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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

WILEY GILL; JAMES PRIGOFF; TARIQ RAZAK; KHALID IBRAHIM; and AARON CONKLIN,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, LORETTA LYNCH, in her official capacity as the Attorney General of the United States; PROGRAM MANAGER – INFORMATION SHARING ENVIRONMENT; KSHEMENDRA PAUL, in his official capacity as the Program Manager of the Information Environment,

Defendants.

Case No. 3:14-cv-03120 (RS)

REPLY IN SUPPORT OF PLAINTIFFS' SPECIAL MOTION TO ESTABLISH RIGHT TO DISCOVERY ON THE DEPARTMENT OF JUSTICE'S STANDARD FOR SUSPICIOUS ACTIVITY REPORTING

Hearing Date:	August 20, 2015
Time:	1:30 p.m.
Judge:	Hon. Richard Seeborg
Courtroom:	3, 17th Floor
Date of Filing:	July 10, 2014
Trial Date:	None Set

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I. INTRODUCTION

Defendants oppose Plaintiffs' motion to establish a right to discovery on the Department of Justice's suspicious activity reporting standard on the same grounds that Defendants raised, and the Court considered, in the motion to dismiss that the Court denied earlier this year. Since Defendants failed to obtain leave to file a motion for reconsideration, their attempt to "renew" their motion to dismiss is improper and should not be considered. Moreover, Defendants' arguments suffer from the same deficiencies that plagued their motion to dismiss—they rely on facts outside the pleadings and mischaracterization of the Complaint. In the final three pages of their brief, Defendants assert without citation or support that the proper procedure is for Defendants to move for summary judgment on all claims and allow Plaintiffs to raise the need for discovery in an opposition to that motion under Federal Rule of Civil Procedure 56(d). But the entire purpose of the instant motion, which Defendants suggested and the Court invited, is for Plaintiffs to seek discovery now, in light of Defendants' dispute with the Complaint's express allegation that the Department of Justice has adopted a standard for suspicious activity reporting that falls short of what is required by the agency's own duly promulgated regulation. For the foregoing reasons and those set forth in Plaintiffs' opening brief, the Court should grant Plaintiffs' motion.

A. Defendants Improperly Seek Reconsideration of the Order Denying Their Motion to Dismiss.

1. Defendants' Attempt to Renew Their Motion to Dismiss Absent Leave to File a Motion for Reconsideration Is Prohibited by Local Civil Rule 7-9.

Defendants' opposition seeks to "renew their motion to dismiss" Plaintiffs' claims related to the DOJ SAR Standard. Defendants' Opposition to Plaintiffs' Special Motion, Dkt. No. 56 ("Opp. to Special Motion") at 2. But Local Civil Rule 7-9 of the Northern District of California prohibits motions for reconsideration to be filed without leave of court. Therefore, Defendants' "renewal" of their motion to dismiss Plaintiffs' claims related to the DOJ SAR Standard is prohibited and Defendants' renewed arguments should be disregarded. *See Lucas v. Hertz Corp.*, Case No. C 11-01581, 2012 WL 3638568, at *5 (N.D. Cal. Aug. 22, 2012) (requests for leave to

file motions for reconsideration cannot include repetition of arguments that were presented to the court in the original motion); Local Civ. Rule 7-9(c) (same).

Even if the Defendants had properly sought leave to file a motion for reconsideration, there is no basis for such a motion. Leave to file a motion for reconsideration may be sought and granted based on only three possible grounds, none of which is present here: a material difference in law or fact exists that was not previously presented to the court; the emergence of new material facts or a change of law since issuance of the order; or a "manifest failure by the Court to consider material facts or dispositive legal arguments which were presented." Local Civ. Rule 7-9(a) and (b); *see also Lucas*, 2012 WL 3638568, at *5. Defendants have not claimed and could not justify a claim that the Court should revisit Defendants' motion to dismiss based on any of the criteria set forth in Rule 7-9.

