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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

CAROLYN JEWEL, TASH HEPTING, YOUNG BOON HICKS, as executrix of the estate of GREGORY HICKS, ERIK KNUTZEN and JOICE WALTON, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, *et al.*,

Defendants.

Case No.: 4:08-cv-4373-JSW

PLAINTIFFS BRIEF RE: THE GOVERNMENT'S NON-COMPLIANCE WITH THE COURT'S EVIDENCE PRESERVATION ORDERS

Courtroom 5, 2nd Floor
The Honorable Jeffrey S. White

[HEARING DATE REQUESTED]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Rules

Constitutional Provisions

Other Authorities

I. INTRODUCTION

There is now no doubt that the government defendants have destroyed evidence relevant to plaintiffs' claims. This case concerns the government's mass seizure of three kinds of information: Internet and telephone content, telephone records and Internet records. The government's own declarations make clear that the government has destroyed three years of the telephone records it seized between 2006 and 2009; five years of the content it seized between 2007 and 2012; and seven years of the Internet records it seized between 2004 and 2011, when it claims to have ended those seizures.

By destroying this evidence, the government has hindered plaintiffs' ability to prove with governmental evidence that their individual communications and records were collected as part of the mass surveillance, something the government has vigorously insisted that they must do, even as a threshold matter. Although plaintiffs dispute that the showing the government seeks is required, the government's destruction of the best evidence that plaintiffs could use to make such a showing is particularly outrageous.

The government destroyed this evidence (by its own account) because it determined that it was not pertinent to this case, a conclusion it reached only by ignoring the parameters of plaintiffs' complaint and substituting its own, narrower view. Despite the plain language of the complaint, the government assumed that plaintiffs were not challenging the government's *ongoing* mass surveillance. Instead, the government assumed that plaintiffs were challenging only the government's past behavior, when it conducted mass surveillance based solely on a claim of executive authority under Article II of the Constitution. The government ignored what plaintiffs have very publicly sought since 2006 – a judicial determination of the constitutionality and legality of mass spying, plus an injunction to stop it, among other relief. On that flimsy basis, the government decided that it need not preserve for the litigation the information it amassed via its mass Internet seizures after 2004; via its mass telephone records seizures after 2006; and via its mass content seizures after January 2007.

If the government defendants had any good-faith uncertainty during the past eight years about the scope of plaintiffs' claims, and thus the scope of defendants' evidence preservation

obligations, they could easily have obtained clarification long before today. They could have done what litigants do every day when a discovery issue arises: ask opposing counsel. They also could have sought the Court's express approval to limit or modify the Court's existing evidence preservation orders, presenting some information in a classified declaration to the extent they felt secrecy was needed. Had they done so, the present situation could have easily been avoided and the evidence preserved. But they did not. Instead, the government submitted a handful of secret statements to this Court referring to its dramatically narrowed, unilateral reading of the complaint – none of which the Court ever acknowledged, much less agreed to – and made a few indirect references in a couple of public filings that were ostensibly about other matters.

Regardless of what the government now says it secretly believed in 2006 or 2008 about the scope of plaintiffs' complaint, however, the government's tortured interpretation of the complaint should have persisted no later than 2010, when plaintiffs directly explained their views. In briefing to the Ninth Circuit, after the government openly asserted its unilaterally narrowed view of the claims, plaintiffs responded as follows:

> The government defendants' assertion that "plaintiffs do not challenge surveillance authorized by the FISA Court" (Govt. Defs. Br. at 7) misconceives both plaintiffs' complaint and the role of the district court under sections 1806(f) and 1806(h). Plaintiffs allege and challenge an untargeted mass surveillance program that violates statutory and constitutional limits on electronic surveillance. To the extent that the Government suggests that there are FISC court orders purporting to authorize the surveillance that plaintiffs allege, no such hypothetical FISC orders could satisfy the requirements of FISA or the Fourth Amendment.

Plaintiff-Appellants Ninth Circuit Reply Br. Case No. 10:15616, at 24 n.9 (ECF No. 39-1).[1] In spite of plaintiffs' explanation, and without seeking any further clarification or approval, the government continued to destroy records of its mass surveillance.

This is spoliation of evidence. A litigant has a clear legal duty to preserve evidence relevant to the facts of a case pending consideration by the court, and that duty requires preservation of all *relevant* evidence, defined as anything that is likely to lead to the discovery of admissible evidence.

[1] In 2010, of course, plaintiffs had no idea that the government was acting on its unfounded interpretation of their complaint by destroying evidence.

This duty is subject only to practical considerations, none of which the government has ever raised. Any private litigant who engaged in this behavior would be rightly sanctioned by the court; indeed many have been severely sanctioned for failure to preserve evidence in far less egregious circumstances.

This court has the power to order a broad range of remedies for spoliation, up to and including terminating sanctions. Plaintiffs here seek more modest relief: that the government be subject to an adverse inference that the destroyed evidence would have shown that the government has collected plaintiffs' communications and communications records. Plaintiffs also request that the Court set a prompt hearing date on this matter in order to halt any ongoing destruction.

II. BACKGROUND

A. The Government Has Had an Obligation to Preserve Evidence Since 2006.

As plaintiffs outlined in their motion for a temporary restraining order ("TRO") in March 2014, litigation challenging the lawfulness of the government's mass seizure of telephone records (also referred to in various places as "call detail records" or "telephone metadata" or "BR metadata"), Internet metadata, and Internet and telephone content has been pending in the Northern District of California continuously since 2006. *See*, *e.g.*, *First Unitarian Church of Los Angeles v. NSA,* No. 3:13-cv-03287 JSW ("*First Unitarian Church*"), ECF No. 186 at 2 (N.D. Cal. Filed Mar. 10, 2014).

