

1 STUART F. DELERY
Acting Assistant Attorney General

2 JOSEPH H. HUNT
Director, Federal Programs Branch

3 ANTHONY J. COPPOLINO
Deputy Branch Director

4 tony.coppolino@usdoj.gov

5 MARCIA BERMAN
Senior Trial Counsel

6 marcia.berman@usdoj.gov

7 U.S. Department of Justice
Civil Division, Federal Programs Branch
8 20 Massachusetts Avenue, NW, Rm. 7132
Washington, D.C. 20001

9 Phone: (202) 514-2205; Fax: (202) 616-8470

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 _____)
In re National Security Agency)
20 *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.)

Judge Jeffrey S. White

26 BARACK OBAMA, *et al.*)

Courtroom 11, 19th Floor

27 Defendants.)

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

23
24
25
26
27
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 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).¹ 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
24
25
26

27 ¹ 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
Jewel v. National Security Agency (08-cv-4373-JSW)
Shubert v. Obama (07-cv-00693-JSW) (M:06-cv-1791)

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.

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 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.²
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
24

25 ² 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.

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 s/ Anthony J. Coppolino
2 ANTHONY J. COPPOLINO
3 Deputy Branch Director
4 tony.coppolino@usdoj.gov

5 s/ Marcia Berman
6 MARCIA BERMAN
7 Senior Trial Counsel
8 marcia.berman@usdoj.gov
9 U.S. Department of Justice
10 Civil Division, Federal Programs Branch
11 20 Massachusetts Avenue, NW, Rm. 7132
12 Washington, D.C. 20001
13 Phone: (202) 514-2205
14 Fax: (202) 616-8470
15 *Attorneys for the Government Defendants*
16 *Sued in their Official Capacities*
17
18
19
20
21
22
23
24
25
26
27

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)