IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GILBERTE JILL KELLEY, *et al.*, Plaintiffs, v. THE FEDERAL BUREAU OF INVESTIGATION, *et al.*, Defendants.	)	Civil Action No. 13-cv-825 (ABJ)

DEFENDANT FBI'S MOTION FOR A PROTECTIVE ORDER

Defendant the Federal Bureau of Investigation ("FBI" or "the Bureau"), by and through undersigned counsel, and pursuant to Federal Rules of Civil Procedure 30(d)(3) and 26(c), respectfully moves the Court for a protective order:

(a) Limiting the September 2, 2015, deposition of FBI Supervisory Special Agent Adam Malone (to the extent the deposition remains open and continued) on the Rule 30(d)(3) ground that certain portions of the deposition were "conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses" the witness or the FBI pursuant to Fed. R. Civ. P. 30(d)(3); and

(b) Restricting, pursuant to Rule 26(c), any further FBI-related discovery to the discovery of (1) facts sufficient to show disclosure(s) to the media by one or more FBI employees in a manner violating the Privacy Act, and (2) facts relating to the governments' defenses to the plaintiffs' remaining claims.

Co-defendant the Department of Defense ("DoD") concurs with the motion. Pursuant to Local Civil Rule 7(m), counsel for defendants have met and conferred with counsel for plaintiffs. Plaintiffs oppose this motion.

For the reasons stated in the accompanying Statement of Points and Authorities and the FBI's proposed Under Seal Supplement, the Court should grant the instant motion.

Dated: October 14, 2015

Respectfully Submitted,

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STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT FBI'S MOTION FOR A PROTECTIVE ORDER

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EXHIBITS

FBI also submits, in connection with this filing, a supplemental filing containing information that cannot at this time be produced on the public record, along with a motion for leave to file the supplement under seal. *See infra*, 3 n.1. *See also* Dkt. # 74 (FBI motion for leave to file under-seal supplement).

I. INTRODUCTION

On September 2, 2015, plaintiffs deposed FBI Special Supervisory Agent Adam Malone. SSA Malone is a Supervisory Special Agent on a cyber squad in the FBI field office in Knoxville, Tennessee. His duties there include oversight of investigations to combat cyber-based attacks and high-technology crimes threatening the United States and our citizens. During the time period relevant to the remaining claim in this case, SSA Malone had been stationed in Tampa, FL, and he served as lead agent on the investigation that began when plaintiffs reported to the FBI allegations of potential cyber stalking. The FBI agreed to make SSA Malone available in Washington, DC, and paid for him to fly from Knoxville to Washington, to attend the deposition. At the deposition, rather than probe SSA Malone on issues germane to the sole extant claim in this case, *i.e.* potentially unlawful disclosures to the media of Privacy-Act-protected information, plaintiffs instead proceeded in a manner designed to annoy, embarrass, and harass SSA Malone and the Bureau. Among other things, plaintiffs questioned FBI's investigative tactics, and they fished for facts to support an unsubstantiated theory that SSA Malone and other FBI agents conducted their investigation for lascivious or other improper motives. The Federal Rules protect witnesses from facing the harassing, embarrassing, and annoying conduct that SSA Malone faced. Pursuant to those rules, defendants seek an order of the Court protecting SSA Malone and the FBI from these or other improper lines of questioning, to the extent that his September 2, 2015, remains open and continued.

Beyond the fact that plaintiffs questioned SSA Malone in a manner designed to annoy, harass, and embarrass him and the Bureau, plaintiffs' topics of inquiry also strayed well outside the appropriate scope of discovery. Plaintiffs are not entitled in this Privacy Act litigation to discover facts either (a) relating solely to their dismissed claims and not to their extant claim, or (b) revealing the methods, timing, or strategy by which the Federal Bureau of Investigation (the

"FBI" or "the Bureau") — after receiving Jill Kelley's report of suspicious emails — conducted its criminal investigation into potential cyber-stalking and related violations. Plaintiffs' persistent and focused attempts to obtain discovery relating to these topics, including in particular plaintiffs' recent deposition questioning of SSA Malone, have reached a level indicating improper use of the discovery system. Therefore, pursuant to Federal Rules of Civil Procedure 30(d)(3) and 26(c), defendant FBI respectfully moves the Court for a protective order (1) limiting the deposition of SSA Malone on the ground that certain portions of the deposition were "conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses" the witness or the Bureau, *see* Fed. R. Civ. P. 30(d)(3), and (2) restricting pursuant to Rule 26(c) any outstanding discovery of or related to the FBI to certain facts, namely: (a) facts sufficient to show disclosure(s) to the media by one or more FBI employees in a manner violating the Privacy Act, and (b) facts relating to the government's defenses to plaintiffs' remaining claims.