1. The Government's Preservation Obligation in *Hepting v. AT&T* and the Multi-District Litigation.

The first case giving rise to this preservation obligation was *Hepting v. AT&T*, No. 06-cv-0672-VRW (N.D. Cal.), filed on January 30, 2006 by four of the five plaintiffs who later filed *Jewel v. NSA*. In May 2006, the government intervened as a defendant. *Hepting*, ECF No. 122. *Hepting* became the lead case in the MDL proceeding in this district, *In Re: National Security Agency Telecommunications Records Litigation,* MDL No. 06-cv-1791-VRW ("*MDL*") (N.D. Cal. Filed May 30, 2006). On November 6, 2007, after plaintiffs brought a motion for an evidence preservation order, this court rejected the government's position that none was necessary, and

entered a formal preservation order. *MDL* ECF No. 393.[2] One of the MDL cases, *Virginia Shubert, et al., v. George W. Bush, et al*., No. 07-cv-0603-JSW (N.D. Cal.), is still pending today before this Court, and the MDL preservation order remains in effect today.

As part of its opposition to the plaintiffs' motion seeking a preservation order, the government asked that this Court agree that its informal, very limited preservation effort was "ample and appropriate," such that no preservation order was required. Defs. Resp. to Pl. Opening Br. re: Evidence Preservation, *Jewel* ECF No. 193, Ex. B at 1.[3] As part of its classified response papers, the government submitted to the Court two documents where it stated that the mass surveillance was covered in part by orders of the FISC. *Id*., Exs. A and B. Needless to say, plaintiffs were unaware of the contents of the classified papers in 2007 and were also unaware of the subject matter of any FISC orders at that date.

This Court did not agree that the existence of the FISC orders meant that the ongoing surveillance activities fell outside the scope of the complaint. The Court also rejected the government's argument that no preservation order was required and imposed a broad order with operative language—"reasonably anticipated to be" and "may be" relevant—almost identical to the plaintiffs' proposed order. *MDL* ECF No. 393.

The government now emphasizes that Judge Walker added the words "to the extent practicable for the pendency of this order" to the proposed order submitted by plaintiffs, but those words do not narrow the substantive scope of the government's preservation obligation. Gov't

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[2] The MDL Preservation Order was most recently filed as Exhibit C to the Declaration of Cindy Cohn in Support of TRO, ECF No. 186-1.

[3] This document was originally filed in the *MDL* in 2007 but since it was classified, it is not available on the public docket in that case. In it, the government only promised to preserve evidence related to the "Terrorist Surveillance Program," or TSP, an undefined term created by the government to retroactively describe the small segment of its surveillance activities that it publicly admitted in December 2005. *See Letter from Att'y Gen. Alberto Gonzalez to Sen. Patrick Leahy* (Aug. 1, 2007) [Summary of Evidence Vol. V, Ex. 102, p. 3481] (emphasis added); *see also* Department of Defense, *et al*., Offices of Inspector Gen., *Unclassified Report on the President's Surveillance Program* (July 10, 2009) at 1 ("OIG PSP Report") [Summary of Evidence (*Jewel* ECF No. 113) Vol. III, Ex. 33, p. 1197]. Of course, as has become clear, the label "TSP" was never used to refer to the mass surveillance plaintiffs allege, so had the court agreed, the government would not have preserved *any* evidence related to its mass surveillance activities.

Defs. Resp. to Pl. Opening Br. re: Evidence Preservation 9:15-20, ECF No. 193 ("Gov't Br."). The government has never argued that preservation of evidence seized as part of its ongoing surveillance after the FISC orders would be impracticable—only that it was not required.

2. The Government's Preservation Obligation in *Jewel v. NSA*.

On September 18, 2008, plaintiffs filed this case, *Jewel v. NSA*, and this Court related it to *Hepting* shortly thereafter. With the agreement of the parties, this Court entered an evidence preservation order in *Jewel* on November 13, 2009 that is substantively the same as the MDL preservation order. ECF No. 51.[4] The *Jewel* evidence preservation order also remains in effect today.

Like the MDL order, the *Jewel* order requires the preservation obligation to be "*interpreted broadly* to accomplish the goal of maintaining the integrity of all documents, data and tangible things *reasonably anticipated to be subject to discovery* under FRCP 26, 45 and 56(e) in this action." *Id.* at ¶ C (emphasis added). Thus, the focus of the preservation duty is not on what the party possessing the evidence thinks is relevant, but on what an opposing party may seek in discovery, "interpreted broadly." The order further requires counsel to inquire about destruction practices of their clients and either "halt" such practices or "arrange for the preservation of complete and accurate duplicates or copies of such material, suitable for later discovery if requested." *Id.* at ¶ 3.

When the *Jewel* order was being negotiated in 2009, the government never expressed its current narrow views about the scope of the complaint or its preservation duties. The government never sought clarification from this Court and never informed plaintiffs that it believed their complaint only addressed surveillance conducted solely under claims of executive authority—all of which had ended by 2007, before *Jewel* was even filed.[5] Plaintiffs could not have raised these issues themselves, because at this point plaintiffs did not know that the government was relying

[4] The Jewel Preservation Orders was most recently filed as Exhibits D to the Declaration of Cindy Cohn in Support of TRO, ECF No. 186-1.

[5] Surveillance conducted solely under purported executive authority ended in 2004, 2006, and 2007 (for the respective types of surveillance at issue). *Jewel* was filed in 2008.

upon FISC orders for the mass surveillance and knew only that some kind of FISC order was put into place in early 2007.

