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15 *Counsel for Plaintiffs*

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)
26) Plaintiffs,
27)
28) v.
29) NATIONAL SECURITY AGENCY, *et al.*,
30)
31) Defendants.

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

**PLAINTIFFS' OPPOSITION TO
GOVERNMENT DEFENDANTS'
ADMINISTRATIVE MOTION TO
EXTEND TIME**

Date: October 31, 2014
Time: 9:00 a.m.
Courtroom 5, 2nd Floor
The Honorable Jeffrey S. White

1 Pursuant to Local Rules 6-3 and 7-11, Plaintiffs respectfully oppose Defendants' motion to
2 extend the time of the due date of their response to Plaintiffs' Motion for Partial Summary
3 Judgment.

4 Plaintiffs brought this case in 2008 in order to address the government's ongoing violation
5 of their privacy and that of millions of other innocent Americans. Plaintiffs have diligently and
6 patiently pursued their claims over the course of six years despite the continuing daily harms to
7 their constitutional rights. They have also tried to move this case forward according to this Court's
8 rules, as parties would do in any other case pending before this Court. Plaintiffs have also
9 consistently accommodated all of the Defendants' reasonable requests over the past eight years to
10 extend or adjust scheduling. Plaintiffs remain willing to do so.

11 However, the present motion arises from unreasonable demands by the Defendants made
12 one week before their opposition was due, namely that Plaintiffs agree to:

- 13 a. Vacate the October 31 hearing date noticed by Plaintiffs after significant
14 accommodations to the Defendants, since Plaintiffs' motion was ready to be filed in
15 mid-July and could have been briefed and heard by mid-September; and
16 b. Extend the briefing schedule to accommodate a last-minute claim that Defendants
17 wish to bring a cross motion, even though they have had Plaintiffs' motion since
18 late July.

19 In response, Plaintiffs agreed to allow Defendants two more weeks to file their opposition,
20 but required in exchange that the hearing date simply be moved accordingly to November 14,
21 2014, without allowing for any cross motion. *See* ECF No 279 Ex. 1. Plaintiffs remain willing to
22 agree to the following schedule for their partial summary judgment motion:

23 Defendants' Opposition due by: **October 3, 2014;**

24 Plaintiffs' Reply due by: **October 31, 2014;**

25 Hearing: **November 14, 2014.**

26 Defendants rejected Plaintiffs' proposal, and this motion followed.
27

July Scheduling Stipulation

1
2 Plaintiffs' motion was originally discussed at the Case Management Conference in
3 November 2013. Due to intervening events, Plaintiffs took it off calendar in early 2014 (with no
4 objection from Defendants) but by mid-July 2014, Plaintiffs were ready to file. On July 10, 2014,
5 Plaintiffs contacted the Defendants and proposed a briefing schedule that began on July 18 and
6 required an opposition in late August, giving the Defendants five weeks to brief their opposition,
7 with a hearing date in early October. *See* Ex. 1.

8 In response, Defendants maintained that, for various internal staffing reasons, they could
9 not possibly respond to the motion, even if filed in mid-July, until late September. In order to
10 accommodate Defendants, Plaintiffs agreed to this, setting Defendants' opposition on September
11 19, as Defendants had suggested. *Id.*

12 Plaintiffs filed their motion early, on July 25, 2014. ECF No. 261. Plaintiffs filed a
13 stipulation reflecting the Defendants' request for extended time on July 29, 2014, which the Court
14 subsequently entered. *See* ECF No. 272.

15 As part of the normal process for motions pursuant to Local Rule 7-2(b), Plaintiffs sought
16 Defendants' agreement on a hearing date. *See* Ex. 1. Surprisingly, Defendants maintained that no
17 hearing date should be set. To resolve this, the parties agreed to note Defendants' objections to
18 setting a hearing in the stipulation filed with the Court on July 29. *Id.*; ECF No. 272.

19 Pursuant to Local Rule 7-2(b) and in order to ensure that this matter would be heard in the
20 normal course, Plaintiffs included a notice of motion and set a hearing date for October 31, 2014.
21 The hearing set by Plaintiffs remains on the Court's calendar.

Request to Vacate Hearing and File Cross-Motion

22
23 On September 11, 2014, nearly seven weeks after receiving Plaintiffs' motion and just one
24 week before the date they proposed (and the court ordered) for their opposition, Defendants
25 contacted Plaintiffs to request: 1) that the hearing date be vacated; 2) that the schedule be entirely
26 rewritten to accommodate their apparently late decision to bring a cross motion; and 3) a short
27 extension of time for their opposition. *See* ECF No. 279 ¶ 5; *id.* Ex 1.

