IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY KLAYMAN, et. al.,

Plaintiffs,

v.

BARACK HUSSEIN OBAMA, et. al.

Defendants.

1:14-cv-00092-RJL

Judge Richard J. Leon

MOTION FOR CERTIFICATION OF CLASS AND MEMORANDUM IN SUPPORT OF CERTIFICATION OF CLASS

I. INTRODUCTION

Plaintiffs, on behalf of themselves and others similarly situated, have brought this action seeking declaratory and injunctive relief requiring Defendants to cease needlessly and illegally collecting the phone record and Internet record metadata and content of all U.S. citizens. Pursuant to Federal Rule of Civil Procedure ("FRCP"), Rule 23(a) and Rule 23(b), Plaintiffs hereby respectfully move for a nationwide class ("Nationwide Class") of similarly situated persons defined as: American citizens who are or have been subscribers, users, and/or consumers of Facebook, Google, Yahoo, YouTube, Skype, AOL, Sprint, AT&T, Apple, Microsoft, PalTalk, and other certain telecommunications and Internet service providers and have had their telephone calls, Internet activities, emails and/or any other communications made or received through said certain telecommunications and Internet service providers, collected, recorded and/or listened to by or on behalf of Defendants.

Excluded from the Nationwide Class are the officers, directors, and employees of Defendants, their legal representatives, heirs, successors, and assigns of Defendants, and all judges who may ever adjudicate this case.

II. ARGUMENT

A court may certify a class under FRCP 23(b)(2) if two conditions are met: (1) the moving party satisfies the requirements of Rule 23(a), and (2) "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). *See Gen. Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). The requirements of Rule 23(a) are:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Where a movant meets these requirements, a court has broad discretion to certify the proposed class. *See Hartman v. Duffy*, 19 F.3d 1459, 1471 (D.C. Cir. 1994).

A. Joinder Would Be Impracticable

With hundreds of millions of putative members, the proposed class satisfies the requirement of Rule 23(a)(1) that "the class is so numerous that joinder of all members is impracticable[.]"Fed. R. Civ. P. 23(a)(1). Courts have generally found that a class with at least 40 members satisfies this requirement. *See Meijer v. Warner Chilcott Holdings, Inc.*,

246 F.R.D. 293, 306 (D.D.C. 2007) (certifying class of approximately 30 people); *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9, 25 (D.D.C. 2006). Plaintiffs are not required "to provide an exact number of putative class members in order to satisfy the numerosity requirement." *Pigford v. Glickman,* 182 F.R.D. 341, 347 (D.D.C. 1998) (citing *Marcial v. Coronet Ins. Co*., 880 F.2d 954, 957 (7th Cir. 1989)). Rather, an estimate will suffice. *See Moore v. Napolitano,* No. 00-953, 2013 WL 659111, at *13-14 (D.D.C. Feb. 25, 2013) (class sufficiently numerous where plaintiffs "estimate[d] that the class would contain 120 members"); *Hardy v. District of Columbia*, 283 F.R.D. 20, 23-24 (D.D.C. 2012) (numerosity requirement satisfied where plaintiffs provided evidence supporting their estimate as to the size of the class).

Here, there is no question that joinder is impracticable. The National Class is so numerous that the individual joinder of all members, in this or any similar action, would not be in the interest of justice. The exact number or identification of Class members is presently unknown to Plaintiffs, but it is believed that the Class numbers will be over hundreds of thousands of citizens. Accordingly, based on the sheer number alone, joinder of these plaintiffs' claims is impracticable.

B. <u>There Are Questions of Law and Fact Common to the Class</u>

Rule 23 requires that "there are questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). To satisfy this requirement, Plaintiffs must "demonstrate that the class members 'have suffered the same injury[.]'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (citing *Falcon*, 457 U.S. 147 at 157). This can be shown through the "identification of a policy or practice that affects all members of the class[.]"*DL v. District of Columbia*, 277 F.R.D. 38, 46 (D.D.C. 2011) *5. A common policy or practice is crucial