B. Plaintiffs' Discovery of the Government's Evidence Destruction and Secret Reinterpretation of Their Complaint.

Plaintiffs only discovered that the government had destroyed relevant evidence in this case through happenstance. Plaintiffs learned that something was amiss after the government filed a motion in the FISC in which it affirmatively represented that it was not subject to any civil preservation orders with respect to the call detail records it had collected and failed specifically to mention this case at all. Plaintiffs then alerted the FISC to this case and the existing preservation order and also sought emergency relief from this Court. It was not until after this Court granted that relief and ordered further declassification review that the government revealed it had destroyed the records. [6]

C. Chronology of Events

For ease of reference, the basic chronology is as follows:

1/31/2006	*Hepting* complaint filed.
5/12/2006	-NSA Director Lt. General Alexander declares that *Hepting* "Plaintiffs, in fact, have put at issue activities that have been considered and approved by the FISC." -DNI Negroponte declares that "this case implicates . . . certain activities that have been specifically authorized by the FISC."
4/20/2007	DNI McConnell declares this case "implicates" surveillance conducted by the FISC.
11/6/2007	Court enters an evidence preservation order in *Hepting*, rejecting government's position that no order is necessary.
2007	*Government begins destruction of Internet meta-data relevant to the Hepting claims (or continues destruction of the data).*
9/18/2008	*Jewel* complaint filed.
2008	*Government begins destruction of telephone records relevant to the Hepting and Jewel claims.*

[6] Notably, the government's first response to this issue, when plaintiffs requested clarification about why this case had not been brought to the attention of the FISC, was to urge plaintiffs not to raise their concerns either with this Court or with the FISC. Declaration of Cindy Cohn in Support of TRO, *First Unitarian Church*, ECF No. 186-1, Ex. E (March 10, 2014).

2008	*Government destroys an additional year's worth of Internet meta-data relevant to the Hepting and Jewel claims.*
11/13/2009	Court enters an evidence preservation order in *Jewel*.
2009	*Government begins destruction of content records relevant to the Hepting and Jewel claims.*
2009	*Government destroys an additional year's worth of Internet meta-data relevant to the Hepting and Jewel claims.*
2009	*Government completes destruction of three years of telephone records collected between 2006 and 2009, relevant to the Hepting and Jewel claims.*
2010	*Government destroys an additional year's worth of Internet metadata and content records relevant to the Hepting and Jewel claims.*
12/6/2010	*Jewel* Plaintiffs file a Ninth Circuit brief disputing the government's assertion that "plaintiffs do not challenge surveillance authorized by the FISA Court" and explaining that it misconceives the *Jewel* complaint.
2011	*Government completes destruction of seven year's worth of Internet metadata, relevant to the Hepting and Jewel claims.*
2011	*Government destroys an additional year's worth of content records relevant to the Hepting and Jewel claims.*
9/11/2012	-DNI Clapper declares that plaintiffs' allegations include the activities authorized by the FISC. -NSA Executive Director Fleisch says plaintiffs' complaint puts at issue all three NSA activities later transitioned to FISC authority.
2012	*Government destroys an additional year's worth of content records relevant to the Hepting and Jewel claims.*
12/20/2013	-DNI Clapper declares that FISA approved interception "may relate to or be necessary to adjudicate plaintiffs' allegations" and references the need to protect "the identities of any carriers that continue to participate in the program today." -NSA Executive Director Fleisch declares that plaintiffs seek relief in this litigation that would prohibit such collection activities even though they were later transitioned to FISC and remain so.
2013	*Government destroys an additional year's worth of content records relevant to the Hepting and Jewel claims.*

III. ARGUMENT

As noted above, *for the entire lifetime of this now six-year-old litigation* the government has been routinely destroying the information it has illegally seized, preserving only the records it seized in the past under its executive authority theory (not information seized under color of orders of the FISC) and those that it keeps for its own purposes. Specifically, this appears to mean that at least the following evidence has been destroyed:

1) Telephone records: The government destroyed approximately **three years** of telephone records it seized between 2006 and 2009. The first FISC order addressing these records was issued in May 2006, so records seized prior to that date were seized under claims of executive authority alone, and should have been preserved even under the government's narrow view of plaintiffs' claims. Ms. Shea has declared that the government destroyed telephone records sometime in 2009. Declassified Shea Decl. at ¶ 33, ECF. No. 228.

2) Content: The government has apparently destroyed **five years** of content it collected via fiber optic cables between January 2007 and 2012, except for some unknown amount that it retains for its own purposes pursuant to its regular retention procedures. Declassified Shea Decl. at ¶¶ 35-38, ECF No. 228 (discussing transitions in legal authority for content collection and noting that under current procedures most "upstream" content is retained for two years).[7]

3) Internet metadata: The government has destroyed **seven years** of Internet metadata it seized, between 2004 and 2011. The first FISC order addressing this data was entered in 2004, and the government has admitted that it destroyed all other Internet metadata it had seized on December 7, 2011. Fleisch Decl. n.32, ECF No. 227.[8]

The government has failed to justify any of this destruction of evidence, conducted without the Court's approval and without plaintiffs' knowledge. The record does not support the

[7] The Shea Declaration indicates that there is currently a five-year retention period for the contents of "telephony and certain [non-"upstream"] Internet communications." Declassified Shea Decl. at ¶¶ 35-38, ECF No. 228.

[8] These timeframes are also summarized in the Fleisch Decl. at ¶ 43, ECF No. 227.

government's self-serving arguments that the evidence it destroyed was not relevant to plaintiffs' claims. Nothing the government said in any of its secret filings, or what it might have said extremely obliquely in its public filings, supports this unilateral decision to destroy relevant evidence.

