146-47; *Snow*, 2011 WL 1642520, at *2.

Under Rule 12(b)(1), consistent with the requirements of Article III, "federal courts do not presume jurisdiction and the party asserting federal jurisdiction bears the burden of proof," *Wildearth Guardians v. U.S. Forest Serv.*, 2016 WL 390047, at *2 (D. Utah Feb. 1, 2016); *see Loving*, 133 F.3d at 772, which is to say, "the burden of proving all jurisdictional facts." *Santucci v. U.S. Dep't of State*, 2005 WL 3113173, at *3 (D. Ariz. Nov. 21, 2005) (citations omitted). *See also Hanson v. Health Ins. Innovators*, 2011 WL 4527367, at *1 (D. Ariz. Sept.

28, 2011) (in attacks on subject-matter jurisdiction under Rule 12(b)(1), plaintiffs "bear the burden of proof that jurisdiction does in fact exist") (citation omitted); *Owen v. United States*, 2007 WL 628662, at *1 (E.D. Cal. Feb. 28, 2007) (where factual disputes arise under Rule 12(b)(1) concerning the existence of jurisdiction, the party asserting jurisdiction has the burden of proof).

II. PLAINTIFFS LACK STANDING BECAUSE THE ALLEGED NSA "BLANKET" SURVEILLANCE ON WHICH THEY PREMISE COLLECTION OF THEIR COMMUNICATIONS DID NOT, IN FACT, OCCUR.

A. The Allegation of NSA "Blanket" Surveillance That Underlies Plaintiffs' Claims of Injury Is Untrue.

Plaintiffs' Amended Complaint purports to assert six causes of action against the NSA, under the First and Fourth Amendments, the Stored Communications Act, the Privacy Act, the Administrative Procedure Act, and FISA, but all seek the same relief: a declaration that the NSA's alleged interception, collection, and storage of information about their communications (including content, and metadata) violated, and continues to violate, their legal rights; an injunction prohibiting the NSA from continuing to store information about their communications; and further relief requiring the NSA to disclose what information about their communications has been stored, and to provide assurances that all such information has been deleted and permanently removed from the NSA's records. Am. Compl. ¶¶ 50-51, 58-65, 94-104, 105-112, 117-120, 121-129; *id.*, Prayer for Relief ¶¶ 1-2. *See also Valdez*, 2017 WL 82075, at *2; Anderson Letter at 2. Before Plaintiffs can establish their standing to litigate any of these claims for relief, they must demonstrate that they have suffered a concrete and particularized injury through the interception, collection, and continued maintenance of their communications

by the NSA. *See Valdez*, 2017 87025, at *8 (citing *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1176 (10th Cir. 2009)).

Like the plaintiffs in *Amnesty International*, Plaintiffs here set forth no facts establishing that the Government targeted their communications for surveillance, or that particular communications to which they were parties were intercepted. *See* 133 S. Ct. at 1148. Instead, Plaintiffs attempt to meet the burden of showing standing by sweepingly asserting that, during the 2002 Salt Lake Winter Olympic Games, the NSA conducted "blanket surveillance … over everyone utilizing email, text message, and telephone communications within … Salt Lake City, Utah, and the … vicinity of all Olympic venues." Am. Compl. ¶ 9. According to Plaintiffs, that "blanket, indiscriminate . . . surveillance" captured "the contents of every email and text message, and the metadata of every telephone call … to and from every person engaging in those types of communications" in Salt Lake City and "the vicinity of every other Olympic venue" during the 2002 Winter Olympic Games. *Id.* ¶ 5. They contend that their communications must have been among those intercepted, because during the 2002 Winter Olympics they too engaged in e-mail, text message, and telephone communication in the areas allegedly subject to blanket surveillance. *See id.* ¶¶ 17-23. *See also Valdez*, 2017 WL 82075, at *3 (surveying allegations relevant to Plaintiffs' claims of injury); *id* at *1.