Instead, Defendants assert that "[i]n resolving Defendants' motion to dismiss, the Court reserved decision as to whether [Plaintiffs] had adequately pled claims arising from the purported 'DOJ Standard.'" Opp. to Special Motion at 2. But this is not true at all. The Court observed that for purposes of the motion to dismiss—in which Defendants sought to dismiss all causes of action, including those seeking to set aside the DOJ SAR Standard—"neither party contends there is any significance to the dispute over whether there is one set of protocols or two." Order Denying Motion to Dismiss, Dkt. No. 38 ("Order") at 2. The Court explicitly denied Defendants' motion to dismiss Plaintiffs' first claim to relief "to set aside the DOJ SAR Standard . . . as 'arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law'" and third claim for relief "that the DOJ SAR Standard . . . [is] invalid" because it was adopted without notice and comment. *Id.* at 9-10. Defendants' attempt to rewrite the Order denying their motion to dismiss is a plainly improper attempt to relitigate issues raised and resolved in that motion without seeking leave to file a motion for reconsideration.

2. Defendants' Arguments Are Almost Entirely Repetitive of Arguments Made and Resolved in Their Motion to Dismiss.

In their opposition to the instant motion, Defendants repeat several points that they originally made in their motion to dismiss, that Plaintiffs responded to in their opposition to that

motion, and that the Court resolved in Plaintiffs' favor. Plaintiffs enumerate these arguments here, with citations to previous arguments and their resolution.

a. Defendants' Argument that Plaintiffs Have Not Articulated a Distinct DOJ Standard

A recurring theme of Defendants' opposition to the instant motion is their assertion that Plaintiffs have failed to articulate or provide support for their allegations of a distinct DOJ SAR Standard and the related assertion that the FBI adheres to the PM-ISE SAR standard. *See* Opp. to Special Motion at 11 and 13.[1] This repeats the arguments Defendants made in their motion to dismiss. *See* Defendants' Motion to Dismiss, Dkt. No. 21 ("MTD") at 10 (FBI's eGuardian Privacy Impact Assessment "explains that this definition of suspicious activity 'is consistent with the definition utilized by the [Program Manager in the Functional Standard]'"). Plaintiffs responded to this argument in their opposition to the motion to dismiss. *See* Plaintiffs' Opposition to Motion to Dismiss, Dkt. No. 26 ("Opp. to MTD") at 9:1-6 (describing the DOJ's "may be indicative" standard as broader than the Functional Standard and as leading to different results). The Court held that, for purposes of the motion to dismiss, "neither party contends there is any significance to the dispute over whether there is one set of protocols or two," and denied Defendants' motion to dismiss Plaintiffs' claims as to "Defendants' Standards" generally. Order at 2:24-3:1; 8-11.[2]

[1] As explained in Plaintiffs' opening brief in support of the instant motion and further explained below, whether the DOJ SAR Standard is the same or different from the PM-ISE SAR Standard is not dispositive of Plaintiffs' claim that the DOJ has adopted a standard lesser than and in conflict with the "reasonable suspicion" standard mandated by 28 C.F.R Part 23. *See* Plaintiffs' Special Motion to Establish Right to Discovery on DOJ Standard, Dkt. No. 50 ("Special Motion") at 15:2-5, 16:14-21; *infra* at 9-10.

[2] Defendants cannot claim confusion about whether their motion to dismiss was directed at Plaintiffs' challenges to the DOJ SAR Standard. The Complaint clearly sets forth four claims for relief—two as to the PM-ISE standard and two as to the DOJ Standard. *See* Complaint, Dkt. No. 1 ("Compl.") at 34-36. Plaintiffs' opposition to Defendants' motion to dismiss separately addressed both the PM-ISE and DOJ SAR Standards, and Defendants' reply in support of their motion to dismiss acknowledged Plaintiffs' arguments related to the DOJ Standard. *See, e.g.*, Defendants' Reply in Support of Motion to Dismiss, Dkt No. 28 ("Reply ISO MTD") at 10, n.6. And if Defendants had somehow been surprised when the Court resolved Defendants' motion to dismiss with respect to all causes of action, the proper course would have been to file a motion for leave to file a motion for reconsideration under Rule 7-9.