A. The Government Has Breached Its Evidence Preservation Duties.

The modern duty to preserve evidence arises from common law prohibitions against spoliation of evidence and is incorporated into the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. Rule 37(e); *Disability Rights Counsel of Greater Washington v. Washington Metro. Transit Authority,* 242 F.R.D. 139, 147-48 (D.D.C. 2007) (compelling production of the defendant's backup tapes containing electronically stored information where the defendant did not suspend its routine e-mail deletion process, leaving only the backup tapes, which the defendant then argued were not reasonably accessible); *Doe v. Norwalk Cmty. Coll.,* 248 F.R.D. 372, 378 (D. Conn. 2007) (determining that the defendant's failure to suspend its destruction of electronic documents at any time after receiving notification of the litigation did not satisfy the good faith requirement of Rule 37(f)). The government agrees that its duty under the common law was to preserve "relevant" evidence, which includes all "information that relates to the claims or defenses of any party, and that which is reasonably calculated to lead to the discovery of admissible evidence." Gov't Br. at 13:3-12, *citations omitted.*

The government also acknowledges that the *Jewel* preservation order imposed an express preservation mandate, extending the earlier mandate that had issued in the MDL. The *Jewel* preservation order's mandate is a standard one: that the government preserve "all documents, data and tangible things reasonably anticipated to be subject to discovery." Joint Mot. For Entry of Order re: Preservation of Evidence 1 at ¶ C, ECF No. 51. In successfully obtaining the MDL preservation order (over the government's strenuous objections), plaintiffs made clear that they sought preservation of, among other things, "information sufficient to establish which call records belonging to which customers were turned over by which carriers at approximately which times." *MDL*, ECF No. 392.

Moreover, in eight years of litigating these issues, the government has never claimed that its evidence preservation obligation was impracticable, burdensome or disproportionate, and has thus waived any such argument.

Instead, the government's entire justification for destroying evidence is based on the surveillance records' purported lack of relevance to plaintiff's claims. The government claims that it had no obligation to preserve any evidence of surveillance conducted once any FISC order was in place, because none of its seizures after the FISC orders could possibly be deemed "relevant," "related to the claims of plaintiffs," or "reasonably calculated to lead to the discovery of admissible evidence" in support of plaintiffs' claims.

That claim is dead wrong. Indeed, given the history of this case and its predecessor, and the government's own arguments over the past eight years, it is astonishing.

B. Plaintiffs' Complaint Attacks the Government's Mass Surveillance Activities.

The complaint unequivocally arises from and challenges the government's mass spying activities (which plaintiffs have long established by independent evidence), regardless of the purported authority under which those activities were conducted. That fact alone should end the matter.

Plaintiffs' claim here, plain and simple, is that the government's mass surveillance violates their rights and entitles them to relief. Any government assertion of authority to conduct the surveillance, whether based on inherent presidential authority or the existence of a FISC order, is simply an assertion of a defense, not an element of plaintiffs' claim. Plaintiffs' references to those purported defenses in their Complaint do not limit the scope of plaintiffs' claims only to mass surveillance the government has chosen to conduct under color of presidential authority, nor do they exempt the same mass surveillance from plaintiffs' challenge if it is conducted under the color of different, but equally defective, FISC authority. The government cites no authority holding otherwise.

The standards for pleading in the Ninth Circuit require only that a complaint give the other side notice of a claim: "[U]nder the federal rules a complaint is required only to give the notice of the claim such that the opposing party may defend himself or herself effectively." *Starr v. Baca*,

652 F.3d 1202, 1212 (9th Cir. 2011) (en banc). To comply with the pleading requirements of Fed. R. Civ. P. 8(a)(2), "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests. " *Grabinski v. National Union Fire Ins. Co. of Pittsburgh*, 265 Fed.Appx. 633, 635 (9th Cir. 2008) (quoting *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200 (2007)). "Notice pleading requires the plaintiff to set forth in his complaint *claims for relief,* not causes of action, statutes or legal theories." *Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008) (italics in original).

The burden on the plaintiff in drafting a complaint is to indicate generally the scope of its claims. By this standard, plaintiffs' complaint here is more than sufficient to put the government on notice that plaintiffs seek ongoing relief. The complaint does not support a reading that its scope would be limited by the transition of the underlying legal position of the government. For example, the *Jewel* complaint alleges: [9]

> 2. This case challenges an illegal and unconstitutional program of dragnet telecommunications surveillance conducted by the National Security Agency (the "NSA") and other defendants . . .
>
> 3. This program of dragnet surveillance (the "Program") first authorized by Executive Order of the President in October of 2001 and first revealed to the public in December of 2005, continues to this day.
>
> 9. Using this shadow network of surveillance devices, Defendants have acquired and continue to acquire the content of a significant portion of the phone calls, emails, instant messages, text messages, web communications and other communications, both international and domestic, of practically every American who uses the phone system or the Internet, including Plaintiffs and class members, in an unprecedented suspicionless general search through the nations communications networks.
>
> 10. . . . Defendants have unlawfully solicited and obtained from telecommunications companies such as AT&T the complete and ongoing disclosure of the private telephone and Internet transactional records of those companies' millions of customers (including communications records pertaining to Plaintiffs and class members), communications records indicating who the customers communicated with, when and for how long, among other sensitive information.

[9] Note that the *Jewel* Complaint was most recently attached as Exhibit A to the Cohn Declaration in Support of the Temporary Restraining Order in *First Unitarian Church*. ECF No. 86-2.

> 13. . . . Plaintiffs' communications or activities have been and continue to be subject to electronic surveillance.
>
> 14. Plaintiffs are suing Defendants to enjoin their unlawful acquisition of the communications and records of Plaintiffs and class members, to require the inventory and destruction of those that have already been seized and to obtain appropriate statutory, actual and punitive damages to deter future illegal surveillance.
>
> 82. Defendants have since October 2001 continuously solicited and obtained the disclosure of all information in AT&T's major databases of stored telephone and Internet records, including up-to-the-minute updates to the databases that are disclosed in or near real-time.