Although the permissible scope of discovery under the Federal Rules of Civil Procedure is broad, it is not unlimited. *See* Fed. R. Civ. P. 26(b). A party may not interpose discovery for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. *See, e.g.*, *id.* 26(g)(1)(B)(ii). As Rule 1 of the Federal Rules of Civil Procedure makes clear, the discovery rules (as well as the rest of Rules) are to be construed and used so as to "secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. To allow a party to pursue discovery on claims that have been dismissed, or on topics unrelated to the litigation, would be inconsistent with the purpose and instructions of the Federal Rules. As multiple other courts have observed, "'[r]unaway' discovery that has little relevance to the case and is 'excessive, burdensome, unnecessary, and intrusive' justifies resorting to court intervention" and the issuance of a protective order. *Webb v. CBS Broad., Inc.*,

No. 08 C 6241, 2011 WL 111615, at *6 (N.D. Ill. Jan. 13, 2011) (quoting *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, U. A., 657 F.2d 890, 901 (7th Cir. 1981)); *see also* 8A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2116 (3d ed.) ("The requirement for [a Rule 30(d)(3) protective] order has been held satisfied on a showing ... that the examination has gone too far afield.").

As discussed below and in defendants' proposed under-seal supplement to the instant motion,[1] plaintiffs' discovery of the FBI in this Privacy Act unlawful disclosure case has "gone too far afield." *See id.* The Court should not permit plaintiffs to further probe details of the FBI's criminal cyber-stalking investigation prompted by plaintiffs' complaint to the FBI. The details plaintiffs seek to discover lack relevance or a reasonable likelihood of leading to the discovery of admissible evidence in this Privacy Act unlawful-disclosure-to-the-media case. The Court should grant the FBI's motion and issue a protective order limiting plaintiffs' FBI-related discovery.

II. BACKGROUND

A. Discovery Conducted Prior to the Malone Deposition

Prior to the start of discovery, the Court narrowed the scope of this case. Specifically, on September 15, 2014, this Court ruled on the government's motion to dismiss plaintiffs' amended complaint, denying in part and granting in part that motion. Mem. Op., Dkt. # 46. The Court denied the motion with respect to a portion of Count 1 regarding plaintiffs' claims for unlawful

[1] Defendant FBI is submitting, in connection with the instant motion, a supplemental filing containing information that cannot at this time be produced on the public record; such information has been designated by a party or third party as "CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER," pursuant to the Amended Protective Order issued by the Court (Dkt. # 65). The supplemental filing provides additional context, background, and reasons for the Court to issue the requested protective order. FBI endeavors, however, to explain as much as can be stated publicly in this brief, which on its own provides a sufficient and strong basis for the Court to grant FBI's motion for a protective order.

disclosure(s) by FBI and/or DoD of information about plaintiffs to the media in violation of section 552a(g)(1)(D) of the Privacy Act, *see id.* 3, 23-25, 76. The Court granted the motion with respect to the following claims by plaintiffs,[2] which the Court dismissed:

- Alleged unauthorized disclosure(s) by FBI to DoD of records regarding the plaintiffs (part of Count 1);
- Alleged failures by FBI and DoD to maintain in their records only such information as relevant and necessary to accomplish a purpose of the agency (Count 2);
- Alleged failures by FBI and DoD to maintain records about the plaintiffs with such accuracy, relevance, timeliness, and completeness as was necessary to assure fairness (Count 3);
- The alleged, improper maintenance by FBI and DoD of records describing plaintiffs' exercise of their First Amendment rights (Count 4);
- Alleged failures by FBI, DoD, and then-defendant the Department of State to make reasonable efforts to assure records are accurate, complete, and relevant for agency purposes prior to dissemination (Count 5);
- Alleged failure by FBI and DoD to establish appropriate safeguards to ensure the security and confidentiality of records which resulted in substantial harm and embarrassment (Count 6);
- Alleged violations by the United States of the Stored Communications Act, 18 U.S.C. § 2707(g), which prohibits disclosure of electronic communications obtained by the government through compulsion from a third-party service provider where such disclosure is not made in the proper performance of official functions (Count 7);
- Alleged violation of the notice provision contained in section 2703(b) of the Stored Communications Act, which requires prior notice in certain circumstances to customers or subscribers whose electronic communications will be obtained (Count 8);
- *Bivens* claims against then-defendants Sean Joyce, former FBI Deputy Director; Steve Ibison, former Special Agent in Charge of the FBI's Tampa Division; and SSA Malone (all sued in their individual capacities) alleging

[2] The dismissed claims of plaintiffs' Amended Complaint are briefly summarized here. For a more detailed description, see the list included on pages 9 to 10 of the Court's Memorandum Opinion, Dkt. # 46, and plaintiffs' Amended Complaint, Dkt. # 19.

they violated plaintiffs' Fourth Amendment rights against unreasonable searches and seizures (Count 9);

- *Bivens* claims against then-defendants Sean Joyce, Steve Ibison, and SSA Malone (all sued in their individual capacities), alleging they violated plaintiffs' Fifth Amendment rights to due process, including equal protection under the law (Count 10);

- Claims alleging common-law tort of defamation by then-defendants Leon Panetta, former Secretary of Defense; and George Little, former Deputy Assistant Secretary of Defense for Public Affairs and the Pentagon Press Secretary (both sued in their individual capacities) (Count 11);

- Claims alleging common-law tort of false light by then-defendants Leon Panetta and George Little (both sued in their individual capacities) (Count 12);

- Claims alleging common-law tort of intrusion upon seclusion by then-defendants Sean Joyce, Steve Ibison, and SSA Malone (all sued in their individual capacities) (Count 13); and

- Claims alleging common-law tort of publication of private facts by then-defendants Leon Panetta and George Little (both sued in their individual capacities) (Count 14).

