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

14 CAROLYN JEWEL, *et al.*,)
)
 15 Plaintiffs,)
)
 16 v.)
)
 17 NATIONAL SECURITY AGENCY, *et al.*,)
)
 18 Defendants.)
)
 19 VIRGINIA SHUBERT, *et al.*,)
)
 20 Plaintiffs,)
)
 21 v.)
)
 22 BARACK OBAMA, *et al.*,)
)
 23 Defendants.)
)

Case No. 4:08-cv-04373-JSW
 Case No. 4:07-cv-00693-JSW

**GOVERNMENT DEFENDANTS’
 BRIEF REGARDING COMPLIANCE
 WITH PRESERVATION ORDERS**

No hearing scheduled
 Oakland Courthouse, Courtroom 5,
 2nd Floor
 The Honorable Jeffrey S. White

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INTRODUCTION

1
2 While there have been many disputes in the course of this long-running litigation, until
3 recently there has been no dispute about what the Plaintiffs are complaining about—the legality
4 of certain alleged intelligence-gathering activities authorized by President Bush after the
5 September 11, 2001 terrorist attacks. More specifically, Plaintiffs claim that following the
6 September 11 terrorist attacks, the National Security Agency (“NSA”), pursuant to presidential
7 authorization and with the assistance of Plaintiffs’ telecommunications companies,
8 indiscriminately intercepted the content and obtained the communications records, or metadata,
9 of millions of ordinary Americans as part of an alleged “dragnet” communications surveillance.
10 The gravamen of this complaint is that these activities occurred without any judicial approval
11 and outside the requirements of statutory law. Indeed, it was this very concern that prompted the
12 Government in 2004, 2006 and 2007 to obtain authorization from the Foreign Intelligence
13 Surveillance Court (“FISC”) for certain presidentially-authorized activities.
14
15

16 As the Court is aware, over the past year the Government has, in response to last
17 summer’s unprecedented, unauthorized, and unlawful disclosures by a former NSA contractor,
18 officially acknowledged the existence and some information concerning the bulk telephony
19 metadata program authorized by the FISC in 2006; the bulk Internet metadata program
20 authorized by the FISC in 2004 and discontinued in 2011; certain information about the
21 Government’s use of authority conferred by Section 702 of the Foreign Intelligence Surveillance
22 Act (“FISA”) to collect, for foreign intelligence purposes, certain communications of non-U.S.
23 persons located outside the United States, pursuant to approval of the FISC; and the fact that the
24 two metadata collection activities were conducted prior to FISC authorization under presidential
25 authorizations issued by President Bush in the wake of the September 11 attacks.
26
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1 Plaintiffs now seek to recast their complaints to take advantage of these official
2 disclosures and contend that the Government failed to preserve relevant evidence. Plaintiffs
3 have not, however, sought to amend their complaints but instead make the argument that the
4 complaints should be read to encompass the FISC-authorized activities. Such a reading is
5 directly contrary to the actual allegations in the complaints and stretches them beyond
6 recognition. The complaints and the parties' representations during the long course of this
7 litigation firmly establish the reasonableness of the Government's understanding of Plaintiffs'
8 complaints as challenging presidentially, not FISC, authorized intelligence-gathering activities.
9

10 The Government has fully complied with its preservation obligations by preserving
11 information that may be relevant to Plaintiffs' actual claims. It has done so by diligently
12 identifying the government agencies and components likely to have information that may be
13 potentially relevant to this litigation, issuing specific notices to those entities as to their
14 preservation duties, and confirming that those entities are indeed preserving a wide range of
15 documents and information related to the NSA intelligence activities authorized by President
16 Bush after 9/11 that may be relevant to the Plaintiffs' claims. Details regarding these
17 considerable efforts are set forth in two declarations, one classified and one unclassified, that
18 accompany this brief.
19
20

21 BACKGROUND

22 A. The History of the *Jewel*, *Shubert*, and Multidistrict Litigation and the 23 Preservation Dispute

24 *Jewel* and *Shubert* are lawsuits challenging alleged surveillance activities authorized by
25 the President after the 9/11 attacks, specifically on the grounds that these activities were
26 undertaken without judicial approval and outside the requirements of statutory law, including the
27 Government Defendants' Brief Regarding Compliance with Preservation Orders, *Jewel v. National Security Agency*
28 (08-cv-4373-JSW), *Shubert v. Obama* (07-cv-693-JSW)

1 FISA. Plaintiffs claim “that the federal government, with the assistance of major
2 telecommunications companies, conducted widespread warrantless dragnet communications
3 surveillance of United States citizens following the attacks of September 11, 2001.” *Jewel v.*
4 *NSA*, 965 F. Supp. 2d 1090, 1097-98 (N.D. Cal. July 23, 2013).