because, while the same provision of law can be violated in different ways, *Wal-Mart*, 131 S. Ct. at 2551, the focus on a generally applicable policy or practice necessarily means that all class members have been injured by a common source. *DL*, 2013 WL 1489471, at *5. Moreover, resolution of that contention's "truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. Where a common policy or practice is identified, "[f]actual variations among the class members will not defeat the commonality requirement[.]" *See Moore,* No. 00-953, 2013 WL 659111, at *14; *Encinas v. J.J. Drywall Corp.,* 265 F.R.D. 3, 8 (D.D.C. 2010). Indeed, Rule 23(a) says there "need be only a single issue common to all members of the class." *Ligas ex rel. Foster v. Maram*, No. 05 C 2004 U.S. Dist. LEXIS 10856, *11-12 (N.D. Ill. March 7, 2006). Thus, "[a] common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992).

"[A] class representative's claims are typical of those of the class if 'the named plaintiffs' injuries arise from the same course of conduct that gives rise to the other class members' claims." *Encinas*, 265 F.R.D. at 9 (quoting *Bynum v. District of Columbia (Bynum I)*, 214 F.R.D. 27, 35 (D.D.C.2003)); *Stewart v. Rubin*, 948 F. Supp. 1077, 1088 (D.D.C. 1996), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997) (claims are typical where the "same event or practice or course of conduct that gives rise to a claim of another class member's where his or her claims are based on the same legal theory."). "Typical," of course, does not mean identical. *Moore*, No. 00-953 RWR/DAR, 2013 WL 659111, at *16 (D.D.C. Feb. 25, 2013). Factual variations between class representatives and class members can exist. *Encinas*, 265 F.R.D. at 9 ("A plaintiff's claims can be typical of those of the class even if there is some factual variation between them."); *see Moore*, 2013 WL 659111, at *16.

As courts have repeatedly noted, the typicality and commonality requirements of Rule 23 often merge. *Wal-Mart*, 131 S. Ct. at 2551 *5. That is particularly true where individual plaintiffs seek to represent a class of individuals who have been subjected to a generally applicable policy and practice of discrimination. *See, e.g.*, *McReynolds v. Sodexho Marriott Servs., Inc.*, 208 F.R.D. 428, 444-45 (D.D.C. 2002) (finding that class representatives' claims were typical of class members' claims where the class representatives demonstrated that defendant had a common policy and practice of racial discrimination in promotion practices that affected both class representatives and class members); *Encinas*, 265 F.R.D. at 9 (finding typicality where plaintiffs' and putative class members' claims "all arise from the same alleged course of conduct: [defendant's] policy of retaining ten percent of its drywall employees' gross wages.").

There is a well-defined community of interest in the questions of law and fact involved affecting the members of the Class. These common legal and factual questions include:

(a) Whether Defendants' surveillance and gathering of American citizens' telephonic and Internet metadata violated Plaintiffs' and Class Members' constitutional rights, as guaranteed under the First, Fourth, and Fifth Amendments;

(b) Whether Plaintiffs and Class members are entitled to recover compensatory, statutory and punitive damages, whether as a result of Defendants' illegal conduct, and/or otherwise;

(c) Whether Plaintiffs and Class members are entitled to declaratory, injunctive and equitable relief; and

(d) Whether Plaintiffs and Class members are entitled to an award of reasonable attorneys' fees, pre-judgment interest, and costs of this suit.

C. The Named Plaintiffs' Claims Are Typical of the Class

The "typicality" requirement is met when the named plaintiffs' claims "arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members and . . . are based on the same legal theory." *De La Fuente v. Stokely-Van Camp*, 713 F.2d 225, 232 (7th Cir. 1983). *See Falcon*, 457 U.S. 147 at 157 *13 ("the commonality and typicality requirements of Rule 23(a) tent to merge . . ."). As with commonality, typicality does not require that all class members suffer the same injury as the named plaintiffs. "Instead, we look to the defendant's conduct and the plaintiffs' legal theory to satisfy Rule 23(a)(3)." *Rosario*, 963 F.2d at 1018; *see also De La Fuente*, 713 F.2d at 232 (finding that the typicality requirement was satisfied regardless of whether "there are factual distinctions between the claims of the named plaintiffs and those of other class members. Thus, similarity of legal theory may control even in the face of differences of fact.").

