UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SHARYL THOMPSON ATTKISSON, JAMES HOWARD ATTKISSON, SARAH JUDITH STARR ATTKISSON, Plaintiffs, v. ROD ROSENSTEIN; SHAWN HENRY; SEAN WESLEY BRIDGES; ROBERT CLARKE RYAN WHITE and UNKNOWN NAMED AGENTS 1-50 OF THE DEPARTMENT OF JUSTICE, in their individual capacities, Defendants.	Civil Action No. 1:17-cv-364-LMB-JFA

PLAINTIFFS' MOTION TO REFILE, PURSUANT TO THE FOURTH CIRCUIT'S MANDATE, OR, IN THE ALTERNATIVE, TO REOPEN THE EXISTING CASE UNDER FEDERAL RULE OF PROCEDURE 60(b)

Plaintiff Sharyl Attkisson, an award-winning journalist for CBS News and other organizations, alleges that members of the Government, in response to her investigative reporting, hacked into her personal computer systems and conducted illegal warrantless surveillance in violation of both the Fourth Amendment to the United States Constitution and the Electronic

Communications Privacy Act (ECPA), 18 U.S.C. §§ 2511 & 2520. The difficulty in pursuing such legal claims, of course, is that even though the Attkissons have produced sworn affidavits from reputable computer forensic analysts attesting that a sophisticated cyber-intrusion did take place, it is nearly impossible for her even to name the particular government officials who might have been involved in conducting the surveillance without getting discovery from the Government. Yet, the Government and its agents and representatives have for years denied all of her allegations, including denials in Court pleadings and argument in previous litigation in this case. Thus, the Attkissons have been stymied and have been unable even to name the John Does involved in the illegal activity.

Until now.

In August 2019 a former Government employee directly involved in the surveillance operation came forward to provide information about the illegal surveillance operation that resulted in surveillance of the Attkissons. As a result, for the first time the Attkissons can now name at least some of the Government officials who were directly involved in conducting the illegal surveillance and provide more detail about the surveillance operations itself.

In previous litigation, the Fourth Circuit dismissed the Attkissons' claims against the John Doe federal agents she alleged had conducted the illegal surveillance. CITE. But significantly, the Court of Appeals dismissed these claims *without prejudice to refile once some or all of the John Does could be identified*. CITE. As such, this new Complaint fulfills the Fourth Circuit's mandate.

In the alternative, the Attkissons move for relief from the original judgment in the Eastern

District of Virginia, CITE, pursuant to Federal Rule of Civil Procedure 60(b)(2), 60(b)(3), or 60(b)(6). Although such motions are properly granted only in exceptional circumstances, this case provides a perfect example of a situation where such relief is both necessary and appropriate.

First, from the beginning it has been clear that the relevant information regarding both the identity of the actual agents involved and the contours of the surveillance operation were uniquely in the hands of the Government. By definition, a surveillance operation is conducted secretly, and there is little possibility that the victims of such surveillance will be able to provide full details of such surveillance prior to discovery. The Attkissons did provide many pages of factual allegations in their Complaint, detailing the many problems they encountered with their computer systems, as well as the forensic analysis demonstrating both the extent of the cyber-intrusion, the fact that the intrusion originated from a government-owned IP address, and the strong likelihood that such a sophisticated intrusion could only have originated from the Government. See Attached Affidavit at **Exhibit** 01 and 02. Yet, without Government cooperation in discovery, the Attkissons were limited in what they could prove.

Second, the Government stonewalled all attempts at discovery, repeatedly denying and making what appear to be clearly false statements suggesting that no cyber-intrusion had occurred and that no service of process on the John Doe defendants was even possible. Thus, the Government not only conducted surveillance inappropriately, illegally, and secretly, but has also repeatedly concealed it, misled the parties and the Court, and refused to disclose relevant evidence, all of which amounts to fraud, stealth, and subterfuge, thereby implicating precisely the sort of behavior that Rule 60(b) is meant to remedy.

Third, newly discovered evidence from a Government whistleblower-type witness has now established definitively that the Government lied and concealed evidence regarding the surveillance of the Attkissons. This evidence also allows the Attkissons for the first time to name government officials who were reportedly directly involved in the surveillance operation. Significantly, these are not simply high-level officials who may have ordered the surveillance, but *the actual agents who carried it out*.

Fourth, this is information that the Attkissons could not reasonably have been expected to bring forth sooner, given that the Government cooperating witness/whistleblower, who was unknown to the Attkissons, has only recently come forward to provide information.

Fifth, there will be no prejudice to the newly-named defendants, because they will presumably be represented by the Government, which has been aware of this suit and its claims from the very beginning, so there can be no plausible claim of unfair surprise. Moreover, if this case is reopened, the newly named defendants will still have ample time to prepare their defenses and will not suffer any undue prejudice.

Finally, this is a case of extraordinary national importance, as it goes to the heart of American democracy. If the US Government indeed spied on a US citizen and journalist without a warrant, that is an extreme threat to our Nation's commitment to the rule of law. Now that the Attkissons have even more proof, through this new testimony, that such surveillance did take place, it is incumbent on this Court to at least allow a full discovery process to allow the Attkissons' claims to be tested.

Accordingly, this Court should either permit the Attkissons to file a new Complaint naming

the John Doe defendants, as per the Fourth Circuit's dismissal without prejudice, or alternatively grant relief from the earlier judgment under Rule 60(b) to allow plaintiffs to amend their original Complaint to include the newly acquired whistleblower information.

Respectfully Submitted,

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/s/
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing through the Court's electronic filing system on this 9th day of January 2020 to the Court and all counsel of record before this Court.

/s/ J. Andrew Baxter
J. Andrew Baxter