See id. 9-10, 76; Amended Compl. ¶¶ 113-225. The Court observed: "Whether plaintiffs will be able to prove the remaining [Privacy Act unlawful-disclosure] claims is a question for another day, but for now, the case will proceed, albeit *on a considerably more streamlined basis*." *Id.* at 4. (emphasis added).

Discovery began in November 2014 and is currently scheduled to generally close November 13, 2015. *See* Minute Order, Oct. 7, 2015. It has not proceeded on a particularly "streamlined basis." *Cf.* Mem. Op., Dkt. # 46, at 4. During the course of discovery, plaintiffs have interposed numerous interrogatories and requests for documents, including some such as the following requests seeking broad amounts of information regarding either the FBI criminal investigation that preceded General Petraeus' resignation as Director of the Central Intelligence Agency ("CIA") or facts relevant to dismissed claims:

- "[Produce] All Documents related or created in response to or as a result of the cyberstalking report filed by the Kelleys in the Tampa, Florida FBI Field Office in June 2012 ('Kelley Cyberstalking Report')." (Plaintiffs' Request for Production 3);

- "[Produce] All ... Documents during the relevant time period evidencing all internal and external communications ... relating to ... the Kelley Cyberstalking Report, including, but not limited to, any investigation or inquiry regarding ... Paula Broadwell, General (Ret.) David Petraeus, General John Allen, ... and/or the allegations raised in the Kelleys' Amended Complaint." (Plaintiffs' Request for Production 4);

- "Provide a detailed timeline of the transfer of materials regarding the Allen matter [defined by plaintiffs as 'refer[ing] to the matter concerning communications between General John Allen and Jill Kelley'] to DoD, including discussions around how to proceed with the Allen matter, and identification of all individuals involved in 1) the decision to transfer these materials to DoD and 2) the actual physical transfer itself." (Plaintiffs' Interrogatory 7; *cf.* the dismissed portion of plaintiffs' Count 1).

Recognizing the broad scope of permissible discovery under Rule 26, FBI produced in response to plaintiffs' requests, among other things, significant portions of FBI criminal investigative case file # 288A-TP-74641, the file opened in response to Jill Kelley's report of suspicious emails.[3]

Plaintiffs conducted their first deposition of an FBI employee on March 20, 2015; plaintiffs deposed Special Agent Frederick Humphries, who testified that he was "social friends with the Kelley family" and considered himself "friends with Jill Kelley." Humphries Tr. 71:3-5. During the deposition, plaintiffs elicited testimony with no apparent relevance to the remaining Privacy Act unlawful-disclosure claim, nor with any likelihood of leading to the discovery of

[3] Documents from criminal case file # 288A-TP-74641 were produced to plaintiffs on May 15, 2015, and were produced as "CONFIDENTIAL - SUBJECT TO THE PROTECTIVE ORDER" pursuant to the Protective Order. A copy of the as-produced set of investigative-file documents is being provided to the Court with FBI's [Proposed] Under Seal Supplemental Filing in Support of Motion for Protective Order.

admissible evidence.[4] Indeed, plaintiffs primarily questioned SA Humphries' about facts that bore no apparent relevance to a claim of unlawful disclosure of information to the media. The deposition focused instead on the conduct of the FBI's criminal investigation, and SA Humphries' speculation regarding the same.[5] Plaintiffs' counsel focused on seemingly sensational details, such as SA Humphries' suspicion that election-cycle politics had impacted the course of the cyberstalking investigation, and his recollection of a potentially lewd remark made by an unnamed FBI agent. Within days after the parties (both plaintiffs and defendants) designated certain portions of the Humphries' deposition transcript as "CONFIDENTIAL - SUBJECT TO THE PROTECTIVE ORDER," a redacted copy of the transcript was provided to the media.[6] *See* Ex. A (email from reporter for CNN, to the unit chief of the FBI National Press Office, indicating that CNN had received a copy of the deposition transcript and seeking a response from the FBI); Ex. B (news report stating that CNN obtained a "redacted copy" of the transcript). Several news articles were published regarding the Humphries deposition, highlighting various details that had been described by SA Humphries in response to questioning by plaintiffs' counsel. *See, e.g.*, Jake Tapper, "FBI agent testifies in Paula Broadwell

[4] SA Humphries described the conduct of the criminal cyberstalking investigation in June 2012 and throughout that summer, months before any disclosures of information to the media are alleged to have occurred. *Id.* 41:2-11; 100:22-101:5.

[5] SA Humphries testified that he never served as an investigator on the FBI's cyberstalking case, Humphries Tr. 140:09-12; that he did not know the predicate for establishing cyberstalking, *id.* 82:18-19; that his only involvement, limited to June 2012, was as "liaison" to certain witnesses he knew socially or because of his work at MacDill Air Force Base, *see id.* 37:13-19, 39:08-21, 44:24-45:05; and that he "never accessed the official file for that cyberstalking investigation," *id.* 140:13-15. SA Humphries was represented by his own, private attorney at the deposition; the FBI was represented by Department of Justice counsel. The government's counsel interposed numerous objections during the course of the Humphries deposition, including that plaintiffs' inquiry lacked foundation and called for speculation. *See, e.g.*, *id.* 48:5, 52:15, 53:20-21.