Here, the constitutional rights of Americans have been violated by and through the acts of the Defendants.

D. The Named Plaintiffs and Their Counsel Will Fairly and Adequately Protect the Interests of the Class

Rule 23(a)(4) requires that a class representative "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Courts in this Circuit consider two principal requirements. First, "the named representative must not have antagonistic or conflicting interests with the unnamed members of the class[.]" *Sodexho*, 208 F.R.D. at 446 (quoting *Nat'l Assoc. for Mental Health*, *Inc. v. Califano*, 717 F.2d 1451, 1457 (D.C. Cir. 1983)). "The leading case in this Circuit on the question of conflict of interest is *Phillips v. Klassen*, 502 F.2d 362 (D.C. Cir. 1974)[,]" and it counsels that courts should "focus on the remedies sought by the named plaintiffs and [] determine whether the same relief would also likely be

desired by the rest of the class." *Sodexho*, 208 F.R.D. at 446. The second requirement is that "the representatives must appear able to vigorously prosecute the interests of the class through qualified counsel." *Id.* As shown below, Plaintiffs meet both requirements here.

The ability of the named Plaintiffs to represent the class goes to whether they have a "sufficient interest in the outcome to ensure vigorous advocacy." *Rosario*, 963 F.2d at 1018, as well as any interests "antagonistic to the interests of the class." *Riordan v. Smith Barney*, 113 F.R.D. 60, 64 (N.D. Ill. 1986).

In this case, Plaintiffs' interests are entirely coextensive with those of the class. Plaintiffs share the same claims as the class members as well as a strong interest in security declaratory and injunctive relief to remedy the ceaseless monitoring of Plaintiffs private information which results in outrageous constitutional violations. The relief sought by the Plaintiffs will benefit all members of the class. Furthermore, there are no conflicts or antagonism, whether actual or apparent, between the named Plaintiffs and the class, as they all share in the same interest – to live free from constant government surveillance and to have their rights protected under the First, Fourth, and Fifth Amendments to the U.S. Constitution upheld.

Plaintiffs' counsel has extensive experience in civil rights and public interest litigation, including privacy and constitutional cases, and is thus well-qualified to prosecute this action. Larry Klayman has litigated civil rights cases, privacy cases, First Amendment cases, commercial cases, personal injury, antitrust, government litigation, international trade and commerce cases, patent and trademark cases, criminal cases, food and drug cases, consumer product safety cases, banking cases, securities cases, sexual harassment cases, and employment discrimination and other cases over his many years of legal practice.

III. PROPOSED CLASSES

The proposed classes include:

1. All persons whose constitutional rights have been violated by the Government Defendants with regard to telephonic metadata;
2. All persons whose constitutional rights have been violated by the Government Defendants with regard to Internet metadata;
3. All persons whose constitutional rights have been violated by the Government Defendants with regard to social media;
4. All persons whose constitutional rights have been violated by the Government Defendants with regard to overseas phone calls and foreign communications, known as PRISM and MUSCULAR.

IV. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request this Court to grant its Motion For Class Certification.

Dated: March 25, 2014

Respectfully submitted,

/s/ Larry Klayman

Larry Klayman, Esq.
General Counsel
Freedom Watch, Inc.
D.C. Bar No. 334581
2020 Pennsylvania Ave. NW, Suite 345
Washington, DC 20006
Tel: (310) 595-0800
Email: leklayman@gmail.com

Attorney for Plaintiffs and the Class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of March, 2014 a true and correct copy of the foregoing Motion for Certification of Class and Memorandum in Support of Certification of Class (Civil Action No. 1:14-cv-00092-RJL) was submitted electronically to the District Court for the District of Columbia and served via CM/ECF upon the following:

James J. Gilligan
Special Litigation Counsel
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
(202) 514-3358
Email: James.Gilligan@usdoj.gov

Attorneys for Defendants.

Respectfully submitted,
/s/ *Larry Klayman*
Larry Klayman, Esq.
D.C. Bar No. 334581
Freedom Watch, Inc.
2020 Pennsylvania Ave. NW, Suite 345
Washington, DC 20006
Tel: (310) 595-0800