5 *Shubert* was filed on May 17, 2006, and it was transferred to the *In re NSA*
6 *Telecommunications Records Litigation* Multi-District Litigation (MDL) proceeding (designated
7 as 3:06-md-1791-VRW (hereafter MDL-1791). Joint Case Management Statement at 24 (*Jewel*
8 ECF No. 159). The lead case in the Multi-District Litigation, *Hepting v. AT&T*, No. 06-cv-0672
9 (N.D. Cal.), was filed following President Bush’s December 2005 public acknowledgment, in
10 response to media reports, that he authorized a program in which the NSA intercepted certain
11 international communications to or from the United States reasonably believed to involve a
12 member or agent of al Qaeda (later referred to as the Terrorist Surveillance Program (“TSP”)).
13 *See* First Statement of Interest of the United States at 2 (*Hepting* ECF No. 82). *Hepting* was filed
14 against AT&T entities and alleged that they assisted in a warrantless surveillance program
15 authorized by the President following the September 11 attacks by disclosing to the Government
16 the contents of the communications of, and the communications records about, millions of its
17 customers. *Hepting* Amended Complaint ¶ 6 (“Am. Cmplt.”) (*Hepting* ECF No. 8).

18 *Jewel*, filed on Sept. 18, 2008, was related to *Hepting*, on plaintiffs’ motion. *See* Admin.
19 Motion by Plaintiffs to Consider Whether Cases Should be Related (“Pls.’ Mot. to Relate
20 Cases”) (*Jewel* ECF No. 7); Plaintiffs’ Opening Brief Re Evidence Preservation at 2 (“Pls.’
21 Preservation Brief”) (*Jewel* ECF No. 191). Four of the five plaintiffs who filed *Jewel* were also
22 plaintiffs in *Hepting*. Pls.’ Preservation Brief at 1. Unlike *Hepting*, however, *Jewel* was brought
23 exclusively against the United States, its agencies, and current and former officials, not any
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1 telecommunications carriers, although it alleged, as did *Hepting*, that AT&T assisted the
2 Government with the alleged program. Pls.’ Motion to Relate Cases at 2-3. The *Jewel*
3 Plaintiffs’ motion to relate the cases asserted that “*Jewel* and *Hepting* concern substantially the
4 same transactions and events. In particular, both cases allege the same facts: that in 2001 the
5 President authorized a program of domestic surveillance without court approval or other lawful
6 authorization, and that through this Program, the government illegally obtained and continues to
7 obtain with AT&T’s assistance the contents of Plaintiffs’ and class members’ telephone and
8 Internet communications, as well as records concerning those communications.” *Id.* at 3. *See*
9 *also Jewel* Complaint ¶ 7 (*Jewel* ECF No. 1) (“In addition to eavesdropping on or reading
10 specific communications, Defendants have indiscriminately intercepted the communications
11 content and obtained the communications records of millions of ordinary Americans as part of
12 the Program authorized by . . . President [Bush].”). The Plaintiffs also represented that the cases
13 “raise identical legal questions.” Pls.’ Motion to Relate Cases at 3.

14
15
16 The Government first asserted the state secrets privilege in the MDL litigation in 2006.
17 *See* 2006 Redacted DNI Decl. (*Jewel* ECF No. 222); 2006 Redacted NSA Decl. (*Jewel* ECF No.
18 224). The Government submitted detailed, now-declassified as redacted declarations in support
19 of its privilege assertion, in which it described intelligence-gathering activities at risk of
20 disclosure from litigating the Plaintiffs’ claims and the harm to national security that disclosure
21 of those activities could reasonably be expected to cause. The Government described the
22 activities that were authorized by the President after the 9/11 attacks and also the transition that
23 occurred as those activities were authorized by orders of the FISC, an Article III court (*see* 50
24 U.S.C. § 1803(a)), issued pursuant to the FISA. The purpose of notifying the Court of the
25 transition of the presidentially-authorized activities to orders of the FISC was to demonstrate that
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1 litigating the Plaintiffs' claims about the legality of the activities under presidential authorization
2 risked revealing activities that were ongoing. Thus, the litigation of the Plaintiffs' claims could
3 expose and compromise current sources and methods of intelligence gathering, causing harm to
4 national security. Particularly pertinent to the instant preservation issues, the Government
5 specifically informed the Court in June 2006 that the FISC May 24, 2006 Order authorizing the
6 Government to collect bulk telephony metadata contained a five-year retention limitation.
7
8 Redacted Supplemental Declaration of John D. Negroonte, Director of National Intelligence, at
9 2 (June 16, 2006) (*Jewel* ECF No. 223) (“[T]he FISC has authorized the NSA to retain the meta
10 data for five years, after which time it shall be destroyed.”).

