IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WIKIMEDIA FOUNDATION, Plaintiff, v. NATIONAL SECURITY AGENCY, *et al.*, Defendants.	No. 1:15-cv-00662-TSE

JOINT MOTION TO CONTINUE DISCOVERY DEADLINE PENDING PARTIES' SUBMISSION OF A PROPOSED SCHEDULE FOR COMPLETION OF JURISDICTIONAL DISCOVERY

Plaintiff Wikimedia Foundation ("Wikimedia") and Defendants National Security Agency ("NSA"), *et al.*, hereby move the Court for a brief continuance of the March 17, 2018, deadline for jurisdictional discovery in this matter. The purpose of this request is to allow sufficient time for the parties to conclude ongoing negotiations regarding the appropriate scope and timing of jurisdictional discovery that remains to be completed; to minimize the number of outstanding discovery disputes; to submit, it is hoped, an agreed-upon schedule for the expeditious completion of jurisdictional discovery; and for the Court to consider and act on the parties' proposal. For the reasons stated below, the parties' joint request for a continuance of the discovery deadline should be granted.

As the Court is aware, this case concerns claims by Wikimedia that alleged interception, copying, and review of its international, text-based, Internet communications during the course of NSA "Upstream" surveillance violates its rights under the First and Fourth Amendments, violates Article III, and exceeds the Government's statutory authority. The case is on remand from the Fourth Circuit's decision affirming in part and vacating in part this Court's judgment dismissing the First Amended Complaint of Wikimedia and its former co-plaintiffs for lack of

standing. *See Wikimedia Found. v. NSA*, 857 F.3d. 193 (4th Cir. 2017); *Wikimedia Found. v. NSA*, 143 F. Supp. 3d 344 (D. Md. 2015). Although the Court of Appeals rejected the allegations of standing on which Wikimedia's co-plaintiffs relied, it held that Wikimedia plausibly alleged interception of at least some of its communications. *Wikimedia*, 857 F.3d at 210-11.

At the status conference held on September 22, 2017, the Court concluded that discovery in the case should be limited initially to jurisdictional issues, followed by resolution of the jurisdictional question, before the case proceeded to litigation on the merits of Plaintiff's claims. At the Court's direction, *see* Order dated September 25, 2017 (ECF No. 114) (entered Sept. 27, 2017), the parties submitted a Joint Discovery Plan (ECF No. 116) seeking approximately seven months' time in which to conduct jurisdictional discovery. Thereafter the Court issued an Order, dated October 3, 2017 (ECF No. 117), granting the parties five months' time for jurisdictional discovery, commencing on October 17, 2017. Thus, under the Court's Order, the current period for jurisdictional discovery is scheduled to end on March 17, 2017. The Court added, however, in its October 3 Order, that "[i]f, at the end of five months of discovery, the parties can show that they have made good use of the discovery period and still need additional time, the Court will consider extending the discovery period."

Following the Court's Order the parties embarked upon diligent and, at times, laborious efforts to craft, serve, and respond to discovery requests regarding a wide variety of factual issues surrounding the question of Wikimedia's standing. These include, but are not limited to, the nature, volume, and distribution of Wikimedia's communications, highly technical matters concerning the workings of the Internet, and facts related to Upstream surveillance. Plaintiff served interrogatories, document requests, and requests for admission on the Defendants on November 8, 2017, followed by an additional set of interrogatories and document requests on

November 29, 2017. The Government completed service of its objections and responses to Plaintiff's requests and production of responsive documents by January 8, 2018 (with a revised document response on February 5, 2018, by Defendant Office of the Director of National Intelligence). These tasks were complicated not only by the technical subject matter of the discovery, but also by the necessity of preparing separate responses on behalf of three different Defendant agencies, the extraordinary care required to avoid disclosing classified information, and concurrent, court-ordered discovery obligations in another case challenging the lawfulness of Upstream surveillance, *Jewel v. NSA*, No. 4:08-cv-4373-JSW (N.D. Cal.).

The Government served interrogatories and document requests on Plaintiff on November 16, 2017, followed by additional interrogatories and document requests served on December 20, 2017. Plaintiff served its written objections and responses to the Government's requests on January 11 and 26, respectively, and produced responsive documents on February 12, February 16, and March 6, 2018. Plaintiff provided extensive responses to numerous interrogatories, and it collected, reviewed, and produced significant quantities of documents in order to respond to the Government's requests.

Since January the parties have also conferred frequently—at times on a near-daily basis—in a still-ongoing effort to resolve or at least to narrow their differences over their objections to each other's discovery requests. In the experience of all counsel these discussions have been extraordinarily lengthy and detailed, and they have entailed numerous follow-up requests for information and consideration of various proposals for compromise.

Notwithstanding these efforts, it has become increasingly apparent to the parties over time, given the wide variety of technical and non-technical matters requiring exploration at the jurisdictional stage (including facts and information relevant to the preparation of expert reports) that the parties will require additional time to complete jurisdictional discovery beyond the

current March 17, 2018, deadline. The parties, therefore, have also been engaged for a number of weeks in frequent, lengthy, and highly detailed negotiations regarding the appropriate scope and timing of further jurisdictional discovery. In an effort to streamline additional discovery to the greatest extent practicable, the parties have already engaged in and are considering further exchanges of information about their cases not required under the Federal Rules of Civil Procedure. They have also discussed various procedural innovations for resolving outstanding or anticipated disputes, among other proposals. As a result of these efforts the parties have achieved some common ground regarding the nature and schedule of further jurisdictional discovery, but several important issues remain outstanding. The parties are hopeful that these issues can be resolved through continued negotiation and exchanges of information, but anticipate that doing so will require more time than currently remains before the March 17, 2018, discovery deadline.

The parties therefore respectfully request until March 23, 2018, to submit a joint proposed schedule for the completion of jurisdictional discovery, or, if they are unable to agree upon a proposed schedule, to submit separate proposals for the Court's consideration. The parties also request that the Court suspend the current March 17, 2018 discovery deadline pending the parties' submission of their proposal(s), and the Court's action thereon. With a temporary suspension of the discovery deadline, the parties can continue to focus on developing a joint plan for jurisdictional discovery going forward, while also continuing to seek resolution of their disagreements over discovery already taken to date, and thus to minimize the number of issues the parties will need the Court to resolve.

In light of the great time and effort the parties have devoted to the litigation of this case over the past five months, the agreed-upon need for additional time to conclude jurisdictional discovery, and the importance of the case, the parties respectfully submit that their request for a

continuance of the March 17, 2018, discovery deadline pending submission (and consideration) of a joint proposed plan for completion of jurisdictional discovery, should be granted.

Dated: March 12, 2018

Respectfully submitted,

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