[6] Defendants do not know who provided this transcript to the media, except they know it was not provided by either defendant FBI or DoD nor their counsel.

cyberstalking case," *CNN.com* (April 20, 2015) (attached as Ex. B); Josh Gerstein, "FBI agent in sworn deposition: Petraeus lover accessed his emails," *Politico* (April 23, 2015) (attached as Ex. C); "FBI agent's testimony bolsters Jill Kelley's claims in defamation case," *Tampa Bay Times* (April 20, 2015) (attached as Ex. D).

Plaintiffs conducted their second deposition of an FBI employee on May 1, 2015, the deposition of SSA Stacy Arruda. As with the Humphries deposition, plaintiffs spent much of the Arruda deposition attempting to probe details regarding the FBI's conduct of its criminal cyber-stalking investigation, and very little time seeking information that would be reasonably likely to lead to the discovery of admissible evidence in a Privacy Act unlawful-disclosure-to-the-media case. Defendants' counsel objected to multiple questions on the ground that they called for information protected by the law enforcement privilege. Defendants' counsel also noted on the record that plaintiffs were asking questions that were "incredibly far removed and attenuated from any claim of a ... disclosure in violation of the privacy act," Arruda Tr. 119:12-15, and that "[Plaintiffs are] asking about law enforcement techniques and sources. This is privileged, and I see almost no relevance to an ultimate privacy act disclosure claim. None." *id.* 67:20-24.

In July and August, plaintiffs deposed several current and former DoD employees, and information from those depositions was later provided to the press and reported in news articles appearing to cast plaintiffs in a favorable light. One story — headlined, "Reporters face subpoena in case over CIA head's resignation" — purported to describe testimony given by the DoD witnesses at these depositions.[7] *See* Ted Bridis and Eric Tucker, "Reporters face

[7] The story reported false information and characterizations regarding the DoD witness's testimony, including that "Pentagon officials acknowledged in depositions that they developed a 'press plan' with members of an unspecified delegation from the White House in November 2012 to tell reporters that emails between Allen and Jill Kelley were 'potentially inappropriate' and to suggest that the two had a sexual relationship." *See* Ex. E. Defendants represent to the Court that no DoD witness provided such testimony. Defendants do not know the basis for this

subpoenas...," Associated Press (Sept. 2, 2015) (attached at Ex. E). It also described the plaintiffs' "legal strategy," including their plans to subpoena journalists. *Id.* at 1. The story cited "a person familiar with the case who spoke on condition of anonymity because the case is under a judicial gag order," presumably the Amended Protective Order (Dkt. # 65) entered by this Court. *Id.* at 2. Plaintiffs' Deposition of SSA Malone

Plaintiffs' third deposition of an FBI witness, the deposition of SSA Malone, occurred on September 2. During the course of that deposition, counsel for the parties disagreed over a series of examination questions pursued by plaintiffs' counsel. This disagreement was first discussed on the record two hours into the deposition, after plaintiffs' counsel asked SSA Malone: "[With respect to the determination that certain emails originated from The Thayer Hotel, located at West Point Military Academy,] **When were you able to make that determination?**" Malone Tr. 71:07-08. Defendants' counsel objected, and the following colloquy took place:

> MS. MARCUS [Counsel for Defendants]:
> ... The question is outside the scope of Rule 26, not likely to lead to the discovery of admissible evidence.
> Can you please explain, if you disagree, why you think that question is likely to lead to the discovery of admissible evidence in this Privacy Act case?
>
> MR. NEAL [Counsel for Plaintiffs]:
> Yes. Most definitely, I do disagree. The date by which the FBI was able to identify both location and, ultimately, the identity of the person who was cyberstalking my client is directly relevant to the subsequent actions undertaken by the FBI to engage in a far-reaching and, ultimately, impermissible and unauthorized search of my clients' emails.
> I am setting forward -- setting forth or, at least, laying the foundation for the predicate of that argument. I'm not asking you to agree or disagree, but that's the intent of my questioning. I've got a fair number of questions that relate to that.

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reporting, and they are limited in their ability to publicly respond given the "CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER" designation of the original transcripts.

> MS. MARCUS:
> Well, I understand what you just said, but that actually wasn't my question. I asked you to please explain why you think that the question is likely to lead to the discovery of admissible evidence in this Privacy Act case.
>
> MR. NEAL:
> I answered your question. Let's proceed.
>
> MS. MARCUS:
> I restate my objection on the basis of relevance. The question is outside of the scope of Rule 26 and I think also other rules in the 30s on depositions.
> I will instruct the witness not to answer, if we need to seek a protective order.