11
12 In the fall of 2007, Plaintiffs in the MDL-1791 litigation, represented by the same counsel
13 that represents the *Jewel* Plaintiffs, moved the Court for an order requiring the preservation of
14 evidence. Plaintiffs' Motion for Order to Preserve Evidence (MDL-1791 ECF No. 373).
15 Because the Government had asserted the state secrets privilege over facts necessary to litigate
16 Plaintiffs' allegations of bulk collection of the content of the communications of millions of
17 Americans and of bulk collection of communications records, the Government made clear in
18 response to that motion that the parties were unable to discuss basic factual document
19 preservation issues, such as what different types of potentially relevant information exists, where
20 it is located, how it is being preserved, whether those steps are adequate, and whether additional
21 steps are necessary or would be unduly costly or burdensome. *See* United States' Opposition to
22 Plaintiffs' Motion for an Order to Preserve Evidence at 2 (MDL-1791 ECF No. 386).
23
24 Recognizing that it could not meaningfully confer with the Plaintiffs about basic document
25 preservation issues, the Government submitted a classified declaration and supplemental
26 memorandum (both now filed in redacted form) with its opposition to the Plaintiffs' motion that
27 Government Defendants' Brief Regarding Compliance with Preservation Orders, *Jewel v. National Security Agency*
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1 described how potentially discoverable information, if any, was being preserved. *See* United
2 States' Notice of *In Camera, Ex Parte* Material (MDL-1791ECF No. 387). In its public
3 opposition to the preservation motion, the Government referenced the classified record and
4 offered to address any questions the Court might have about it in a classified setting. United
5 States' Opposition to Plaintiffs' Motion for an Order to Preserve Evidence at 2 (MDL-1791 ECF
6 No. 386).

7
8 The purpose of the classified declaration submitted in response to the preservation motion
9 in MDL-1791 was to "describe the policies and practices in place at NSA to preserve documents
10 and information related to particular intelligence activities authorized by the President after the
11 9/11 attacks that are implicated by the claims in this proceeding" Redacted Declaration of
12 National Security Agency ¶ 2 ("Redacted NSA Decl.") (attached as Ex. A to Gvt. Defs.'
13 Response to Pls.' Opening Brief Re: Preservation, *Jewel* ECF No. 193-1). The declaration made
14 clear, in a number of places, that Plaintiffs challenged activities that occurred under presidential
15 authorization, not under orders of the FISC, and that the declaration was therefore limited to
16 describing information collected pursuant to presidential authorization and the retention thereof.
17
18 In particular, the declaration stated that "[b]ecause Plaintiffs have not challenged activities
19 occurring pursuant to an order of the FISC, this declaration does not address information
20 collected pursuant to such an authorization or any retention policies associated therewith."
21 Redacted NSA Decl. ¶ 12 n.4. *See also id.* ¶ 23 ("To be clear, the presidentially authorized
22 collection of internet metadata is segregated from information collected under the FISC Order of
23 July 2004 and has not been destroyed."); ¶ 24 ("The telephony metadata NSA collected
24 [redacted] prior to the FISC order is segregated in an online database from that collected after
25 May 2006 under the FISC Order"); ¶ 27 ("NSA is preserving documentation of its analysis
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1 of Internet and telephony metadata obtained pursuant to Presidential authorization and prior to
2 the respective FISC Orders for these activities.”). At the conclusion of this declaration, the
3 Government offered to address any questions the Court may have had about the classified
4 submission through secure *in camera, ex parte* proceedings. *Id.* ¶ 54. The Court made no
5 further inquiry of the Government regarding what information was and was not being preserved.
6

