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12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**
OAKLAND DIVISION

14	)	Case No. 4:08-cv-04373-JSW
15)	
16)	
17	)	GOVERNMENT DEFENDANTS'
18	)	UNOPPOSED OUT-OF-TIME MOTION
19	)	FOR AN EXTENSION OF
20	)	TIME TO FILE THE DECLARATION
21	)	OF JAMES R. CLAPPER, DIRECTOR
22	)	OF NATIONAL INTELLIGENCE,
	)	IN SUPPORT OF GOVERNMENT
	)	DEFENDANTS' REPLY BRIEF
)	
	)	No hearing scheduled

23 Pursuant to Local Rules 6-3 and 7-1, the Government Defendants respectfully request a
 24 five-day extension of time, *nunc pro tunc*, to file the Declaration of James R. Clapper, Director
 25 of National Intelligence, in support of the Government Defendants' Reply brief on their cross-
 26 motion for partial summary judgment. The Government Defendants submit the following in
 27 support of this request:

28 1. The Government Defendants filed their Reply in Support of Their Cross-Motion
 Gov't Defs.' Unopposed Out-of-Time Mot. for Extension of Time to File Declaration of Director of National
 Intelligence in Support of Gov't Defs.' Reply Brief, *Jewel v. National Security Agency* (4:08-cv-4373-JSW)

1 for Partial Summary Judgment on Plaintiffs' Fourth Amendment Claim on November 7, 2014
2 (*see* ECF No. 299), pursuant to the Court's scheduling order (ECF No. 293). The Government
3 Defendants informed the Court that a supplemental Classified Declaration by Miriam P. of the
4 National Security Agency, in support of the Government Defendants' reply brief, had been
5 lodged, would be made available for the Court's *in camera*, *ex parte* review, and would provide
6 the Court with information related to the state secrets privilege that cannot be provided in a
7 public filing. *See* ECF No. 301.

8 2. The Government Defendants seek to file, *nunc pro tunc*, the attached public
9 Declaration of James R. Clapper, Director of National Intelligence ("Clapper Decl."), in support
10 of their reply brief. DNI Clapper submits this declaration to confirm that the classified facts set
11 forth in the supplemental, Nov. 7, 2014 Miriam P. declaration fall within the scope of his
12 assertion of the state secrets privilege already made in this case. Clapper Decl. ¶¶ 1, 3-5.¹ As
13 DNI Clapper explains, he was unavailable last week to review that declaration, or to execute the
14 attached declaration, because he was on an unanticipated trip to the Democratic People's
15 Republic of Korea (North Korea) to secure the release of American hostages Matthew Todd
16 Miller and Kenneth Bae. *Id.* ¶ 2.

17 3. This request does not affect the hearing date on the parties' cross-motions for
18 partial summary judgment, set for December 19, 2014, or otherwise affect the schedule of the
19 case.

20 4. The Government Defendants emailed Plaintiffs' counsel to ask their position
21 regarding their *nunc pro tunc* request. Plaintiffs' counsel advised that Plaintiffs do not object to
22 the *nunc pro tunc* filing of the Clapper declaration.

23 For the reasons set forth above, the Government Defendants respectfully request that the
24

25 ¹ The Government filed a similar declaration by the DNI in connection with the Gov't
26 Defs.' Opp. to Pls.' Mot. for Partial Summ. Judg. & Cross-Mot for Partial Summ. Judg. on Pls.'
27 Fourth Amendment Claim (ECF Nos. 286-5, 286-6), in which the DNI confirmed that classified
28 facts contained in the September 29, 2014, Classified Declaration of Miriam P., submitted in
support of the Government Defendants' opening brief (*see* ECF No. 288) also fall within the
scope of his assertion of the state secrets privilege in this case.

Gov't Defs.' Unopposed Out-of-Time Mot. for Extension of Time to File Declaration of Director of National
Intelligence in Support of Gov't Defs.' Reply Brief, *Jewel v. National Security Agency* (4:08-cv-4373-JSW)

1 Court grant their request for a five-day extension of time, *nunc pro tunc*, to file the attached
2 public Declaration of James R. Clapper, Director of National Intelligence.