b. Defendants' Argument that the PIA Is Not Final Agency Action

In renewing their motion to dismiss Plaintiffs' claims as to the DOJ SAR Standard, Defendants argue that the eGuardian Privacy Impact Assessment ("PIA") does not impose legal obligations and therefore is not final agency action reviewable under the Administrative Procedure Act ("APA"). *See* Opp. to Special Motion at 14. Defendants made the same argument in their motion to dismiss. *See* MTD at 23-24 (PIA "does not establish the type of binding legal norm that is reviewable under the APA." "On their face, neither the Functional Standard nor the Privacy Impact Assessment requires NSI participants to apply the definition of suspicions activity . . . or the 'Criteria Guidance' they provide."). In response, Plaintiffs explained that the "DOJ polices compliance with its SAR Standard through a User Agreement that it requires of all entities accessing its eGuardian database, in order to 'ensure consistency of process and of handling protocols'" and cited the User Agreement's statement that "'[f]ailure to comply with this agreement will result in the termination of your eGuardian membership.'" Opp. to MTD at 25. The Court agreed with Plaintiffs, holding that they properly alleged final agency action as to both the PM-ISE and DOJ SAR Standards. *See* Order at 9 ("There is no dispute . . . that if a state or local law enforcement agency does participate in the NSI and submits SARs, it is to do so consistent with the Defendants' Standards" and "[a]s such . . . the second prong of the finality requirement is satisfied").[3]

Even a subpoint made by Defendants in opposition to the instant motion—that the PIA is an analysis that must be issued pursuant to the E-Government Act of 2002—was made, responded to, and rejected by the Court in considering Defendants' motion to dismiss. *See* Opp. to Special Motion at 14-15 (PIA is an analysis required by § 208 of the E-Government Act and does not create any rules that need to be followed); MTD at 9 (PIA "was published by the FBI to satisfy its

[3] In their opposition to the instant motion, Defendants repeat another variation on this unsuccessful theme that was first raised in their motion to dismiss, namely that Plaintiffs have not pled any facts establishing that the FBI has imposed any legal obligation on federal, state, local, tribal, or territorial law enforcement partners to report information consistent with a DOJ SAR standard. *See* Opp. to Special Motion at 17. In the motion to dismiss, Defendants complained, "there is no allegation or indication that the Program Manager, the FBI, or any other federal agency, has ever taken any legal action to compel NSI participants to follow the guidance provided in the Functional Standard or Privacy Impact Assessment." MTD at 25. Plaintiffs replied: "Whether or not Defendants have previously compelled compliance with their Standards, *cf.* Gov. Br. at 25, Defendants assert the right to do so." Opp. to MTD at 25.

obligations under Section 208 of the E-Government Act of 2002") and 27 (federal agencies are required to conduct privacy assessments; these are "not vehicles used to establish binding rules or standards"). In response to this argument in the motion to dismiss, Plaintiffs clarified that they do not seek to challenge the Privacy Impact Assessment itself as final agency action, but that the PIA presents one of many articulations of a DOJ SAR Standard. *See* Opp. to MTD at 23, n.14. In its Order denying Defendants' motion to dismiss, the Court indicated its understanding that Plaintiffs challenge the DOJ SAR Standard, as opposed to the issuance of the PIA itself. *See* Order at 2 ("DOJ's protocols, which plaintiffs refer to as the 'DOJ SAR Standard,' appear in several documents, including one entitled 'eGuardian 2008 Privacy Impact Assessment'"). Defendants' argument concerning the nature of the PIA mischaracterizes Plaintiffs' challenge and has already been considered and rejected by the Court.

c. Defendants' Argument that the PIA Does Not Trigger the APA's Rulemaking Requirement

In opposition to the instant motion, Defendants argue that the PIA is not a legislative rule and does not trigger the APA notice-and-comment rulemaking procedures. *See* Opp. to Special Motion at 16. Defendants also made and lost this argument in their motion to dismiss. There, Defendants argued that the rulemaking requirements for legislative rules did not apply to the DOJ Standard because the Functional Standard and PIA "do not purport on their face to impose mandatory obligations, let alone to have the force and effect of law." MTD at 26. Plaintiffs responded, providing a legislative rule analysis as to both the PM-ISE and DOJ SAR Standards. *See* Opp. to MTD at 31-33. The Court denied Defendants' motion to dismiss Plaintiffs' claims—including the claim that the DOJ Standard was issued without requisite rulemaking procedures:

> The proper characterization of *Defendants' Standards* as legislative or interpretative likely will involve few disputed factual issues, and perhaps can be resolved on cross-motions for summary judgment. At this juncture, however, plaintiffs have sufficiently identified potential grounds for treating the *standards* as legislative to avoid dismissal.