7 The Government coupled the declaration with a classified memorandum. This
8 memorandum also informed the Court that the NSA was preserving documents and information
9 related to the presidentially-authorized activities which may be relevant to the Plaintiffs’ claims,
10 not documents and information related to activities occurring pursuant to an order of the FISC,
11 because the Plaintiffs’ claims were that the challenged activities occurred without court approval.
12 *See, e.g.,* Redacted Supplemental Memorandum of the United States in Opposition to Plaintiffs’
13 Motion for Order to Preserve Evidence at 3 n.4 (attached as Ex. B to Gvt. Defs.’ Response to
14 Pls.’ Opening Brief Re: Preservation, *Jewel* ECF No. 193-2) (“Because Plaintiffs have not
15 challenged activities occurring pursuant to an order of the FISC, the NSA classified submission
16 does not address information collected pursuant to FISA authorization or any retention policies
17 associated therewith.”); at 8 (“As set forth by NSA, telephony metadata collected under
18 presidential authorization is being preserved by NSA”); at 9 (“any discussion of the matter
19 would also risk or require disclosure of the FISC Telephone Records Collection Order itself, to
20 demonstrate an important limitation on the scope of potentially relevant evidence concerning
21 telephony metadata.”); at 10 (“NSA . . . preserves the [Internet] metadata collected prior to the
22 July 2004 FISC Pen Register Order”).
23
24
25

26 On November 6, 2007, the Court entered a preservation order in the MDL litigation
27 (which, again, included *Hepting*, the predecessor to *Jewel* and *Shubert*). MDL-1791 ECF No.
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1 393. In that order, the Court reminded the parties of their duties to preserve evidence that may
2 be relevant to the claims in the action. *Id.* at 2. The Court instructed that preservation includes
3 taking “reasonable” steps to prevent the destruction of information “reasonably anticipated to be
4 subject to discovery” *Id.* at 3. Then the Court directed counsel “to inquire of their
5 respective clients if the business practices of any party involve the routine destruction . . . of such
6 materials and, if so, direct the party, *to the extent practicable for the pendency of this order*,
7 either to (1) halt such business processes; (2) sequester or remove such material from the
8 business process; or (3) arrange for the preservation of complete and accurate duplicates or
9 copies of such material, suitable for later discovery if requested.” *Id.* (emphasis added).
10

11 In light of the substantially similar allegations between *Hepting* and *Jewel*, and the fact
12 that the Government had already set forth for the Court the actions it had taken to preserve
13 evidence related to those allegations, there was little purpose in re-litigating the same
14 preservation issue in *Jewel*. Accordingly, in November 2009, the parties in *Jewel* jointly moved
15 the Court to enter a preservation order identical in substance to the MDL preservation order.
16 *Jewel* ECF No. 50. On November 16, 2009, the Court issued the parties’ proposed order, noting
17 that it was based on the MDL order. *Jewel* ECF No. 51. The *Jewel* preservation order contains
18 the language quoted above.
19

20
21 B. The Present Preservation Dispute

22 Following the unauthorized disclosure in June 2013 of a FISC order, issued on April 25,
23 2013, which directed the production to the NSA of bulk call detail records, and the
24 Government’s confirmation of the authenticity of that order, several plaintiffs filed suit in
25 various United States District Courts challenging the legality of the Government’s receipt of bulk
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1 telephony metadata pursuant to FISC orders.¹ The complaints in these cases, in contrast to the
2 complaints in *Jewel*, *Shubert*, *Hepting*, and other cases in the MDL proceeding, challenge the
3 legality of the Government's acquisition of bulk telephony metadata pursuant to FISC orders
4 (specifically, orders issued under Section 215 of the USA PATRIOT Act, Pub. L. No. 107-56
5 (2001) (Section 215), codified at 50 U.S.C. § 1861). *See, e.g., First Unitarian First Amended*
6 *Complaint* ¶ 4 ("FAC") (*First Unitarian* ECF No. 9).

8 As the Court is aware, in February 2014, the Government sought relief from the FISC's
9 requirement that telephony metadata acquired under the FISC's orders be destroyed after five
10 years, to enable the Government to preserve information that may be relevant to the new cases
11 challenging the FISC's telephony metadata orders. The FISC denied without prejudice the
12 Government's request, causing the Plaintiffs in *Jewel* and *First Unitarian* to seek an order from
13 this Court enjoining the destruction of any telephony metadata. The Court held a hearing on
14 March 19, 2014 and issued a preservation order to govern *First Unitarian* on March 21, 2014
15 (*First Unitarian* ECF No. 103), but it reserved addressing the question of whether the
16 Government had complied with the Court's preservation order in *Jewel*, pending further briefing.
17
18

19 This brief responds to the Court's instruction at the end of the March 19 hearing that the
20 Government brief its compliance with this Court's preservation order in *Jewel*, and to the
21 *Shubert* Plaintiffs' unopposed request that this briefing include compliance with this Court's
22 preservation order in *Shubert*. *Shubert* ECF No. 117.