1 Though this motion has been contemplated for nearly a year and actually brought two
2 months ago, the September 11 email was the first time Defendants indicated that they intended to
3 file a cross motion. ECF No. 279 Ex. 1. Notably, they did not mention any such intent when the
4 Plaintiffs' motion was originally discussed in the fall of 2013, or in July 2014 when the schedule
5 was negotiated, or in the two months since then when they have had Plaintiffs' actual motion in
6 hand.

7 As noted above, Plaintiffs offered to accommodate Defendants' requests for a two-week
8 extension for their opposition, provided that Defendants would agree to a November 14, 2014
9 hearing and to bring any cross motion on a separate schedule. *Id.* Defendants refused Plaintiffs'
10 offer and instead filed the instant motion.

11 **Defendants Provide an Insufficient Basis for Their Administrative Motion**

12 Defendants have failed to satisfy Local Rule 6-3(a)(3) and have not identified any, much
13 less substantial, harm or prejudice that would result if this Court does not change the time for their
14 response:

15 First, in light of the Plaintiffs' original accommodation of Defendants' requests giving
16 Defendants eight weeks to draft their opposition, Defendants' statement last week that they
17 "underestimated the amount of time it would take to respond to the motion" is not a sufficient
18 reason for an extension. ECF No. 279 ¶ 3. Not only is this an insufficient reason to extend a date
19 that the Defendants themselves set, Defendants have given no reason for failing to raise this
20 concern in the past two months that they have had the motion in hand. Defendants also note the
21 departure of one of the many lawyers on this case, but he is plainly not lead counsel and it is
22 difficult to believe that the Justice Department, the world's largest law firm, cannot provide
23 sufficient counsel.

24 Second, Defendants have not provided any reason for their delay in determining that they
25 wished to bring a cross motion. Notably, the grounds will likely be similar to the arguments raised
26 in their previous two motions for summary judgment, the first of which was filed in 2008.

1 Third, judicial economy would be not served by adjusting the schedule now to add a cross
2 motion. Defendants have not indicated any new arguments they require a cross motion to raise.
3 This means that their opposition briefing and the cross motion briefing will be largely duplicative.
4 Moreover, if Plaintiffs' partial summary judgment motion is granted, Defendants' motion will be
5 moot; if Plaintiffs' motion is denied, Defendants can then seek summary judgment on those
6 grounds, since the Court will already have ruled substantively.

7 Finally, the request will cause scheduling difficulty for Plaintiffs because key Plaintiffs'
8 counsel (Cindy Cohn) is unavailable with pre-paid and pre-scheduled travel out of the country from
9 November 17 to December 10. Hence, if Defendants' motion is granted, the hearing on this matter,
10 appears likely to be put off into 2015.

11 As noted above, Plaintiffs suggested and remain willing to grant Defendants a two-week
12 extension to oppose their motion, as long as this motion remains calendared for hearing according
13 to the normal process in this Court with a hearing date of November 14. What Plaintiffs cannot
14 agree to is an indefinite postponement of the hearing on their motion and the insertion of a cross
15 motion into their long-negotiated briefing schedule.

16 Accordingly, Plaintiffs respectfully request that the Court deny Defendants' administrative
17 motion to extend the time for Defendants' response to Plaintiffs' motion and let stand the briefing
18 schedule it previously ordered:

19 Defendants' response to Plaintiffs' motion due by: **September 19, 2014;**

20 Plaintiffs' reply due by: **October 17, 2014.**

21 Alternatively, Plaintiffs request that the Court adjust the briefing schedule to require:

22 Defendants' response due by: **October 3, 2014;**

23 Plaintiffs' response due by: **October 31, 2014;**

24 Hearing date: **November 14, 2014.**

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Dated: September 18, 2014

Respectfully submitted,

/s/ Cindy Cohn

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KURT OPSAHL
JAMES S. TYRE
MARK RUMOLD
ANDREW CROCKER
DAVID GREENE
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JUSTINA K. SESSIONS
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LAW OFFICE OF ARAM ANTARAMIAN

Counsel for Plaintiffs

DECLARATION OF CINDY COHN
IN SUPPORT OF PLAINTIFFS’ OPPOSITION
TO GOVERNMENT DEFENDANTS’ ADMINISTRATIVE MOTION
TO EXTEND TIME

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1. I am the Legal Director of the Electronic Frontier Foundation and counsel of record for Plaintiffs in this action. The statements made herein are based on my personal knowledge, and on information made available to me in the course of my duties and responsibilities as counsel for Plaintiffs.