Thus, as the Court has recognized, Plaintiffs' assertion that they have been injured by NSA surveillance, collection, and storage of their communications "turns on their allegation that the NSA conducted blanket surveillance of every email, text message, and the metadata from every telephone call from every person in Salt Lake City and the surrounding Olympic venues during the 2002 Winter Olympic Games." *Id.* at *8; *see id.* at *1. That allegation, however, is not true. As a matter of fact, the NSA has never, at any time, conducted "blanket" indiscriminate

surveillance, interception, or analysis of e-mail, text message, telephone, or other telecommunications in Salt Lake City, or in the vicinity of the 2002 Winter Olympic venues, whether during the 2002 Winter Olympic Games or otherwise. Murphy Decl. ¶¶ 3-4, 24. Plaintiffs' allegation to the contrary, even if sufficient as a matter of pleading, *see Valdez*, 2017 WL 87025, at *8-11, may not be presumed true where, as here, jurisdiction is contested as a matter of fact. *Rural Water Dist. No. 2*, 698 F.3d at 1272 n.1; *Holt*, 46 F.3d at 1003. And so deprived of the exclusive factual basis on which they rest, Plaintiffs' claims of injury collapse, and Plaintiffs are unable to carry their burden of demonstrating "that jurisdiction does in fact exist." *Hanson*, 2011 WL 4527367, at *1.

B. No Other Allegations Support Plaintiffs' Standing.

The Amended Complaint contains no other allegations upon which Plaintiffs' claims of injury due to NSA surveillance can be supported. Plaintiffs allege that the claimed "blanket" surveillance of communications in and around Salt Lake City "evolved" from the three components of the PSP, Am. Compl. ¶ 5, the surveillance program authorized by then-President George W. Bush, in the immediate wake of the September 11, 2001, attacks, to detect (and prevent the execution of) terrorist plots against the United States. Murphy Decl. ¶¶ 8-13. But on a factual challenge to jurisdiction, Plaintiffs' murky allegation of a connection to the PSP may not be presumed true. It is also incorrect, as a matter of fact, and supplies no basis on which to conclude that Plaintiffs' communications have ever been subjected to NSA surveillance.

As explained above, the PSP comprised three separate NSA intelligence-gathering activities, all now terminated, *id.* ¶ 13, and none of which involved "blanket" interception or collection of information (whether content, or metadata) about all Americans' communications. The first, the Terrorist Surveillance Program (TSP), was a targeted program aimed at acquiring

the contents of international (one-end foreign) communications in which at least one participant was reasonably believed to be associated with al Qaeda or another specified international terrorist group. *Id.* ¶ 14. As such, it did not involve blanket, indiscriminate interception or collection of Americans' telecommunications. *Id.* ¶¶ 14, 23. (And as the Court has observed, "Plaintiffs do not allege that their specific communications were targeted by the NSA," *Valdez*, 2017 87025, at *2, whether under the TSP or otherwise.) The other two activities conducted under the PSP, the bulk collection of telephony metadata, and of Internet metadata, were broad in scope and involved the collection and aggregation of large volumes of data, but never captured information on all (or even virtually all) Americans' telecommunications. Murphy Decl. ¶¶ 18, 22, 23. Consistent with these limits in the operation of the PSP's constituent programs, at no time did the PSP "evolve" into "blanket, indiscriminate surveillance … of the contents of every email and text message and the metadata of every telephone call" sent or received in Salt Lake City, or the vicinity of the 2002 Winter Olympic venues, during the 2002 Winter Olympic Games. *Id.* ¶ 24; *see* Am. Compl. ¶ 5.[9] Plaintiffs' unsupported allegation to the contrary is wrong.

[9] While the Government has officially acknowledged the existence of the PSP, and disclosed some information about the activities conducted under the PSP, additional information concerning the scope and operation of the program remains classified to protect sensitive intelligence sources and methods, and cannot be disclosed without compromising ongoing intelligence operations, and placing national security at risk. Murphy Decl. ¶¶ 28-31. That information would be subject to protection from disclosure under the state secrets privilege. *See ACLU v NSA*, 493 F.3d 644 (6th Cir. 2007); *see also Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1090 (9th Cir. 2010); *El–Masri v. United States*, 479 F.3d 296, 308-311 (4th Cir. 2007)); *Halkin v. Helms*, 690 F.2d 977, 994-95 (D.C. Cir. 1982). Operational details about the PSP are also protected by section 6 of the National Security Agency Act of 1959, 50 U.S.C. § 3605, which provides that no law shall be construed to require the disclosure of any information regarding the NSA's intelligence-gathering activities. *See Larson v. Dep't of State*, 565 F.3d 857, 868 (D.C. Cir. 2009); *Linder v. NSA*, 94 F.3d 693, 698 (D.C. Cir. 1996).

Plaintiffs' contention that the NSA must have intercepted and collected communications of theirs, because in early 2002 it intercepted and collected information about everyone's communications in and around Salt Lake City, is not rooted in fact. It offers no ground on which Plaintiffs can establish standing to maintain this suit.

CONCLUSION

The Amended Complaint should be dismissed for lack of subject matter jurisdiction.

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