Malone Tr. 71:14-72:23. Counsel continued to dialogue on the record for approximately four minutes and then agreed to go off the record to try to resolve their differences. *See id.* 74:04-05. During the break, counsel for the parties discussed — among other things — Federal Rule of Civil Procedure 30(d)(3) and defense counsel's intent to seek, on behalf of the FBI, a protective order pursuant to that Rule. Counsel for the parties were unable to resolve their substantive disagreement but they agreed on procedure, as explained by counsel on the record after the break:

> MR. NEAL:
> Back on the record. We took a break, which extended into a lunch break, during which counsel attempted to resolve the DOJ's objection and specifically its instruction to the witness not to answer questions about when the FBI suspected, and later determined, that Paula Broadwell was the cyberstalker of Jill Kelley and Dr. Scott Kelley.
> We were not able to resolve our differences, despite our good faith efforts. We agreed to limit our argument over the merits, as to which we have very divergent opinions. I will, however, state that it is my belief that counsel's instruction is inappropriate, that it's inconsistent with Rule 30(d)(1), and the Advisory Committee Notes.
> Federal Rule of Civil Procedure 30(d)(1) forbids a party to instruct a deponent to refuse to answer a question unless such instruction is necessary to preserve a privilege, to enforce a limitation on evidence imposed by the Court, or to permit the making of a motion for a protective order under Rule 30(d)(3).
> I have offered to keep the sensitive parts of the transcript under seal, and the DOJ has taken that matter under advisement. But we were unable to reach an agreement during the lunch break on a protocol to keep my questions and the witness' answers under seal.

I debated whether to stop this deposition and reach out either immediately, or in short order, to the Court with a motion to compel, but I decided to proceed. The problem I have is, I don't have just one question for this witness on this subject matter, I have a series of questions.

In fact, a good chunk of my outline relates to when the FBI discovered the identity of the cyberstalker and why they [took particular law enforcement actions] after they made such a determination. Of course, my question may yield answers to allow me to explore other relevant areas in this case.

I am mindful that the witness is a busy professional, who flew in from Tennessee to be deposed today. I will proceed, reluctantly, to do two things: One, to make my record by continuing with my line of questioning on this subject matter until, as a practical matter, it makes no sense for me to go further, in the face of the DOJ instructing the witness not to answer my questions, and, two, to question the witness about matters unrelated to this cyberstalker issue.

... .

MS. MARCUS:

Thank you, Mr. Neal, for that description of our conversation and your views. Thank you also for what I view -- what I view to be productive conversation during the lunch break.

I think it's my understanding that our plan generally today is to proceed with this deposition, that you will ask the questions that you intend to ask of this witness.

I will state, as necessary, any objections I have for the record. I will, as necessary and consistent with the Federal Rules of Civil Procedure, instruct the witness not to answer questions that seek privilege[d] information or questions that pertain to our anticipated motion for a protective order.

With respect to the suggestion that we agree to ... seek a more restricted use and dissemination provision or provisions for portions of this deposition, I confirm that Mr. Neal and I discussed that idea during the lunch break, and that it is a matter that I and my colleagues, representing the defendants, are taking under advisement at this time.

I will note that there is currently a protective order in this case ... docket number, Document 65. That's the amended protective order. That protective order is generally applicable ... [i]n discovery[;] it contains provisions for identifying and designating information as confidential, subject to the protective order.

The idea that Mr. Neal raised was to have some more -- even more restricted ... set [of] protocol[s] on use or dissemination for portions of the testimony, which is something that we will consider ... [I]t may not be necessary, and, ultimately ... the idea may not address the concern of making sure that the proceeding is within the scope of the discovery rules, which are broad, but have limits as to the scope of discovery -- permissible discovery.

...

Again, I thank Mr. Neal and Ms. Manoranjan, his colleague, who is here, for our professional and productive dialogue. And I think, collectively, we will attempt to build a record here so that if either side needs to present anything to the

> Court, the scope of our discovery dispute will be as limited as possible and as clear as possible.

Id. 74:18-79:24.

The deposition proceeded. In response to multiple questions posed by plaintiffs' counsel, defendants' counsel stated a relevance objection on the record but allowed the witness to answer. In response to other questions, defendants' counsel instructed the witness not to answer because the questions were covered by the FBI's intended Rule 30(d)(3) motion for a protective order. Those questions — many of which were essentially the same question asked in different ways — included the following:[8]

- **Related question, sir. How much longer after June 14th, 2012, did you make a determination that the four emails set forth on Bates number 185 originated from The Thayer hotel?** (*Id.* 91:09-12.)
- **When did you first suspect that Paula Broadwell was the author of the cyberstalking emails?** (*Id.* 93:05-06.)
- **When did you suspect that Paula Broadwell was the author of the cyberstalking emails?** (*Id.* 96:19-20.)
- **When did you believe that Paula Broadwell was the author of the cyberstalking emails?** (*Id.* 96:24-25.)
- **When did you determine that Paula Broadwell was the author of the cyberstalking emails?** (*Id.* 97:04-05.)
- **When did you first learn that individuals, other than Jill Kelley and Dr. Scott Kelley, were receiving harassing emails from either Tampa.Angel or Kelley Patrol?** (*Id.* 101:10-13.)
- **How did the FBI identify Paula Broadwell as being responsible?** (*Id.* 109:19-20.)
- **The suspect of the Jill and Dr. Scott Kelley cyberstalking complaint was identified by the FBI by June 27th, 2012, correct?** (*Id.* 110:06-08.)

[8] The FBI lists on its supplemental filing the other questions for which defendants' counsel instructed the witness not to answer based on the FBI's anticipated motion for a protective order; those questions are not listed here because they reference information that has been designated "CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER."

- **Agent Malone, you had your man -- or, in this case, your woman -- as of June 27th, 2012, correct?** (*Id.* 110:13-15.)

- **Did you believe as of June 27th, 2012, that there were any additional suspects who were behind the dissemination of the cyberstalking emails complained about by Jill Kelley and Dr. Scott Kelley?** (*Id.* 110:19-22.)