The broad scope of the claims is also clear from the specific causes of action. The Fourth Amendment count is exemplary:

> 112. At all relevant times, Defendants committed, knew of and/or acquiesced in all of the above-described acts, and failed to respect the Fourth Amendment rights of Plaintiffs by obtaining judicial or other lawful authorization and conforming their conduct to the requirements of the Fourth Amendment.
>
> 113. By the acts alleged herein, Defendants have violated Plaintiffs' and class members' reasonable expectations of privacy and denied Plaintiffs and class members their right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment to the Constitution of the United States.
>
> 114. By the acts alleged herein, Defendants' conduct has proximately caused harm to Plaintiffs and class members.

Plaintiffs sought, among other relief, an injunction "requiring Defendants to provide to Plaintiffs and the class an inventory of their communications, records, or other information that was seized in violation of the Fourth Amendment." *Jewel* Complaint, Prayer for Relief. *Hepting* and *Jewel* relate to the "substantially the same transactions and events" because they challenge the same surveillance activities, regardless of the government's legal positions seeking to justify those activities. *See*, *e.g.*, Gov't Br. at 4:3-4.

In urging its cramped interpretation, the government cannot point to anything in the *Jewel* complaint that limits Plaintiffs' claims to collection done solely under presidential authority. Instead, ignoring the allegations noted above, the government cherry-picks portions of the *Jewel* complaint that reference lack of authority for the mass surveillance. The government points to paragraphs 76, 92, 110, 120, 129, and 138 of the *Jewel* complaint, which allege defendants have

acted "without judicial or other lawful authorization, probable cause, and/or individualized suspicion, in violation of statutory and constitutional limitations, and in excess of statutory and constitutional authority." Gov't Br. at 15. This allegation merely states that the Government's conduct was illegal. It does not limit the scope of the surveillance to which plaintiffs object. And it in no way undercuts the obvious conclusion that plaintiffs object to the mass surveillance per se, regardless of any shifting legal theories under which the government conducts it.[10] Nor is the complaint limited by paragraph 7, which alleges that that the surveillance was indiscriminate, not targeted; or by paragraph 39, which refers to the original authorization in 2001 based on executive authority.

The government overreaches in trying to limit plaintiffs' complaint. For example, the government tries to use the fact that plaintiffs often characterize the surveillance as "warrantless" as indicating that the complaint doesn't reach surveillance conducted under the FISC. But this characterization is absolutely true even as to the FISC-authorized surveillance. Whatever the legal import of the FISC orders, they are unequivocally not full Fourth Amendment warrants, and the surveillance conducted under them is "warrantless." Thus, this court was exactly correct in July 2013 when it stated that Plaintiffs' claim is "that the federal government . . . conducted widespread warrantless dragnet communications surveillance of United States citizens following the attacks of September 11, 2001." *Jewel v. NSA*, 965 F. Supp. 2d 1090, 1097-98 (N.D. Cal. 2013); Gov't Br. at

[10] Indeed, the allegation does not even say what the government claims it says. Plaintiffs' allegations are about the illegal and unconstitutional facts of mass spying, which encompass surveillance whether or not under color of a FISC order. The first clause of this allegation alleges defendants have acted "without judicial or other lawful authorization, probable cause, and/or individualized suspicion." Any one of the three conditions suffices to satisfy the allegation, and it is undisputed that none of the FISC orders upon which the Government relies for bulk collection of telephone records and Internet and telephone content are based on probable cause or individualized suspicion. And, fairly read, only lawful judicial authorization is within the scope of the allegation; unlawful judicial authorization, like the FISC orders purporting to authorize bulk collection of telephone records under section 215, is not. The second and third clauses—"in violation of statutory and constitutional limitations," and "in excess of statutory and constitutional authority"—allege in the alternative that even if defendants are acting under color of judicial authorization, their conduct is nonetheless in violation of statutory and constitutional limitations, and in excess of statutory and constitutional authority.

3:1-3; *see also* 22:10-16 (quoting "warrantless surveillance" language in September 20, 2013 Joint Case Management Statement at 33); *see also* 3:16-17 (noting that *Hepting* discussed "warrantless surveillance"). The mass surveillance was warrantless in 2001; it remains warrantless today.

Likewise, the record does not support the government's argument that plaintiffs implicitly accepted the government's narrow view of their claims, when plaintiffs supposedly "should have known" about the other secret FISC orders in January 2007. At that point, the government publicly admitted only that it had sought FISC approval for what it said were the limited activities it retroactively called the TSP. Gov't Br. at 16:1-17:8. Contrary to the government's position, that episode reaffirms plaintiffs' claims about the scope of their complaint. In response to this 2007 disclosure, plaintiffs immediately, affirmatively (and correctly) informed the court that they did not believe that this FISC decision about TSP reached, or legally could reach, the bulk collection they alleged:

> Earlier today, the government announced that it will seek authorization from the FISA court for any future electronic surveillance of international communications involving al Qaeda suspects as part of the "Terrorist Surveillance Program." *See* Letter from Attorney General Gonzales to Chairman Leahy and Senator Specter (January 17, 2007) (MDL-1791 ECF No. 127, Ex. 1). *This announcement is irrelevant to Plaintiffs' claim that the carriers are assisting the government in the interception and electronic surveillance of all or most of the communications, both domestic and international, that transit the carriers' networks. Nor does the FISA court have the statutory or constitutional authority to issue a general warrant authorizing such dragnet surveillance of million of innocent Americans.* Rather, under FISA, a FISA court judge must find probable cause to believe that the particular target of electronic surveillance is a foreign power or agent thereof before authorizing that surveillance. *See* 50 U.S.C. § 1805(a)(3).