2. Filed with this declaration, as Exhibit 1, is a true and correct copy of the email correspondence between counsel for Plaintiffs and the Government Defendants, from July 10–16, 2014. As described in the above Plaintiffs’ Opposition to Government Defendants’ Administrative Motion to Extend Time, the email correspondence provided as Exhibit 1 shows the efforts made by Plaintiffs to accommodate Defendants’ original requests for extended time in briefing their opposition to Plaintiffs’ motion for partial summary judgment.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 18, 2014, at San Francisco, CA.

/s/ Cindy Cohn _____
Cindy Cohn

Exhibit 1

Exhibit 1

"Gilligan, Jim (CIV)" <James.Gilligan@usdoj.gov>

July 16, 2014 9:30 AM

To: Cindy Cohn <Cindy@eff.org>

Cc: "Berman, Marcia (CIV)" <Marcia.Berman@usdoj.gov>, Rick Wiebe <wiebe@pacbell.net>, "Ilann M. Maazel" <imaazel@ecbalaw.com>, "Stephanie Shattuck" <steph@eff.org>, "Thomas E. Moore III" <tmoore@moorelawteam.com>, "Patton, Rodney (CIV)" <Rodney.Patton@usdoj.gov>, "Dearinger, Bryan (CIV)" <Bryan.Dearinger@usdoj.gov>, "Berman, Julia (CIV)" <Julia.Berman@usdoj.gov>

RE: Jewel 4th Amendment motion schedule

Cindy, thanks for the accommodation on scheduling. We'll look for the draft stip. next week. We're happy for the time being to agree to disagree about setting a hearing date, but we will want to convey to the court, in whatever the parties file, our differing views on that point.

JG

James J. Gilligan
Special Litigation Counsel
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044

Tel: 202-514-3358

From: Cindy Cohn [mailto:Cindy@eff.org]

Sent: Tuesday, July 15, 2014 7:13 PM

To: Gilligan, Jim (CIV)

Cc: Berman, Marcia (CIV); Rick Wiebe; Ilann M. Maazel; Stephanie Shattuck; Thomas E. Moore III; Patton, Rodney (CIV); Dearinger, Bryan (CIV); Berman, Julia (CIV)

Subject: Re: Jewel 4th Amendment motion schedule

Hi Jim,

Thanks for your response. In order to accommodate the government, we will agree to that briefing schedule on our Motion for Partial Summary Judgment on the 4th Amendment:

Opening brief: August 15 (we may file sooner)

Opposition brief: September 19

Reply Brief: October 17

Since I'm heading out of town, we will send over a briefing and page limits schedule stipulation early next week. I do not believe we will need a full 35 pages and will adjust accordingly. If the government needs additional pages in opposition after seeing the brief, please let me know and I'm confident we can reach a reasonable accommodation.

However, we do believe that we should set a hearing date. That is the standard practice in the Northern District. We will set the date for October 31, 2014 in accordance with the local rules. Note that Judge White is unavailable on any Friday during November.

If Judge White wants to combine that with other issues, he can and of course will. If the government wishes to vacate the hearing date or have it combined with the other issues, it can make a motion.

Cindy

On Jul 15, 2014, at 9:35 AM, "Gilligan, Jim (CIV)" <James.Gilligan@usdoj.gov> wrote:

Cindy,

We've conferred internally about your proposed schedule for briefing plaintiffs' motion for partial summary judgment on their standing to bring their Fourth Amendment claims.

Unfortunately, the schedule you've suggested conflicts with our team's longstanding summer leave plans and briefing deadlines in other cases. Most of our team will be out of the office for the next two weeks (July 21 through August 1), including one who will likely be out for an extended paternity leave. (Client agency personnel working on this and other NSA litigation will also be out on leave during this period.) Moreover, we have briefs due in other NSA cases on August 11 and 14. Under these circumstances, to ensure that we have sufficient time to prepare papers in response to plaintiffs' motion, we propose that plaintiffs file their motion on August 15, 2014, that the government file its opposition on September 19, and that plaintiffs file their reply on October 17. Of course, we do not object if plaintiffs wish to file their motion in advance of August 15, or their reply in advance of October 17. For the reasons stated above, however, the government's opposition should be due no earlier than September 19.