Order at 11 (emphasis added). Defendants' attempt to take a second bite at the apple is improper and their attempt to "renew" their motion to dismiss Plaintiffs' claims regarding the DOJ SAR Standard must fail.

3. Defendants Fail to Present New Arguments that Would Justify Dismissal of Plaintiffs' Challenges to the DOJ SAR Standard.

The vast majority of Defendants' arguments that Plaintiffs fail to state a claim as to the DOJ SAR Standard repeat arguments made and rejected in Defendants' motion to dismiss. To the limited extent Defendants raise new arguments, they fail to show that such arguments are justified by facts or law that were not available at the time of Defendants' motion to dismiss, as would be required for leave to file a motion for reconsideration under Local Rule 7-9. In addition, those new arguments fail on the merits.

The main new theme Defendants raise in their opposition to the instant motion is that the FBI's invitation to federal, state, local, tribal, and territorial law enforcement agencies to report "suspicious activities" that are not supported by reasonable suspicion is governed by "the FBI's general investigative authority under 28 U.S.C. § 533 and its general authority to collect records under 28 U.S.C. § 534," and that discovery into the DOJ SAR Standard would amount to "seeking general discovery into the FBI's investigative practices." Opp. to Special Motion at 9, 13. The suggestion is that, under the protocol set forth in the 2013 eGuardian Privacy Impact Assessment, law enforcement partners may *report* information to the FBI that falls short of the PM-ISE SAR Standard, but the FBI only *shares* that information through the NSI if it meets the PM-ISE SAR Standard. This assertion is both inapposite and unavailing for three reasons.

First, Defendants' argument relies on facts outside of Plaintiffs' Complaint and Defendants' disagreement with Plaintiffs' well-pleaded allegations. Contrary to Defendants' assertion, Plaintiffs have not "abandoned" their characterization of the DOJ SAR Standard as one that includes "observed behavior that may be indicative of intelligence gathering or pre-operational planning related to terrorism, criminal or other illicit intention." Compl. ¶ 54; Opp. to Special Motion at 2. Defendants emphasize that the 2008 eGuardian PIA uses a definition of suspicious activity reporting from an earlier version of the PM-ISE Functional Standard and contend that the current, 2013 eGuardian PIA uses the definition from the version of the Functional Standard challenged in Plaintiffs' Complaint. Opp. to Special Motion at 2. But as alleged in the Complaint, the Government Accountability Office ("GAO") issued a report in

March 2013, after the January 4, 2013 approval date of the 2013 eGuardian PIA, that stated the FBI "uses the criteria in the eGuardian Privacy Impact Assessment (dated November 25, 2008) . . . to determine if SARs have a potential nexus to terrorism." Compl. ¶ 54 (quoting GAO SAR Report at 6, n.10). The 2008 eGuardian PIA, as previously explained, uses a "may be indicative" standard that is different from and broader than the "reasonably indicative" standard in the PM-ISE Functional Standard 1.5. *Id*. Based not only on the 2008 eGuardian PIA, but also on the findings of the GAO report that was cited in the Complaint and DOJ-issued guidance regarding suspicious activity reporting that was appended to the Complaint, Plaintiffs have clearly alleged the content of a DOJ SAR Standard ("may be indicative") that is separate from and broader than the PM-ISE SAR Standard ("reasonably indicative"). *See* Compl. ¶¶ 53-64. Defendants cannot simply dispute Plaintiffs' well-pleaded allegations to avoid discovery necessary for judicial scrutiny of that standard. Instead, discovery is warranted to establish the content of the SAR standard that the DOJ communicates to federal, state, local, tribal, and territorial partners, including fusion centers.