Opp. to Stay, *MDL* ECF No. 128 at 3-4 n.2 (Filed Jan., 17, 2007) (emphasis added). This statement was correct and confirmed the breadth of plaintiffs' claims.

C. The Government Failed to Give Plaintiffs Or the Court Fair Notice of its Radically Limited View of its Preservation Duties.

The government now urges the Court to accept its unilaterally narrowed interpretation of plaintiffs' complaint to justify its failure to preserve plainly relevant evidence. But the government has known for years that plaintiffs dispute that narrow interpretation, and the government's own

secret statements to the Court since 2006 (now declassified) confirm that even the government knew plaintiffs' claims are broader than it now claims.

1. Plaintiffs Contested the Government's Single Public Assertion of Its Narrow Interpretation of Plaintiffs' Complaint.

The only time that the government directly asserted the narrow interpretation of plaintiffs' complaint that it now urges the Court to adopt was in the 2010 appeal in this case. As explained above, in response to that assertion, plaintiffs expressly rejected the idea that the FISC orders mooted their complaint. Specifically, plaintiffs stated: "Plaintiffs allege and challenge an untargeted mass surveillance program that violates statutory and constitutional limits on electronic surveillance. To the extent that the Government suggests that there are FISC court orders purporting to authorize the surveillance that plaintiffs allege, ***no such hypothetical FISC orders could satisfy the requirements of FISA or the Fourth Amendment***." *Jewel v. NSA*, Plaintiff-Appellees' Ninth Circuit Reply Brief at 24 n.9 (emphasis added). This, at a minimum, put the government on clear notice of a potential dispute about the scope of its preservation duties. Yet the government said nothing and continued its destruction efforts.

2. The Government's Now-Declassified Secret Statements Acknowledge That Plaintiffs' Claims Extend to Mass Surveillance Conducted Under Color of FISC Orders.

The government now claims that any information about its mass surveillance under color of FISC orders was so far from being "relevant" to plaintiffs' claims that it did not have a duty to preserve that information. Yet at the same time, in multiple declarations asserting the state secrets privilege over the last eight years, the government has informed this court that plaintiffs' case "*puts at issue*," its FISC-approved activities, that FISC-approved surveillance information "may *relate to* or be necessary to adjudicate plaintiffs claims," or that the case "may *implicate*" its FISC-approved activities. Both of these assertions cannot be true. The information cannot both be "put at issue" by, "relate[d] to," or "implicate[d]" by plaintiffs' claims, and be so irrelevant that the government does not even have to preserve it. And of course there is no reason, and no authority, for the government to assert the privilege over material that it did not believe was relevant to the case. But that is exactly what the government now claims to have done. For example:

1) In May 2006, NSA Director Lt. General Alexander admits that "Plaintiffs, in fact, have *put at issue activities that have been considered and approved by the FISC*," ECF No. 224, 2006 Alexander Decl. at ¶ 3 (emphasis added). Alexander restates this admission in a section of his declaration called "Meta Data Collection and Analysis," noting that "The Plaintiffs' Amended Complaint in this case *also puts at issue* sources and methods for surveillance activities conducted pursuant to orders of the Foreign Intelligence Surveillance Court." 2006 Alexander Decl. at ¶ 37 (emphasis added).

2) In May 2006, Director of National Intelligence ("DNI") Negroponte states: "this case *implicates* several highly classified and critically important intelligence activities of the National Security Agency . . . Such information includes . . . [redacted] including certain activities that have been specifically authorized by the Foreign Intelligence Surveillance Court ("FISC")." ECF No. 222, Negroponte Decl. at ¶ 3. (emphasis added).

3) In April 2007, DNI Michael McConnell asserted: "this case *implicates* several highly classified and critically important intelligence activities of the National Security Agency . . . Specifically [redacted] (1) targeted content surveillance pursuant to the . . . recent orders of the Foreign Intelligence Surveillance Court . . . (2) bulk collection and targeted analysis of non-content information about telephone and Internet communications . . . that are now conducted pursuant to FISC orders." ECF No. 221, McConnell Decl. at ¶ 3 (emphasis added).

4) In September 2012, DNI Clapper asserted that plaintiffs' allegations *include the activities authorized by the FISC,* specifically referencing "current surveillance activities" and FISC orders. ECF No. 172-7, 2012 Clapper Decl. at ¶ 57.

5) In September 2013, NSA Executive Director Frances Fleisch asserted that: "Plaintiffs' allegations *put at issue* all three NSA activities originally authorized by the President after the 9/11 attacks and later transitioned to FISA authority." ECF No. 172-8, Sept. Fleisch Decl. at ¶ 6 (emphasis added).

6) In December 2013, DNI Clapper says: "further litigation would require the risk or disclosure of information concerning . . . targeted content surveillance; . . . the bulk collection and targeted analysis of non-content information about telephone and Internet communications . . . This

lawsuit therefore *implicates* information concerning foreign intelligence-gathering activities." ECF No. 220, 2013 Clapper Decl. at ¶ 12 (emphasis added). Also, in describing transition of the earlier Bush-era program to the Foreign Intelligence Surveillance Court (¶ 8), DNI Clapper lists information "that *may relate to or be necessary to* adjudicate plaintiffs' allegations," (¶ 61) as including both "information concerning operational details related to the collection of communications under FISA section 702" and call records. (¶ 26) (emphasis added).

7) In December 2013, DNI Clapper also expressly references "the identities of any carriers that continue to participate in the program today," recognizing that the plaintiffs' allegations include the ongoing surveillance purportedly authorized by the FISA court. ECF No. 168, 2013 Clapper Public Decl. at ¶ 44.