3
4 Dated: November 12, 2014

Respectfully Submitted,

5 JOYCE R. BRANDA
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9 Deputy Branch Director

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13 **UNITED STATES DISTRICT COURT**
 14 **NORTHERN DISTRICT OF CALIFORNIA**
 15 **OAKLAND DIVISION**

16	CAROLYN JEWEL, <i>et al.</i>,	)	Case No. 4:08-cv-4373-JSW
)	
17	Plaintiffs,	)	DECLARATION OF
		)	JAMES R. CLAPPER,
18	v.	)	DIRECTOR OF NATIONAL
		)	INTELLIGENCE
19	NATIONAL SECURITY AGENCY, <i>et al.</i> ,)	
)	
20	Defendants.)	Date: December 19, 2014
)	Time, Location: 9:00 a.m., Ctrm. 5, 2nd Floor
)	The Honorable Jeffrey S. White

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22 1. (U) I am the Director of National Intelligence (“DNI”) of the United States, a
 23 position I have held since August 9, 2010. In my capacity as the DNI, I oversee the U.S.
 24 Intelligence Community and serve as the principal intelligence advisor to the President. I submit
 25 this declaration to confirm that the classified facts set forth in the Supplemental Classified
 26 Declaration of Miriam P., National Security Agency (“November 7 Classified Miriam P.
 27 Declaration”) (submitted *ex parte, in camera*, on November 7, 2014), fall within the scope of my
 28 assertion of the state secrets privilege already made in this case. The statements made herein are
 based on my personal knowledge and on information made available to me as the DNI.

1 2. (U) Last week, when the November 7 Classified Miriam P. Declaration was
2 executed and submitted, I was on an unanticipated trip to the Democratic People's Republic of
3 Korea (North Korea) to secure the release of American hostages Matthew Todd Miller and
4 Kenneth Bae. As a result, I was unavailable and could neither review that declaration nor
5 execute this declaration prior to the November 7, 2014 deadline for the Government Defendants'
6 Reply in Support of Their Cross-Motion for Partial Summary Judgment on Plaintiffs' Fourth
7 Amendment Claim.

8 3. I have now reviewed the November 7 Classified Miriam P. Declaration, which
9 advises the Court of particular operational details about the capabilities and effectiveness of the
10 NSA's "Upstream" collection of communications under Section 702 of the Foreign Intelligence
11 Surveillance Act that are implicated by Plaintiffs' Combined Reply in Support of their Motion
12 for Partial Summary Judgment and Opposition to the Government Defendants' Cross-Motion for
13 Partial Summary Judgment, ECF No. 294. I agree with Miriam P. that, although the Government
14 has publicly released some information about NSA's Upstream collection, the operational details
15 about the capabilities and effectiveness of that collection, as discussed in the November 7
16 Classified Miriam P. Declaration, have not been officially disclosed and remain classified.


17 4. (U) I also conclude that the operational details about the capabilities and
18 effectiveness of the NSA's "Upstream" collection of communications set forth in her declaration
19 fall within my assertion of the state secrets privilege in this case first made in September 2012
20 and reaffirmed in large part in December 2013. *See* Public Declaration of James R. Clapper,
21 DNI (Sept. 11, 2012) (ECF No. 104) ¶¶ 3, 9, 11; Public Declaration of James R. Clapper, DNI
22 (Dec. 20, 2013) (ECF No. 168) ¶¶ 4, 9, 10, 11, 19.C.(1)(b). At paragraph 19.C.(1)(b) of my
23 December 20, 2013 public declaration, I asserted the privilege over the scope and operational
24 details of NSA intelligence activities that may be necessary to adjudicate plaintiffs' allegations,
25 including information concerning operational details related to the collection of communications
26 under FISA section 702. The information contained within the Classified Miriam P. Declaration
27 filed November 7, 2014, sets forth operational details regarding NSA "Upstream" capabilities
28 and describes the effectiveness and importance of this collection tool. This information falls
within the scope of paragraph 19.C.(1)(b).

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5. These details, if disclosed, would provide our Nation’s adversaries, including foreign terrorist organizations, with unparalleled insight into exactly how the Upstream process works and why it is effective, and permit sophisticated adversaries to further refine and advance their capabilities to avoid U.S. Government surveillance activities. This is not an academic concern. The Intelligence Community has seen terrorist groups and other foreign intelligence targets adopt or alter their security practices in direct response to public discussions, whether accurate or inaccurate, of the sources and methods U.S. intelligence agencies use to execute their assigned foreign-intelligence responsibilities. Therefore, disclosure of specific information regarding Upstream collection, whether for purposes of addressing the allegations in Plaintiffs’ recent filing, for litigating the remainder of Plaintiff’s claims, or for any other purpose, could reasonably be expected to cause exceptionally grave damage to the national security.

(U) I declare under penalty of perjury that the foregoing is true and correct.

DATE: November 12, 2014


JAMES R. CLAPPER
Director of National Intelligence