Second, even assuming that the 2013 eGuardian PIA states the operative DOJ standard, it nevertheless supports Plaintiffs' contention that DOJ's SAR Standard encourages maintaining and disseminating criminal intelligence (within the purview of 28 C.F.R. Part 23) based on broader criteria than required by the PM-ISE SAR Standard. Defendants assert that the 2013 eGuardian PIA allows "sharing" of SARs only if they meet PM-ISE criteria. *See* Opp. to Special Motion at 8. But before SARs can be "shared" through the NSI, they must be "reported." Critically, Defendants do not dispute that the 2013 eGuardian PIA allows "reporting" based on a standard broader than the PM-ISE and also acknowledge that such reporting happens through fusion center databases. *See* Opp. to Special Motion at 8:14-16 ("Information that is shared should meet the definition of suspicious activity in the Functional Standard, while information that is reported to the FBI does not need to satisfy that definition."); 9:8-12 ("Reported information . . . can only be viewed by the authoring agency, *the appropriate fusion center*, and the FBI") (emphasis added). Thus, even under Defendants' account, individual law enforcement partners would "report" suspicious activities through their fusion centers, which Plaintiffs have

alleged are criminal intelligence systems subject to 28 C.F.R. Part 23. Compl. ¶¶ 23, 25 (fusion centers are focal points for sharing SARs; they collect, maintain and disseminate SARs through databases that receive federal funding through the Office of Justice Programs). Even if a SAR submitted to the FBI through a fusion center is not ultimately shared through the entire NSI, the submission—or "reporting"—would entail the collection and maintenance of SARs by that fusion center's criminal intelligence system based on a standard that Defendants admit is broader than the PM-ISE SAR Standard.

Finally, even if the FBI only facilitated sharing of suspicious activity as defined by the PM-ISE SAR Standard, doing so would still undermine and conflict with the DOJ's own duly promulgated and binding regulation, 28 C.F.R. Part 23, which is all that is needed to state Plaintiffs' claims against Defendant DOJ. The Court understood this point when it denied Defendants' motion to dismiss and noted that, for purposes of that motion, "neither party contends there is any significance to the dispute over whether there is one set of protocols or two." Order at 2. Because Plaintiffs challenge the DOJ SAR Standard as in conflict with a binding regulation and issued without the requisite rule-making procedures, material allegations regarding the *content* of that standard need only assert that it is lower than that required by 28 C.F.R. Part 23. This much Defendants do not dispute.

While the parties' disagreement about the content of the DOJ SAR standard is not material to whether Plaintiffs have stated a claim, whether the DOJ engaged in separate agency action in adopting its SAR standard is relevant to another question raised by Defendants' opposition to the instant motion: Is the PM-ISE's administrative record sufficient to explain the DOJ's adoption of its SAR standard?[4] It is not. In their opening brief in support of the instant motion, Plaintiffs set forth the distinct agency actions taken by the PM-ISE and DOJ in their respective processes of adopting and promulgating standards for suspicious activity reporting. *See* Special Motion at 4-6 and 12-14.[5] Defendants fail to address that history in any respect, simply

[4] *See* Opp. to Special Mot. at 19 (suggesting summary judgment as to Plaintiffs' challenge to DOJ SAR Standard be decided based on PM-ISE administrative record and agency declarations).

[5] Defendants object to Plaintiffs' reference to publicly available documents to provide further context to the well-pleaded allegations of the Complaint. *See* Opp. to Special Mot. at 18. Plaintiffs agree that challenges to the claims for relief must be based on the pleadings, *i.e.* the

insisting that the DOJ uses the same standard as the PM-ISE and, therefore, there is no separate claim against the DOJ for its adoption of a standard that conflicts with its own duly promulgated regulation. But as this Court has already held, Plaintiffs' Complaint states a claim against the DOJ under the APA, even if the DOJ SAR Standard tracks the PM-ISE SAR Standard. Order at 2. Because the records considered by the DOJ are not revealed by Defendant PM-ISE's administrative record on the PM-ISE Standard, and because the DOJ's process was separate and distinct from the PM-ISE's process for adopting its SAR standard, the DOJ cannot simply ride along on the PM-ISE's administrative record. Plaintiffs are entitled to discovery into what the DOJ considered in adopting its suspicious activity reporting standard and how that standard has been implemented and enforced since its adoption.