8) In December 2013, Director Fleisch declared that "Plaintiffs seek relief in this litigation that would prohibit such collection activities, *even though they were later transitioned to FISC-authorized programs and remain so to the extent the programs continue*. ECF No. 227, Fleisch Decl. at ¶ 27 (emphasis added).

Thus, the government's declarants have repeatedly acknowledged that plaintiffs seek relief against mass surveillance, whether or not it is authorized by the FISC, and have directly asserted that post-FISC surveillance is at the very least relevant to plaintiffs' claims. In fact, the government can point to only a handful of times that it affirmatively (and obliquely) alluded to its cramped view of the complaint. Yet a fact so critical to the case – that plaintiffs had embarked on a multi-year litigation odyssey involving two trips to the Ninth Circuit, supposedly based only on surveillance authorities that ended either before or shortly after the *Hepting* complaint was filed, and long before this litigation (*Jewel*) began – certainly merited more than a casual aside or a dependent clause.

The Government cannot have it both ways, as it seeks to do here. It cannot present one understanding of the scope of plaintiffs' claims – a very broad one – when asserting the state secret privilege, but claim a much narrower understanding when it is destroying potential evidence.

D. The Government Has Ignored Multiple Opportunities to Clarify the Scope of Plaintiffs' Claims.

As noted above, the government had many options if it was uncertain about the scope of plaintiffs' claims, and thus the scope of its evidence preservation obligations. Most obviously, as noted above, the government could have resolved this issue like any ordinary litigant, by contacting plaintiffs' counsel. The government also could have sought clarification or modification of the Court's evidence preservation orders. Either way, the government had a clear duty to raise any interpretative issues with this Court and with plaintiffs at the earliest opportunity—and before destroying masses of relevant evidence—so the question could quickly be put to rest.

These options, and the government's duty, do not change just because the government has asserted secrecy over some of the evidence at issue. The fact that plaintiffs seek to stop the ongoing spying is not a secret. If the government had ever asked plaintiffs whether their complaint was limited to claims based solely upon executive authority, plaintiffs would have readily confirmed that it was not. Plaintiffs could have confirmed that the complaint sought to stop the government's mass surveillance because it violates the First, Fourth and Fifth Amendments and is not permitted by any lawful statutory authority—regardless of the government's purported legal justification for it.

E. The FISC's Orders Governing the Government's Retention of Data Do Not Justify the Government's Spoliation.

The government argues that reading the preservation orders in *Hepting* and *Jewel* broadly would have conflicted with orders of the FISC limiting its retention of data to certain periods of time, but this makes no sense. A litigant facing potentially conflicting duties in multiple jurisdictions must seek appropriate relief from the relevant courts, not simply ignore the problem. Moreover, the government had a duty of candor both to the FISC and to this Court. (FISC order, BR 14-01, March 21, 2014)[11]. That duty of candor should have prompted the government to disclose this litigation and its attendant preservation duties to the FISC, most obviously at any one of many possible junctures: when *Hepting* was first filed in 2006, when the first express

[11] *Available at* http://www.fisc.uscourts.gov/public-filings/opinion-and-order-march-21-2014.

preservation order was entered in 2007, when *Jewel* was filed in 2008, when the *Jewel* preservation order was entered in 2009, or when the plaintiffs disputed the government's position before the Ninth Circuit in 2010. Indeed, it is remarkable that the FISC appears to have been entirely unaware of these cases, much less the preservation orders in *Hepting* and *Jewel,* until plaintiffs notified it in March 2014.

F. The Government Has Spoliated Evidence.

The Court can and should sanction the government for its spoliation of evidence. It is firmly established in the Ninth Circuit that "[a] federal trial court has the inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of certain evidence," which includes the power "to permit a jury to draw an adverse inference from the destruction or spoliation against the party or witness responsible for that behavior." *Glover v. BIC Corp*., 6 F.3d 1318, 1329 (9th Cir. 1993) (*citing Unigard v. Lakewood*, 982 F.2d 363, 368 (9th Cir. 1992) and *Akiona v. United States*, 938 F.2d 158 (9th Cir. 1991)); *accord Med. Lab. Mgmt. Consultants v. Am. Broad. Cos*., 306 F.3d 806, 824 (9th Cir. 2002). Sanctions for spoliation of evidence can be issued under both Rule 37 and the court's inherent power to control abusive litigation practices. *Leon v. IDX Systems Corp.*, 464 F.3d 951, 958 (9th Cir. 2006); *E.E.O.C. v. Fry's Electronics, Inc.*, 874 F. Supp. 2d 1042, 1044 (W.D. Wa. 2012).

Spoliation exists where: (1) the party with control over the evidence had an obligation to preserve it at the time of destruction; (2) the evidence was destroyed with a "culpable state of mind"; and (3) the evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. *Zubulake v. UBS Warburg, LLC* ("*Zubulake IV*"), 220 F.R.D. 212, 220 (S.D.N.Y.2003); *see also United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002).

All three elements are satisfied here. First, as demonstrated above, the government was under an obligation to preserve the evidence of its mass surveillance, and its claims to the contrary are not credible. Second, the government had a "culpable state of mind" because it had (at a

minimum) "some notice that the documents were potentially relevant to the litigation before they were destroyed." *Kitsap*, 314 F.3d at 1001.[12] Here, the government had clear notice from the complaint itself—and that notice was unequivocally re-confirmed in 2010 before the Ninth Circuit. Third, the evidence was plainly relevant to the claims, since the actual records and communications seized are the most direct evidence of the government's seizure.

