

1 CINDY COHN (SBN 145997)
cindy@eff.org
2 LEE TIEN (SBN 148216)
3 KURT OPSAHL (SBN 191303)
4 JAMES S. TYRE (SBN 083117)
5 MARK RUMOLD (SBN 279060)
6 ANDREW CROCKER (SBN 291596)
7 DAVID GREENE (SBN 160107)
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: 415/436-9333; Fax: 415/436-9993

8 RICHARD R. WIEBE (SBN 121156)
wiebe@pacbell.net
9 LAW OFFICE OF RICHARD R. WIEBE
10 One California Street, Suite 900
11 San Francisco, CA 94111
Telephone: 415/433-3200; Fax: 415/433-6382

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14
15 *Counsel for Plaintiffs*

RACHAEL E. MENY (SBN 178514)
rmeny@kvn.com
PAULA L. BLIZZARD (SBN 207920)
MICHAEL S. KWUN (SBN 198945)
AUDREY WALTON-HADLOCK (SBN 250574)
BENJAMIN W. BERKOWITZ (SBN 244441)
JUSTINA K. SESSIONS (SBN 270914)
KEKER & VAN NEST, LLP
633 Battery Street
San Francisco, CA 94111
Telephone: 415/391-5400; Fax: 415/397-7188

THOMAS E. MOORE III (SBN 115107)
tmoore@rroyselaw.com
ROYSE LAW FIRM, PC
1717 Embarcadero Road
Palo Alto, CA 94303
Telephone: 650/813-9700; Fax: 650/813-9777

ARAM ANTARAMIAN (SBN 239070)
aram@eff.org
LAW OFFICE OF ARAM ANTARAMIAN
1714 Blake Street
Berkeley, CA 94703
Tel.: 510/289-1626

16 **UNITED STATES DISTRICT COURT**
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
18 **OAKLAND DIVISION**

19)
20) CAROLYN JEWEL, TASH HEPTING,
21) YOUNG BOON HICKS, as executrix of the
22) estate of GREGORY HICKS, ERIK KNUTZEN
23) and JOICE WALTON, on behalf of themselves
24) and all others similarly situated,

25) Plaintiffs,

26) v.

27) NATIONAL SECURITY AGENCY, *et al.*,

28) Defendants.

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

) **IMMEDIATE ACTION REQUESTED**

) **PLAINTIFFS' EMERGENCY**
) **APPLICATION TO ENFORCE THE**
) **COURT'S TEMPORARY RESTRAINING**
) **ORDER**

) **HEARING REQUESTED FOR**
) **JUNE 6, 2014**

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

1 By this emergency application, plaintiffs seek immediate enforcement of the evidence
2 preservation Temporary Restraining Order (the “TRO”) entered by the Court on March 10, 2014
3 (ECF No. 189) and reaffirmed in the Court’s April 17, 2014 Amended Minute Order (ECF
4 No. 206). Because of the urgency of this matter, plaintiffs respectfully request that the Court hear
5 the parties on this matter on **Friday, June 6, 2014** at a time convenient to the Court. Plaintiffs
6 have conferred with counsel for the plaintiffs in *Shubert v. Obama* and they join in this application.
7 Plaintiffs also informed defendants, as of 10:30 am PDT today, that they are seeking this relief.
8 Cohn Decl., Exh. E.

9 In its TRO, the Court ordered the government to refrain from any further destruction of
10 evidence pending final resolution of the parties’ dispute over the government’s evidence
11 preservation obligations: “Accordingly, it is HEREBY ORDERED that Defendants, their officers,
12 agents, servants, employees, and attorneys, and all those in active concert or participation with
13 them are prohibited, enjoined, and restrained from destroying *any potential evidence relevant to the*
14 *claims at issue in this action*, including but not limited to prohibiting the destruction of any
15 telephone metadata or ‘call detail’ records, pending further order of the Court.” ECF No. 189 at 2
16 (emphasis added). In its Amended Minute Order, the Court reiterated that the TRO’s prohibition
17 on any evidence destruction remains in effect until the Court has finally decided the evidence
18 preservation dispute: “The Court extends the temporary restraining order issued on March 10,
19 2014 until a final order resolving the matter is issued.” ECF No. 206 at 1.

20 In communications with the government this week, plaintiffs learned to their surprise that
21 the government is continuing to destroy evidence relating to the mass interception of Internet
22 communications it is conducting under section 702 of the Foreign Intelligence Surveillance Act.
23 This would include evidence relating to its use of “splitters” to conduct bulk interceptions of the
24 content of Internet communications from the Internet “backbone” network of AT&T, as described
25 in multiple FISC opinions and in the evidence of Mark Klein and J. Scott Marcus, ECF Nos. 84,
26 85, 89, 174 at Ex. 1.

27 Specifically, in connection with the modification of the evidence preservation briefing
28 schedule earlier this week, plaintiffs’ counsel sought assurances from the government that no

1 evidence destruction would occur if the briefing schedule were extended. Cohn Decl. Ex. A. After
2 initially giving a cryptic response, the government finally confirmed today that in its view the TRO
3 does *not* require it to preserve evidence relating to Internet content interceptions and that it has not
4 stopped the routine destruction of such evidence. Cohn Decl., Exs. B, C and D. The government
5 stated: “The Court is presently considering whether the Government must preserve material
6 obtained under Section 702 of FISA in the context of the Jewel/Shubert litigation. In the
7 meantime, pending resolution of the preservation issues in this case, we have been examining with
8 our clients how to address the preservation of data acquired under the Section 702 program in light
9 of FISC imposed data retention limits (even though we disagree that the program is at issue in
10 Jewel and Shubert).” This, quite plainly, means that the government has interpreted the March 10,
11 2014 TRO as putting it under no current obligation to preserve evidence it has collected under
12 section 702 despite the clear language of the TRO and the context in which it was entered.

13 Once again, the government has apparently secretly and unilaterally reinterpreted its
14 obligations under the Court’s evidence preservation orders, without notice to the Court or to
15 plaintiffs, and has determined that it need not engage in preservation of relevant evidence. This
16 time, however, there can be no dispute that the government was aware of broad scope of the TRO
17 and the Court’s intention that no destruction occur of evidence plaintiffs contend is relevant until
18 the Court has decided the matter.

19 Plaintiffs request an immediate hearing before the Court on Friday, June 6, 2014 to enforce
20 the existing TRO and to impose on the government whatever further measures are necessary to
21 ensure that no destruction of evidence occurs before the Court has decided the pending evidence
22 preservation dispute.

23 Dated: June 5, 2014

Respectfully submitted,

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/s/ Cindy Cohn

25 CINDY COHN
26 LEE TIEN
27 KURT OPSAHL
28 JAMES S. TYRE
MARK RUMOLD
ANDREW CROCKER

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DAVID GREENE
ELECTRONIC FRONTIER FOUNDATION

RICHARD R. WIEBE
LAW OFFICE OF RICHARD R. WIEBE

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PAULA L. BLIZZARD
KEKER & VAN NEST LLP

ARAM ANTARAMIAN
LAW OFFICE OF ARAM ANTARAMIAN

Counsel for Plaintiffs