B. Plaintiffs Are Entitled to Discovery on the DOJ SAR Standard.

Defendants assert, without authority, that they "should be permitted to file a motion for summary judgment supported by the already filed administrative record and any additional declarations that are needed to establish that a grant of summary judgment is appropriate." Opp. to Special Motion at 19. But the "already filed administrative record" in this case purports to reflect only information related to the PM-ISE's adoption of its SAR standard, specifically:

> . . . information considered in the development of the definition of suspicious activity, including the behavior criteria related to that definition, used in the functional standard to provide guidance to participants regarding the sharing of ISE suspicious activity reports through the Nationwide Suspicious Activity Reporting Initiative. The administrative record encompasses documents related to versions 1.0, 1.5, and 1.5.5 of the functional standard.

Certification of Administrative Record, Dkt. No. 52-1 ("PM-ISE Administrative Record"), ¶ 3. On its face, the "already filed administrative record" is not one that would provide Plaintiffs or the Court with an understanding of information considered by the DOJ in its adoption and promulgation of the DOJ SAR Standard.

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facts alleged in the Complaint must be accepted as true and Defendants' arguments against Plaintiffs' claims cannot be based—as they were in the motion to dismiss and are again in this motion—on their disputes with Plaintiffs' allegations. In the opening brief for the instant motion, Plaintiffs merely provided additional context that, while not necessary to support the allegations in the Complaint, leaves no doubt that Plaintiffs' allegations are plausible and well supported. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); Special Motion at 5.

In the instant motion, Plaintiffs seek discovery into the DOJ SAR Standard because Defendants' continued denial that the DOJ has adopted such a standard strongly suggests no administrative record exists. *See* Special Motion at 17. Defendants essentially concede that an administrative record "has not been developed setting forth 'the reasons for agency action'" in this case, and then claim that review should be based on the agency's own self-serving explanations. *See* Opp. to Special Motion at 19:13-14 (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973)). But Defendants misleadingly quote only part of the opinion in *Camp*, which cites *Citizens to Preserve Overton Park v. Volpe* for the proposition that where "there was such failure to explain administrative action as to frustrate effective judicial review," the court may "obtain from the agency, either through affidavits *or testimony*, such additional explanation of the reasons for the agency decision as may be necessary." *Camp*, 411 U.S. at 142-43 (citing *Overton Park*, 401 U.S. 402 (1971) (emphasis added)). *Overton Park*, in turn, makes clear that an agency's "'post hoc' rationalizations" in the form of "litigation affidavits" are an "inadequate basis for review" as they "clearly do not constitute the 'whole record' compiled by the agency." *Overton Park*, 401 U.S. at 419. Based on this case law and the circumstances presented, discovery is an appropriate tool to identify the information and material considered by the agency, as well as any relevant factors *not* considered, a common exception to the general rule against discovery in APA challenges. *See Autotel v. Bureau of Land Mgmt.*, Case No. 2:12-cv-00164, 2015 WL 1471518, at *1-3 (D. Nev. Mar. 31, 2015) (ordering supplementation of the administrative record to include agency's files on other applicants to explore plaintiff's claim that its application was treated differently).

While cross motions for summary judgment may be an appropriate approach to APA challenges to agency action where there are no disputed facts for the district court to resolve, that is not the situation here. *Cf. Occidental Eng'g Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985). Defendants cite no rule—because there is no rule—precluding discovery in APA cases prior to the filing of an agency's motion for summary judgment. On the contrary, courts may and do consider motions to supplement an administrative record, and motions for leave to take discovery for the purpose of identifying materials for submission to the administrative record, prior to and

