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10 *Attorneys for the Government Defs. in their Official Capacity*

11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**  
13 **SAN FRANCISCO DIVISION**

14 \_\_\_\_\_ )  
CAROLYN JEWEL, *et al.*, )

Case No. 3:08-cv-04373-JSW

15 Plaintiffs, )

16 v. )

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

18 Defendants. )

19 \_\_\_\_\_ )  
20 *In re National Security Agency* )  
21 *Telecommunications Records Litigation* )  
(M:06-cv-1791) )

Case No. 07-cv-00693-JSW

**DEFENDANTS' RESPONSE TO**  
**PLAINTIFFS' OPPOSITION TO**  
**DEFENDANTS' JUNE 7, 2013 NOTICE**

22 This Document Relates To: )  
23 VIRGINIA SHUBERT, *et al.*, )

24 Plaintiffs, )

25 v. )

26 BARACK OBAMA, *et al.* )

27 Defendants. )

Judge Jeffrey S. White

Courtroom 11, 19<sup>th</sup> Floor

28 Defs.' Resp. to Pls.' Opp. to Defs.' June 7, 2013 Notice  
*Jewel v. National Security Agency* (08-cv-4373-JSW)  
*Shubert v. Obama* (07-cv-00693-JSW) (M:06-cv-1791)

1 On June 7, 2013, the Government Defendants notified the Court that, in response to  
2 media reports about alleged surveillance activities, the Director of National Intelligence (“DNI”)  
3 had, the day before, directed that certain information related to the “business records” provision  
4 of the Foreign Intelligence Surveillance Act (“FISA”) be declassified and immediately released  
5 to the public. Recognizing that this official disclosure could affect the Government’s pending  
6 state secrets privilege assertion, the Government Defendants asked the Court to pause its  
7 consideration of that assertion, briefed in the parties’ pending cross-motions for summary  
8 judgment, while the Government Defendants determined the impact of the disclosure on the  
9 privilege assertion. We indicated in our notice that we would consult with plaintiffs about the  
10 way forward during this pause, but plaintiffs opposed the notice before any substantive  
11 consultation could take place. *See* Dkt. 143, Plaintiffs’ Opposition (“Pl. Opp.”).

12 Plaintiffs have very much overreacted to the Government’s notice. They erroneously  
13 accuse the Government of seeking to delay proceedings and propose an order for further  
14 proceedings that we believe would be inappropriate at this stage.

15 The DNI’s declassification decision was necessitated by a government contractor’s  
16 unauthorized disclosure of a top secret U.S. court document, not by any desire by the  
17 Government to delay this litigation. *See* DNI Statement on Recent Unauthorized Disclosures of  
18 Classified Information, *available at* [http://www.odni.gov/index.php/newsroom/press-](http://www.odni.gov/index.php/newsroom/press-releases/191-press-releases-2013/868-dni-statement-on-recent-unauthorized-disclosures-of-classified-information)  
19 [releases/191-press-releases-2013/868-dni-statement-on-recent-unauthorized-disclosures-of-](http://www.odni.gov/index.php/newsroom/press-releases/191-press-releases-2013/868-dni-statement-on-recent-unauthorized-disclosures-of-classified-information)  
20 [classified-information](http://www.odni.gov/index.php/newsroom/press-releases/191-press-releases-2013/868-dni-statement-on-recent-unauthorized-disclosures-of-classified-information). The Government simply notified the Court that the DNI’s  
21 declassification determination could impact its state secrets privilege assertion presently before  
22 the Court, and that the Court should accordingly not rule on it until the Government determined

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Def.’ Resp. to Pls.’ Opp. to Defs.’ June 7, 2013 Notice  
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1 what the impact of this development would be on this case. We believe this was the appropriate  
2 and responsible thing to do under the circumstances. The parties' cross-motions for summary  
3 judgment were heard on December 14, 2012, and the Court could have issued a decision on them  
4 at any time. The Government sought to make the Court aware as quickly as possible of the  
5 potential impact of these developments before further action by the Court.  
6

7 Plaintiffs mischaracterize the Government's notice by claiming it requested an indefinite  
8 stay of this litigation. *See* Pl. Opp. at 2 (Dkt. 143).<sup>1</sup> To the contrary, the Government asked the  
9 Court to hold the cross-motions for summary judgment in abeyance for 30 days to give it time to  
10 sort out the impact of recent events on the pending state secrets assertion and file a status report.  
11 While the Government cannot state at this time precisely how we believe the case should  
12 proceed thereafter, the Court can at least take into account the Government's report (as well as  
13 plaintiffs' position). In these circumstances, we believe it makes sense for the Court to allow the  
14 Government some time to assess the impact of recent developments on this case.  
15

16 Plaintiff's assertion that the Government's notice is intended to delay this case is also  
17 meritless. *See* Pl. Opp. at 5 (Dkt. 143). The Government has filed multiple dispositive motions  
18 and state secrets assertions to obtain dismissal of this action, and certainly favored a ruling on the  
19 pending motions, but judged it necessary to alert the Court of the potential impact of recent  
20 developments on this case. Plaintiffs erroneously refer to the Court's prior stay of proceedings in  
21 this case, pending the Ninth Circuit's decision in *Al-Haramain v. Obama*, as an example of the  
22 Government seeking to delay the case. *See* Pl. Opp. at 6 (Dkt. 143). But that appeal raised the  
23 very same argument plaintiffs assert here -- that 50 U.S.C. § 1806(f) preempts the state secrets  
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27 <sup>1</sup> Pin citations are to ECF page numbers at the top of the document, not the page numbers  
28 at the bottom.