- **And between -- is it fair to say that, sir, between June 13th and June 27th, at some point within that two-week window, the FBI identified Paula Broadwell as the sender of the cyberstalking emails?** (*Id.* 114:02-05.)

- **What steps did you take between June 23rd and June 27th of 2012 to obtain that affirmative proof that Ms. Broadwell was the author of the cyberstalking emails to Jill Kelley and Dr. Scott Kelley?** (*Id.* 115:13-16.)

- **Did you attempt to confront Ms. Broadwell about your suspicions that she was the author of the cyberstalking emails between the period of June 13th, 2012, and June 27th, 2012?** (*Id.* 115:22-25.)

- **Between June 13th, 2012, and June 27th, 2012, did you make an effort to contact Ms. Broadwell to tell her to stop sending the cyberstalking emails to Jill Kelley and Dr. Scott Kelley?** (*Id.* 116:06-09)

- **Between June 13th, 2012, and June 27th, 2012, did you make any effort to interview Ms. Broadwell about the cyberstalking emails to Jill Kelley and Dr. Scott Kelley?** (*Id.* 116:14-17.)

- **Did you make that request before or after you identified Paula Broadwell as the author of the cyberstalking emails?** (*Id.* 123:04-06.)

- [With regard to the prior question, which had asked: "I will repeat the question. At any point in time, did you suspect that Jill or Dr. Scott Kelley had committed a crime?] **And at what point in time was that?** (*Id.* 131:22.)

- **What evidence did you have that Ms. Kelley was obstructing justice?** (*Id.* 134:16-17.)

- **Does the FBI investigate the sex lives of private citizens?** (*Id.* 135:05-06.)

The deposition lasted approximately 4 hours and 40 minutes, not including breaks. Toward the end of the deposition, after a colloquy between counsel, plaintiffs' counsel terminated the deposition. *See* Ex. F at 19-21.

III. DISCUSSION: THE COURT SHOULD ISSUE A PROTECTIVE ORDER LIMITING FBI-RELATED DISCOVERY

A. To the extent the deposition of SSA Malone remains open, the Court should uphold defense counsel's instructions not to answer certain questions, and should grant FBI's motion for a protective order pursuant to federal rule of civil procedure 30(d)(3).

Federal Rule 30(d)(3) provides that "[a]t any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party." The drafters of the Federal Rules included Rule 30(d)(3) as a "safeguard" on account of the broad right to discovery generally provided by Rule 26. *See* Fed. R. Civ. P. 30, advisory committee notes (1937). A ruling to limit deposition examination pursuant to Rule 30(d)(3) is "in the sound discretion of the court." *De Wagenknecht v. Stinnes*, 243 F.2d 413, 417 (D.C. Cir. 1957); *see also id.* 243 F.2d at 417 n.5 ("The power of the court to prevent abuse of its process is very broad ... during the course of the examination [pursuant to] 30(d).").

In considering whether to limit a deposition pursuant to Rule 30(d)(3), courts may properly consider the "repetitiveness and breadth" of questions asked, *Tran v. Sonic Indus. Servs., Inc.*, No. CIV-10-69-C, 2010 WL 4696272, at *2 (W.D. Okla. Nov. 12, 2010) *aff'd,* 490 F. App'x 115 (10th Cir. 2012), the discovery that has previously occurred, *see, e.g.*, *Mr. Frank, Inc. v. Waste Mgmt., Inc.*, No. 80 C 3498, 1983 WL 1859, at *2 (N.D. Ill. July 7, 1983), and whether the examination is pursued not to further one's claims or defenses but for an "ulterior purpose," *see, e.g.*, *Empire Liquor Corp. v. Gibson Distilling Co.*, 2 F.R.D. 247, 248 (S.D.N.Y. 1941). Courts also distinguish between party and non-party witnesses, allowing "greater latitude" in the cross-examination of a party and providing greater protection to a non-party witness. *De Wagenknecht*, 243 F.2d at 417.

Here, the Court should exercise its discretion to limit the deposition of SSA Malone, a non-party witness and former named defendant. Instead of asking SSA Malone — or either of the other two FBI witnesses plaintiffs have deposed — about any particular alleged disclosure to the media, any news article, any attribution to a "law enforcement official," or any conversation with any reporter,[9] the plaintiffs relentlessly inquired about details of the FBI's criminal investigation. Information about *how* and *why* the FBI collected certain information has no bearing on the question of *whether* the FBI subsequently disseminated that information to the media. Notwithstanding its irrelevance to the remaining Privacy Act claims in this case, the FBI has already produced a significant amount of discovery on this issue. Plaintiffs' examination focused with particular intensity on FBI investigative activity occurring in June 2012, more than four months before any of the alleged media-disclosures in this case took place. Plaintiffs' stated purpose for this inquiry is that: "[t]he date by which the FBI was able to identify both [the] location and, ultimately, the identity of the person who was cyberstalking [Jill Kelley] is directly relevant to the subsequent actions undertaken by the FBI to engage in a far-reaching and, ultimately, impermissible and unauthorized search of my clients' emails." Malone Tr. 71:23-72:04. But the Court has already dismissed plaintiffs' multiple claims of investigative impropriety — including plaintiffs' Fourth Amendment, Fifth Amendment, and Stored Communications Act claims — and thus this line of inquiry is not properly directed to legitimate