Where spoliation has occurred, as it has here, the law presumes that the destroyed evidence goes to the merits of the case, and the burden is on the spoliating party to show that no prejudice resulted. *Apple Inc. v. Samsung Electronics Co., Ltd.*, 888 F. Supp. 2d 976, 998 (ND Cal. 2012). After having repeatedly and vociferously claimed that the plaintiffs must produce evidence from the government of individual seizure of their communications and records (as opposed to the boxes of their evidence plaintiffs have long presented), the government cannot meet its burden to show no prejudice has occurred here. Unsurprisingly, it has made no attempt to do so.

G. An Adverse Inference Against Defendants is Necessary and Appropriate.

To redress the government's spoliation of evidence, plaintiffs seek the sanction of an adverse inference, where necessary, that their communications and communications records were collected by the government as part of the mass surveillance programs at issue. To determine what level of sanctions should be imposed for spoliation, the court considers: 1) the degree of fault of the party who altered or destroyed the evidence, 2) the degree of prejudice suffered by the opposing party, and 3) the availability of lesser sanctions that will avoid substantial unfairness to the opposing party. *Apple*, 888 F. Supp. 2d at 992. A finding of bad faith is not necessary to impose a sanction short of outright dismissal, including the lesser sanction that plaintiffs seek here. *Lewis v. Ryan*, 261 F.R.D. 513, 518-20 (S.D. Cal. 2009); *Pauls v. Green*, 816 F. Supp. 2d 961, 981-82 (D. Idaho 2011). Ultimately, the choice of appropriate spoliation sanctions must be determined on a case-by-case basis, and should be commensurate to the spoliating party's motive or degree of fault in destroying the evidence." *Apple*, 888 F. Supp. 2d at 992.

[12] The government does not need to have acted in bad faith. *See Lewis v. Ryan*, 261 F.R.D. 513, 520 (S.D. Cal. 2009); *Pauls v. Green*, 816 F. Supp. 2d 961, 981-82 (D. Idaho 2011).

Here, the government has a high degree of fault – its interpretation of the complaint is not reasonable, and it ignored multiple opportunities to clarify the scope of plaintiffs' claims and its resulting preservation duty. The government also failed to take any corrective action (and continued to destroy evidence) even after plaintiffs directly disputed its unreasonably narrow reading of their claims in 2010, and submitted misleadingly incomplete information on these issues to the courts. The prejudice to plaintiffs is significant: they have lost an entire source of information, namely three, five, and seven years worth of records respectively, for telephone records, content and Internet records. As this Court is aware, one of the class representatives, Gregory Hicks, passed away in 2010, so the destruction is especially important to his individual claims. The *Apple* court recognized, "the loss of an entire source of documents significantly hampers [an opposing party's] ability to prepare and prosecute their case. 888 F. Supp. 2d at 994, (*citing In re Napster*, 462 F. Supp. 2d 1060, 1077 (N.D. Cal. 2006)).

Moreover, the relief plaintiffs seek here falls well within the range of sanctions routinely granted for spoliation, and is not the most severe sanction available. An adverse inference that the destroyed evidence would have shown that the government collected plaintiffs' communications and communications records is much less onerous than a sanction of dismissal or default. *Apple*, 888 F. Supp. 2d 976. Judges throughout the Ninth Circuit have regularly relied on their inherent power to issue such adverse inference instructions as a sanction for spoliation. *See, e.g., Cont'l Cas. Co. v. St. Paul Surplus Lines Ins. Co*., 265 F.R.D. 510, 535 (E.D. Cal. 2010); *Herson v. City of Richmond,* No. C 09–02516 PJH (LB), 2011 WL 3516162, at *2 (N.D. Cal. Aug. 11, 2011); *Io Grp. Inc. v. GLBT Ltd.,* No. 10-cv-1282 MMC (DMR), 2011 WL 4974337 at *2, *3 (N.D. Cal. Oct. 19, 2011); *Aiello v. Kroger Co.,* No. 2:08–cv–01729–HDM–RJJ, 2010 WL 3522259 (D. Nev. Sept. 1, 2010); *Dong Ah Tire & Rubber Co., Ltd. v. Glasforms, Inc.,* No. 06-cv-3359 JF (RS), 2009 WL 1949124 at *4 (N.D. Cal. July 2, 2009).

IV. CONCLUSION

Given the magnitude of the misconduct here, the remedy plaintiffs seek is straightforward and modest: plaintiffs simply seek to ensure that their ability to present their case is not harmed by the government's deliberate and unabashed destruction of evidence relevant to their claims. The

only way to ensure that is for this court to adopt an adverse inference that the destroyed evidence would have shown that the government has collected plaintiffs' communications and communications records. Plaintiffs hereby request such an order. Plaintiffs also request a prompt hearing to stop any upcoming evidence destruction.

Dated: May 30, 2014

Respectfully submitted,

/s/ Cindy Cohn

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

CAROLYN JEWEL, TASH HEPTING, YOUNG BOON HICKS, as executrix of the estate of GREGORY HICKS, ERIK KNUTZEN and JOICE WALTON, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, *et al.*,

Defendants.

Case No.: 4:08-cv-4373-JSW

[PROPOSED] ORDER RE: THE GOVERNMENT'S NON-COMPLIANCE WITH THE COURT'S EVIDENCE PRESERVATION ORDERS

Courtroom 5, 2nd Floor
The Honorable Jeffrey S. White

[HEARING DATE REQUESTED]

ORDER

Having considered the pleadings and arguments in this matter, and good cause appearing:

1. This Court finds that the government has destroyed records of telephone calls, Internet and telephone communications content, and Internet records in violation of its statutory and common law duties and the orders of this Court to preserve evidence; and

2. This Court thus finds that an adverse inference exists for any trier of fact that the evidence destroyed by the government would have shown that the government has collected plaintiffs' communications and communications records.

IT IS SO ORDERED.

Dated: _____

_____
Hon. Jeffrey S. White
United States District Court Judge