28 Defs.' Resp. to Pls.' Opp. to Defs.' June 7, 2013 Notice  
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1 privilege -- and this Court agreed to grant a stay. The Ninth Circuit's decision in *Al-Haramain*,  
2 690 F.3d 1089 (9th Cir. 2012), issued less than two weeks after this Court entered the stay, was  
3 indeed relevant to the pending motions, as evidenced by the questions posed by the Court for  
4 discussion at the December 14, 2012 hearing on those motions and by the discussion at the  
5 hearing itself. *See* Transcript of Dec. 14, 2012 hearing at 10-11, 16, 18 (Dkt. 133). The stay  
6 clearly did not, as plaintiffs contend, "prove[] a waste of time." Pls. Opp. at 6 (Dkt. 143).

8 Plaintiffs' further position that the Court should nonetheless rule on the motions before it,  
9 including the Government's state secrets privilege, *see* Pl. Opp. at 6-8 (Dkt. 143), is likewise  
10 meritless. Plaintiffs do not know the details of the Government's privilege assertion, as set forth  
11 in its classified declarations. Rather than accept plaintiffs' speculation about how recent  
12 developments have impacted the state secrets privilege assertion, the Court should permit the  
13 Government an opportunity to address the matter in a status report.

15 Similarly, plaintiffs' suggestion that the Court should decide their motion concerning  
16 whether 50 U.S.C. § 1806(f) preempts the state secrets privilege, *see* Pl. Opp. at 4-5 (Dkt. 143),  
17 is meritless. The questions of how the state secrets privilege impacts this case, and whether it is  
18 displaced by the FISA, are clearly related and should be considered at the same time. The Court  
19 should thus await a report on the privilege assertion to have a fuller understanding of these  
20 issues, including the implications and potential risks of plaintiffs' FISA displacement theory. If,  
21 however, the Court were inclined to consider plaintiffs' motion concerning 50 U.S.C. §1806(f), it  
22 should deny that motion. The Government has set forth extensive grounds as to why § 1806(f)  
23 does not function to displace the state secrets privilege and, indeed, why this displacement theory  
24 is inapplicable where the Ninth Circuit has now ruled that plaintiffs' cause of action under the  
25 FISA, *see* 50 U.S.C. §1810, does not apply to the United States. *See* Defs.' Mtn. for Summ.

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1 Judgment at 21, 47 n.24 (Dkt. 102), Defs.' Reply at 8-9 (Dkt. 119), Transcript at 43, & *Al-*  
2 *Haramain*, 690 F.3d at 1094-99. In addition, the Government explained at the hearing on the  
3 pending cross-motions that further district court proceedings in *Al-Haramain* proved to be  
4 unworkable following Judge Walker's ruling that § 1806(f) displaced the state secrets privilege.  
5 See Transcript at 12, 54-57. Thus, if anything, plaintiffs' motion should be denied. But the  
6 Government's request at this stage is simply to defer ruling on the parties' cross-motions.<sup>2</sup>  
7

8 Accordingly, the Government Defendants respectfully submit that the Court should defer  
9 ruling on the pending cross-motions until the Government has had an opportunity to provide the  
10 Court with its views on further proceedings.  
11

### 12 CONCLUSION

13 For the foregoing reasons, as well as the reasons set forth in Defendants' Notice and  
14 Request that the Court Hold the Pending Cross-Motions for Summary Judgment in Abeyance,  
15 the Government Defendants respectfully request that the Court hold the pending cross-motions  
16 for summary judgment (Dkt. Nos. 83, 102) in abeyance at this time and that the parties file a  
17 joint or separate status report by July 12, 2013.  
18

19 Dated: June 19, 2013

Respectfully Submitted,

20 STUART F. DELERY  
21 Acting Assistant Attorney General

22 JOSEPH H. HUNT  
23 Director, Federal Programs Branch  
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25 <sup>2</sup> For this reason, while the Government agrees with plaintiffs that the Court need not reach  
26 the state secrets privilege in order to rule on the Government's threshold defense that Congress  
27 has not waived the sovereign immunity of the United States as to plaintiffs' statutory claims, (*see*  
28 Pls.' Opp. at 4), we believe the better course would be for the Court to continue to consider all  
threshold issues at once rather than address certain issues in piecemeal fashion.

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