separate from motions for summary judgment. *See, e.g.*, *State of Calif. v. U.S. Dep't of Labor*, Case No. 2:13-cv-02069, 2014 WL 1665290 (E.D. Cal. Apr. 24, 2014) (allowing supplementation of administrative record and considering motion for leave to seek discovery prior to motions for summary judgment); *Smith v. Fed. Trade Comm'n*, 403 F. Supp. 1000, 1008 (D. Del. 1975) (allowing discovery where the agency designated an incomplete record because doing otherwise "would prevent courts from discharging their duty to make a searching and careful inquiry to determine whether all relevant factors were considered by the agency"); *Harrisonville Tel. Co. v. Ill. Commerce Comm'n*, 472 F. Supp. 2d 1071, 1075 (S.D. Ill. 2006) (noting that "[t]he threshold for permitting limited discovery in administrative review proceedings is not high," and that discovery should be permitted if "the party's need for discovery was not insubstantial or frivolous"); *Pension Benefit Guar. Corp. v. LTV Steel Corp.*, 119 F.R.D. 339, 341, 342 (S.D.N.Y. 1988) (finding that "limited discovery will be useful to ensure that all matters considered by the [agency] are brought before the court" and noting that past litigants "have succeeded in obtaining limited discovery to ensure that the administrative record before the court is complete").

As explained in Plaintiffs' opening brief, this is no ordinary APA case. Defendant DOJ has continually denied adopting its own SAR standard (notwithstanding the GAO report's clear conclusions to the contrary and express allegations in the Complaint to that effect), and Defendants concede in their opposition to the instant motion that no administrative record exists. Many of the facts necessary to inform the Court's review and assist it in evaluating Defendants' contentions are likely to be found in documents not necessarily considered by the agency in developing the standard. For example, Defendants have disputed whether the DOJ engaged in "final agency action" and disagree with Plaintiffs' characterization of the DOJ SAR Standard. *See, e.g.* MTD at 26 (Defendants contend "there is no indication" FBI's Privacy Impact Assessment has ever been "or could ever be" enforced as a mandatory obligation). Evidence shedding light on these factual disputes will be found in training documents and guidance to fusion centers and other law enforcement partners, as well as materials bearing on Defendants' policing of compliance with and NSI participants' implementation of the DOJ SAR Standard. Many of these materials will have been generated after adoption of the DOJ SAR Standard or be

in the possession of third parties. Defendants have also asserted that suspicious activity reporting does not take place through criminal intelligence systems that are governed by 28 C.F.R. Part 23. *See* MTD at 28-29 (contending that Plaintiffs fail to allege databases used to share SARs receive Omnibus Act funding). Evidence necessary to resolve these defenses—such as information about the funding of fusion centers, DOJ-issued training materials for fusion centers, and information about how SARs are vetted at the fusion center stage and beyond—likely would not be included in an administrative record and are not part of the PM-ISE administrative record already filed in this case.

Given the long history of Defendant DOJ's actions in adopting and promulgating a standard for suspicious activity reporting that conflicts with its own duly promulgated regulation, its denial of having adopted such a standard and concession that no administrative record exists, and the delay caused by Defendants' approach to this litigation so far, it would further judicial economy and be well within the Court's discretion to allow Plaintiffs to serve discovery related to the DOJ's standard for suspicious activity reporting.

II. CONCLUSION

For the foregoing reasons, Plaintiffs seek an order affirming that they are entitled to obtain discovery from Defendants Loretta Lynch and Department of Justice and to take third-party discovery related to the DOJ's standards and systems for suspicious activity reporting.

Dated: July 30, 2015

Respectfully submitted,

/s/ Julia Harumi Mass
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FILER'S ATTESTATION

I, Nicole R. Sadler, am the ECF user whose identification and password are being used to file this REPLY IN SUPPORT OF PLAINTIFFS' SPECIAL MOTION TO ESTABLISH RIGHT TO DISCOVERY ON THE DEPARTMENT OF JUSTICE'S STANDARD FOR SUSPICIOUS ACTIVITY REPORTING. Pursuant to L.R. 5-1(i)(3), I hereby attest that concurrence in the electronic filing of this document has been obtained from each of the other signatories.

Dated: July 30, 2015

By */s/Nicole R. Sadler*
Nicole R. Sadler