Regarding a hearing date, the issue on which the court authorized briefing—plaintiffs' standing to bring their Fourth Amendment claims—is intertwined with the other threshold standing issues on which Judge White directed briefing at the September 2013 status conference. Indeed, plaintiffs sought and Judge White granted leave to address that issue as part of the briefing on the third of the four threshold issues he identified. We do not think it is appropriate, therefore, to request a separate hearing date on plaintiffs' partial summary judgment motion. Rather, that motion should be heard, at the earliest, at the same time that Judge White indicates he is prepared to hear argument on the Court's four threshold issues.

Finally, we do not object to the page limits you propose for the parties' briefs, but reserve the government's right to seek a further enlargement of the page limit for its opposition if necessary to appropriately address plaintiffs' arguments.

Let us know if that schedule works for plaintiffs.

Thanks.

Jim

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Tel: 202-514-3358

From: Cindy Cohn [mailto:Cindy@eff.org]

Sent: Friday, July 11, 2014 1:52 PM

To: Berman, Marcia (CIV)

Cc: Rick Wiebe; Ilann M. Maazel; Stephanie Shattuck; Thomas E. Moore III; Gilligan, Jim (CIV); Patton, Rodney (CIV); Dearing, Bryan (CIV); Berman, Julia (CIV)

Subject: Re: Jewel 4th Amendment motion schedule

OK. Note that I'll be traveling much of Wednesday and Thursday and out Friday next week.

Cindy

On Jul 11, 2014, at 10:30 AM, "Berman, Marcia (CIV)" <Marcia.Berman@usdoj.gov> wrote:

Hi Cindy -- we're discussing this and will get back to you -- probably early next week, as Tony is on vacation this week. Thanks -- Marcy

From: Cindy Cohn [mailto:Cindy@eff.org]

Sent: Thursday, July 10, 2014 5:45 PM

To: Berman, Marcia (CIV)

Cc: Rick Wiebe; Ilann M. Maazel; Stephanie Shattuck; Thomas E. Moore III; Gilligan, Jim (CIV); Patton, Rodney (CIV); Dearing, Bryan (CIV); Berman, Julia (CIV)

Subject: Jewel 4th Amendment motion schedule

Hi Marcy and co,

I'm writing to see if we can reach agreement on a schedule and page limits for a motion for partial summary judgment on the 4th Amendment in Jewel. This is the one we took off calendar before -- we're now ready to go forward.

Here's what we propose:

Plaintiffs' Opening brief: July 18

Govt Opposition: August 22

Plaintiffs' Reply: September 19

Hearing: October 3

This works for Judge White's schedule as far as we can tell.

Please let me know the government's position. Obviously this gives both parties much more time than the normal 35 day schedule in the ND Cal.

We will also be proposing that our opening brief be up to 35 pages, with a corresponding extension for the government of up to 35 pages, as well as likely a reply of up to 20 pages. Please also let me know the government's position on that as well.

By the way, separately, my colleague Tom Moore will be reaching out to you about our plan to amend the Complaint in First Unitarian Church v. NSA now that the FTCA deadlines have passed.

Cindy

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Join EFF! <https://supporters.eff.org/donate>

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22) estate of GREGORY HICKS, ERIK KNUTZEN
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28) v.
29) NATIONAL SECURITY AGENCY, *et al.*,
30)
31) Defendants.

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

**[PROPOSED] ORDER DENYING
GOVERNMENT DEFENDANTS'
ADMINISTRATIVE MOTION TO
EXTEND TIME**

Date: October 31, 2014
Time: 9:00 a.m.
Courtroom 5, 2nd Floor
The Honorable Jeffrey S. White

[PROPOSED] ORDER

1
2 Upon consideration of the Government Defendants' Administrative Motion to Extend the
3 Time for Their Response to Plaintiffs' Motion for Partial Summary Judgment, and Plaintiffs'
4 response thereto, **IT IS HEREBY ORDERED** that the Government Defendants' motion is
5 **DENIED**. The briefing schedule shall remain unchanged: Defendants' response to Plaintiffs'
6 Motion for Partial Summary Judgment is due September 19, 2014, and Plaintiffs' reply is due
7 October 17, 2014.

8 **IT IS SO ORDERED.**

9
10 Dated: _____

HON. JEFFREY S. WHITE
UNITED STATES DISTRICT COURT JUDGE