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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION (M:06-cv-1791)

This Document Relates to:

VIRGINIA SHUBERT, NOHA ARAFA, SARAH DRANOFF and HILARY BOTEIN, individually and on behalf of all others similarly situated,

Plaintiffs,

-against -

BARACK OBAMA, et al.,

Defendants.

Case No. 07-cv-00693-JSW

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR A STAY

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Plaintiffs filed this lawsuit on May 17, 2006. For over seven years during the pendency of this case, the Government has engaged in a massive, indiscriminate domestic spying Dragnet, sucking in billions of telephone and internet communications of ordinary Americans. Not just metadata, but Americans' *actual* "communications on fiber cables and infrastructure as data flows past"—their phone calls and email.[1] The Government used every possible tactic to delay this case, filing state secrets motions to dismiss not once,[2] not twice,[3] but now *three* times.[4] Even as it violated the law for seven years, the Government successfully prevented any Court review of this breathtaking scheme.

Now the Government seeks to delay the case, *again*.[5] The motion should be denied. First, Plaintiffs agree with the *Jewel* Plaintiffs that the Court can and should resolve the 1806(f) issue. *See* No. 08-cv-04373-JSW, *Jewel* Doc. #143 (incorporated herein). Should plaintiffs prevail on the 1806(f) argument—made in both *Shubert* and *Jewel*—the state secrets privilege does not apply and defendants' motion to dismiss is moot. The 1806(f) argument is a purely legal argument unaffected by any of the recent disclosures about the NSA.

More to the point, the Government should withdraw its motion to dismiss and the case should proceed apace. Years ago, this Court held that defendants' content monitoring program is "hardly a secret," much less a state secret. *Hepting v. AT&T Corp.*, 439 F.Supp.2d 974, 994 (N.D.Cal. 2006). If the Dragnet is not secret, it is not a state secret. *Id.* To the extent there was any reasonable debate about the secrecy of the Dragnet, that debate is now over. *See* Maazel Decl., Exs. A-P; *see also Jencks v. United States*, 353 U.S. 657, 675 (1957) (Burton, J., concurring) ("Once the defendant learns the state secret . . . the underlying basis for the privilege disappears, and there usually remains little need to conceal the privileged evidence from the jury. Thus, when

[1] Declaration of Ilann M. Maazel dated June 14, 2013 ("Maazel Decl.") & Ex. P. NSA slide also available at http://www.guardian.co.uk/world/2013/jun/08/nsa-prism-server-collection-facebook-google.
[2] MDL Doc. #295 (May 25, 2007).
[3] *Shubert* Doc. #38 (Oct. 30, 2009).
[4] *Shubert* Doc. #69 (Sept. 28, 2012).
[5] *Shubert* Doc. #90 (June 7, 2013).

the Government is a party, the preservation of these privileges is dependent upon nondisclosure of the privileged evidence to the defendant."). If there ever was a state secrets privilege in this case, it is no more.

It is time to proceed forward. This case involves the ongoing violation of Constitutional rights: the right to be free from unreasonable searches and seizures, U.S. Const. amend. IV; the right to be free from "military intrusion into civilian affairs," *Laird v. Tatum*, 408 U.S. 1, 15 (1972). Virginia Shubert's Constitutional rights deserve protection by this Court. Ms. Arafa's, Ms. Dranoff's, and Ms. Botein's Constitutional rights deserve protection by this Court. Tens of millions of Americans have a Constitutional right to make phone calls and send email free from surveillance by the NSA, *today*, tomorrow, and until a court enjoins thus unlawful program. The median time in 2012 from filing to disposition of a federal civil case was 7.8 months nationally, and 6.4 months in this District.[6] Through no fault of the Court, after *84.9* months, the parties have not even had an initial Rule 16 discovery conference, much less approached resolution of the case.

President Obama stated he "welcome[s] this debate" about NSA surveillance of millions of Americans.[7] The place to debate the legality and constitutionality of government action is here, in a court of law. If the President *truly* welcomes the debate, the President's Justice Department should no longer obstruct this case. It should no longer obstruct legal review of the NSA's conduct. It should not assert alleged "state secrets" featured on the covers of hundreds of newspapers around the world. The Government's latest attempt to delay public scrutiny, judicial oversight, and justice should be soundly rejected.

[6] http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/district-courts-september-2012.aspx
[7] Maazel Decl. Ex. I.

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Dated: June 14, 2013

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