[9] Plaintiffs did not ask SSA Malone a single question regarding his interactions or potential interactions with the media, despite defense counsel's entreaty that they do so before terminating the deposition, Ex. F at 19-21, and her statement that FBI would not voluntarily reproduce the witness, *id.* at 16.

factual development. Rather, it appears to be directed to embarrassing and harassing SSA Malone and the FBI for some purpose unrelated to their remaining claim.[10]

The justifications attempted by plaintiffs during the course of the deposition for this line of questioning do not persuade. Plaintiffs' counsel explained that plaintiffs sought to discover details of the FBI's criminal cyber stalking investigation because the manner in which the FBI conducted that investigation "directly relate[s], to our Privacy Act claim, including whether or not the ultimate disclosure, the ultimate leaks … was willful and was intentional under the Privacy Act." Malone Tr. 137:10-13. But, at least thus far in discovery, plaintiffs have failed to adduce evidence showing an actual disclosure by the FBI to the media of Privacy-Act-protected records or information; plaintiffs plainly cannot demonstrate that a disclosure was "willful or intentional" pursuant to 5 U.S.C. § 552a(g)(4) if no disclosure took place. Even if plaintiffs do ultimately show an actual FBI disclosure of Privacy-Act-protected information to the media, the relevance of inquiry into the cyber stalking investigation remains far from obvious. The terms "intentional" and "willful" in subsection (g)(4) of the Privacy Act "do not have their vernacular meanings"; rather, they are "terms of art." *See, e.g.*, *White v. OPM*, 840 F.2d 85, 87 (D.C. Cir. 1988) (*per curiam*). How the FBI conducted a criminal investigation months prior to the alleged disclosures in this case has no bearing on whether any alleged FBI disclosure to the media in November 2012 was made "without grounds for believing [the disclosure] to be lawful, or by flagrantly disregarding others' rights under the [Privacy'] Act." *See id.*

Moreover, even if plaintiffs sincerely view their inquiry into the details of the FBI's cyber stalking investigation as somehow relevant to their Privacy Act claims, the Court should still grant the FBI's Rule 30(d)(3) motion. Plaintiffs' view of this case may be "sincerely held," but

[10] The Court has previously admonished plaintiffs about using the Court's docket as a means to facilitate a public relations campaign. *See* Minute Order (Sept. 24, 2012).

"the questioning [of SSA Malone] certainly exceeded the limits of the case, and went over the line in a manner that unreasonably annoyed, embarrassed, or oppressed" the witness and the FBI. See *Webb*, 2011 WL 111615 at *6.

The following series of questions illustrates how the examination of SSA Malone reached the level of harassment of the witness and the FBI:

> MR. NEAL:
> Does the FBI investigate the sex lives of private citizens?
>
> MS. MARCUS:
> Objection, foundation, form, relevance. It's time to cut this off. This has nothing to do with the -- to do with -- this question is not likely to lead to admissible evidence or discovery of anything -- any relevant information.
> Beyond that, it's a broad question and is beyond the scope of Rule 26.
>
> MR. NEAL:
> So is it DOJ's position that whether or not Jill Kelley had sexual relationships with generals, private citizens -- heck, with all due respect, Ms. Kelley -- all of Tampa, that that has no relevance whatsoever to the cyberstalking investigation?
>
> MS. MARCUS:
> That is not my position, nor is it the DOJ's position.
>
> MR. NEAL:
> Can you explain the basis for why you're cutting off inquiry on that, if it may possibly have relevance to this litigation?
>
> MS. MARCUS:
> No, that wasn't your statement. Your statement was whether it has relevance to the cyberstalking investigation. It may have had relevance to the cyberstalking investigation. It has no relevance to the Privacy Act case that is pending and for which we are engaging in discovery.

Id. 135:05-136:05.

Plaintiffs' previous attempts at far-reaching discovery of the FBI further informs how plaintiffs' pursuit of this irrelevant line of inquiry from SSA Malone rises to the level of annoyance, embarrassment, or harassment. FBI has already produced to plaintiffs a broad amount of information about the cyber stalking investigation, including (but not limited to) every

document (except for one document withheld on work product and law enforcement privilege grounds) serialized to the cyber stalking investigative file, FBI case # 288A-TP-74641, that refers to or discusses plaintiffs Jill and Scott Kelley, or that refer to or discuss either their @yahoo.com email address and/or their @me.com email address. Plaintiffs' counsel has deposed three FBI witnesses, asking each one of them about various aspects of the investigation. Plaintiffs have no valid need for further discovery into the FBI's conduct of its cyber-stalking investigation.

The Court should also consider plaintiffs' depositions of DoD witnesses and the subsequent news stories, which show that plaintiffs' focus in eliciting deposition testimony may not always be to establish facts necessary to prove their remaining claims, but may also (or instead) be designed to promote an ulterior purpose of advancing plaintiffs' public relations goals. An Associated Press story published in September described those depositions and cited a person "familiar with the case who spoke on condition of anonymity because the case is under a judicial gag order." Ex. E. Defendants previously relayed to the Court that they have been concerned about the apparent disclosure of confidential deposition testimony evidenced by this news story.[11] That the cited source apparently was aware of the Court's Amended Protective Order ("a judicial gag order") and chose anyway to disclose confidential information provides reason for the Court to police the remaining depositions in this case, including the deposition of SSA Malone to the extent it remains open and continued.[12]

For these reasons, the Court should uphold defense counsel's instruction to SSA Malone that he not answer the questions bulleted on pages 12-13, above, and pages 2-3 of the

[11] This issue was raised with plaintiffs' counsel and the Court by defense counsel prior to the Court's September 16 teleconference with the parties.

