

1 ILANN M. MAAZEL
2 MATTHEW D. BRINCKERHOFF
3 ADAM R. PULVER (268370)
4 EMERY CELLI BRINCKERHOFF
5 & ABADY LLP
6 75 Rockefeller Plaza, 20th Floor
7 New York, New York 10019
8 Phone: (212) 763-5000
9 Fax: (212) 763-5001
10 *Attorneys for Plaintiffs*

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

14 IN RE NATIONAL SECURITY AGENCY)
15 TELECOMMUNICATIONS RECORDS)
16 LITIGATION (06-MD-1791))

Case No. 07-cv-00693-JSW

17 This Document Relates to:)

18 VIRGINIA SHUBERT, NOHA ARAFA,)
19 SARAH DRANOFF and HILARY)
20 BOTEIN, individually and on behalf of all)
21 others similarly situated,)

PLAINTIFFS' SUPPLEMENTAL
BRIEFING RE: *CLAPPER* v. *AMNESTY*
INTERNATIONAL USA

22 Plaintiffs,)

Hon. Jeffrey S. White
Courtroom: 11, 19th Fl.

23 -against -)

24 BARACK OBAMA, et al.,)

25 Defendants.)

26 Plaintiffs Virginia Shubert, Noha Arafa, Sarah Dranoff, and Hilary Botein

27 (collectively, the "*Shubert Plaintiffs*") respectfully submit this brief in response to the Court's
28 February 27, 2013 Order (Doc. No. 87) and Defendants' March 6, 2013 Supplemental Brief (Doc.
No. 88).

The *Shubert Plaintiffs* join in and adopt in full those arguments made by the
Plaintiffs in *Jewel v. National Security Agency*, No. 3:08-cv-04373-JSW, filed today, in response to
the same two documents, and also argue an additional point in response to the Defendants'
incorrect statement that the summary judgment standard is appropriately applied to analyze
Plaintiffs' standing.

1 **I. FOR THE REASONS SET FORTH BY THE *JEWEL* PLAINTIFFS, *CLAPPER* HAS**
2 **NO IMPACT ON THIS CASE OR THE MOTION BEFORE THIS COURT**

3 As explained in detail by the *Jewel* Plaintiffs, *Clapper v. Amnesty International*
4 *USA*, --- S. Ct. ----, 2013 WL 673253 (Feb. 26, 2013), does not impact this case at all, as it does not
5 disturb the Ninth Circuit's earlier consolidated opinion in these two cases, *Jewel v. National*
6 *Security Agency*, 673 F.3d 902 (9th Cir. 2011), which remains the law of the case, or the binding
7 Ninth Circuit and Supreme Court authority upon which the *Jewel* Court relied. The unrelated dicta
8 relied upon by the Government does not, and cannot, reverse this binding authority, for the reasons
9 set forth in the *Jewel* Plaintiffs' brief, which the *Shubert* Plaintiffs adopt in full.

10 Like the *Jewel* Plaintiffs, the *Shubert* plaintiffs have alleged past and present injury-
11 not the "hypothetical future harm" the *Clapper* Court determined was insufficient to meet the
12 Constitution's standing requirements. See *Clapper*, at *3, *11. The operative Second Amended
13 Complaint ("SAC") is based on actions that have already occurred and are ongoing, and alleges
14 injuries that Plaintiffs have already suffered and are currently suffering. SAC (MDL Doc. No. 771)
15 ¶¶ 7, 10-13, 20, 30, 82-84, 91, 104, 109, 113, 116-18.

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18 **II. THERE IS NO SUMMARY JUDGMENT MOTION PENDING ON THE ISSUE OF**
19 **STANDING, AND THE SUMMARY JUDGMENT STANDARD DOES NOT APPLY**

20 In addition to the arguments raised by the *Jewel* Plaintiffs, the *Shubert* Plaintiffs
21 briefly respond to the Government's suggestion that the issue of standing is before the Court on a
22 motion for summary judgment, and should be analyzed under the summary judgment standard. See
23 Defs.' Br. (Doc. No. 88) at 4, 4 n. 1. There is no such motion pending. The Government has not
24 moved for summary judgment on standing grounds. The only pending motion in the *Shubert* action
25 is the Defendants' motion to dismiss certain claims on the basis of sovereign immunity, and for
26 summary judgment on the applicability of the state secrets privilege. Defs.' Third Mot. to Dismiss
27 and for Summ. J. (Doc. No. 69).
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1 The heightened burden of proof that would accompany a motion for summary
2 judgment and which Defendants invoke is simply premature. There has been no discovery in this
3 case. Plaintiffs have submitted an affidavit in connection with the pending motion setting forth
4 discovery they would take should the Government's state secrets motion be denied, pursuant to
5 Fed. R. Civ. Pro. 56(d). Doc. No. 77. No case law supports Defendants' apparent position that,
6 where no discovery has taken place and no motion for summary judgment is pending on the issue
7 of standing, Plaintiffs must introduce evidence to establish their standing. To the contrary,
8 "Federal Defendants have not moved for summary judgment on the issue of standing, and, as
9 discovery has not yet closed, the record is insufficient to address standing on summary judgment
10 *sua sponte.*" *Coal. for a Sustainable Delta v. Fed. Emergency Mgmt. Agency*, 812 F. Supp. 2d
11 1089, 1119 n. 9 (E.D. Cal. 2011). For purposes of standing analysis, this case remains in the same
12 procedural posture it did when Judge Walker issued his subsequently-reversed opinion in 2010.

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15 While a court may always review the issue of standing *sua sponte*, *see, e.g., B.C. v.*
16 *Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999), the proper standard for such
17 review is that of a motion to dismiss – that is, the Court ““must accept all factual allegations of the
18 complaint as true,”” and “[g]eneral factual allegations of injury resulting from the defendant's
19 conduct may suffice, as [the Court] ‘presume[s] that general allegations embrace those specific
20 facts that are necessary to support the claim.’” *Jewel*, 673 F.3d at 907 (quoting *Bernhardt v. Cnty.*
21 *of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002) and *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871,
22 889 (1990) (marks omitted)). Unlike in *Clapper*, the SAC here alleges actual searches of
23 Plaintiffs' communications, plainly sufficient allegations to demonstrate standing, as even the
24 Government acknowledges.
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CONCLUSION

For the reasons above and those in the *Jewel* Plaintiffs’ brief , Plaintiffs respectfully submit the Court should decline to depart from the Ninth Circuit’s previous ruling as to standing, and find *Clapper* does not affect this Action.

Dated: March 13, 2013

Respectfully submitted,

/s/ Ilann M. Maazel
Ilann M. Maazel
Matthew D. Brinckerhoff
Adam R. Pulver (SBN # 268370)

EMERY CELLI BRINCKERHOFF
& ABADY LLP

Attorneys for Plaintiffs