[12] FBI views the SSA Malone deposition as closed.

supplemental filing. The Court should limit the deposition of SSA Malone pursuant to 30(d)(3). Having terminated the deposition early, without leave of Court, *see* Ex. F at 19-21, plaintiffs should not be permitted to take a second deposition of SSA Malone.

B. The Court should also grant FBI's motion for a protective order pursuant to Federal rule of Civil Procedure 26(c).

In addition to protecting SSA Malone and the FBI from the improper deposition questioning at the Malone deposition, this Court should also include in its protective order a forward-looking provision, pursuant to Rule 26(c), limiting outstanding and future FBI-related discovery.

Rule 26(c) authorizes the Court to issue a discovery order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." In furtherance of that objective, Rule 26(c) "confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). With this broad authority, the court "should not hesitate to exercise appropriate control over the discovery process." *Herbert v. Lando*, 441 U.S. 153, 177 (1979).

"[D]iscovery has limits and … these limits grow more formidable as the showing of need decreases." *Federal Practice and Procedure* § 2036. Plaintiffs cannot show a litigation need for much, if not most, of the FBI-related discovery they have been pursuing. Plaintiffs' repeated attempts to elicit detailed information about how the FBI conducted a cyber stalking investigation in the summer and fall of 2012, and why the FBI pursued the investigation in one direction or another, bears no relevance to the Privacy Act claim here, which relates only to whether an unlawful disclosure of information to the media occurred in November 2012. Nor is it reasonably calculated to lead to the discovery of admissible evidence.

Plaintiffs should not be allowed to pursue further discovery related to their dismissed claims or the FBI's cyber stalking investigation. Plaintiffs' pursuit of discovery into details of the FBI's cyber- stalking investigation has caused the FBI and its witnesses to incur undue expense and burden at odds with the Court's observation that the case should proceed "on a considerably more streamlined basis" after the dismissal of nearly all of the 14 Counts in plaintiffs' Amended Complaint. Mem. Op. at 4.

The Court should limit the scope of the remaining discovery related to the FBI, so that the remainder of the discovery period may proceed on the "streamlined basis" contemplated in the Court's ruling on the motion to dismiss. *See* Mem. Op. at 4. Plaintiff Jill Kelley sent an email seeking assistance from a public relations consultant prior to filing the Complaint, *see* Ex. G at 1, and plaintiffs have continued to attract media attention, including reports about witnesses' deposition testimony, *see, e.g.*, Ex. H (same, regarding Amended Complaint); "From Petraeus Scandal, an Apostle for Privacy," *New York Times*, Jan. 5, 2014 (attached as Ex. I); "Reporters face subpoenas...," (Ex. E). Plaintiffs' deposition of Fred Humphries, in which they sought broad-ranging testimony with little apparent-relevance to a Privacy Act unlawful-disclosure claim was followed by multiple news stories on the FBI's cyberstalking investigation, but little-to-no evidence that would actually be admissible in this case. Plaintiffs' proposed further discovery of the FBI's cyber stalking investigation may be intended to provide a means for promoting plaintiffs' public image, but it does nothing to help resolve the pending legal claim and would subject the FBI to additional undue burden and expense.

Moreover, were the Court to allow plaintiffs to continue probing the methods, timing, and strategy by which the FBI pursued its cyber stalking investigation, such discovery would inevitably implicate privileged information, including but not limited to information protected by

the law enforcement privilege and the work product privilege.[13] Details of the cyber stalking investigation remain highly sensitive; the investigation involved the Director of the Central Intelligence Agency and more than one four-star General. Allowing additional discovery into this irrelevant area would likely lead to disputes between the parties regarding privilege issues, and potentially more motions practice.

Plaintiffs should be wrapping up, not ramping up, their affirmative discovery. The Court should limit FBI-related discovery to include only (a) facts sufficient to show disclosure(s) to the media by one or more FBI employees in a manner violating the Privacy Act, and (b) facts relating to the governments' defenses to the plaintiffs' remaining claims.

IV. CONCLUSION

For the above-stated reasons, the Court should grant FBI's motion for a protective order providing two forms of protection: (1) limiting the deposition of SSA Malone on the ground that certain portions of the deposition were "conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses" the witness or the Bureau, *see* Fed. R. Civ. P. 30(d)(3), and (2) restricting pursuant to Rule 26(c) any outstanding discovery of or related to the FBI to certain facts, namely: (a) facts sufficient to show disclosure(s) to the media by one or more FBI employees in a manner violating the Privacy Act, and (b) facts relating to the government's defenses to plaintiffs' remaining claims.

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[13] SSA Malone and his co-agent worked closely with prosecutors in the U.S. Attorney's Office in Tampa.

Dated: October 14, 2015

Respectfully Submitted,

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