25
26 ¹ *See, e.g., American Civil Liberties Union v. Clapper*, No. 13-cv-3994 (WHP)
27 (S.D.N.Y.); *Klayman v. Obama*, Nos. 13-cv-851, 13-cv-881, 14-cv-092 (RJL) (D.D.C.); *Smith v.*
28 *Obama*, No. 13-cv-00257 (D. Idaho); *First Unitarian Church v. NSA*, No. 3:13-cv-3287 (JSW)
(N.D. Cal.); *Paul v. Obama*, No. 14-cv-0262 (RJL) (D.D.C.).
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ARGUMENT

I. COMMON LAW PRESERVATION OBLIGATIONS IN CIVIL LITIGATION

When litigation is reasonably anticipated against a party, that party has a common law obligation to preserve—i.e., identify, locate, and maintain—information that is “relevant to specific, predictable, and identifiable litigation.” *Apple Inc. v. Samsung Elec. Co., Ltd.*, 881 F. Supp. 2d 1132, 1137 (N.D. Cal. 2012). “It is well-established that the duty pertains only to relevant documents.” *Id.* (collecting cases). “Relevant” in this context means relevant for purposes of discovery, *see, e.g.*, Fed. R. Civ. P. 26(b)(1), 34(a)(1), including information that relates to the claims or defenses of any party, and that which is reasonably calculated to lead to the discovery of admissible evidence. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217-18, 220 (S.D.N.Y. 2003) (“*Zubulake IV*”).

Once the duty to preserve takes effect, the preserving party is “required to suspend any existing policies related to deleting or destroying files and preserve all relevant documents related to the litigation.” *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1070 (N.D. Cal. 2006); *Apple Inc.*, 881 F. Supp. 2d at 1137; *see Jewel v. NSA*, 08-cv-04373-JSW, ECF No. 51 at 3 (ordering parties to halt destruction policies “to the extent practicable for the pendency of this order”). The common law duty to preserve relevant, discoverable information persists throughout the litigation. *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432-33 (S.D.N.Y. 2004) (“*Zubulake V*”).

Reasonableness and proportionality are recurring touchstones informing the extent of a party’s preservation obligations. *Apple Inc.*, 881 F. Supp. 2d at 1137 n.26, 1144; *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010). *Orbit One Commc’ns, Inc. v. Government Defendants’ Brief Regarding Compliance with Preservation Orders, Jewel v. National Security Agency* (08-cv-4373-JSW), *Shubert v. Obama* (07-cv-693-JSW)

1 *Numerex Corp.*, 271 F.R.D. 429, 436 n.10 (S.D.N.Y. 2010). Because the duty to preserve “is
2 neither absolute, nor intended to cripple organizations,” *Victor Stanley, Inc.*, 269 F.R.D. at 523
3 (internal quotation omitted), courts have explained that preservation obligations require a litigant
4 to take reasonable and proportional steps to preserve discoverable information under the
5 circumstances. *Id.* at 522-23; *see also, e.g., Sloan Valve Co. v. Zurn Indus., Inc.*, 2012 WL
6 1886353, at *11-12 (N.D. Ill. May 23, 2012) (“A party fulfills its duty to preserve evidence if it
7 acts reasonably.”). Determining whether preservation conduct is acceptable in a given case
8 “depends on what is reasonable, and that in turn depends on whether what was done—or not
9 done—was proportional to that case.” *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp.
10 2d 598, 613 (S.D. Tex. 2010); *see also Pippins v. KPMG LLP*, 279 F.R.D. 245, 255 (S.D.N.Y.
11 2012) (explaining that this inquiry “depends heavily on the facts and circumstances of each case
12 and cannot be reduced to a generalized checklist of what is acceptable or unacceptable”) (internal
13 quotations omitted).

14
15
16 Because “[p]reservation and production are necessarily interrelated,” application of the
17 proportionality and reasonableness principles to preservation “flow[] from the existence of
18 th[ose] principle[s] under the Federal Rules of Civil Procedure.” *Pippins*, 279 F.R.D. at 255
19 (“[P]roportionality is necessarily a factor in determining a party’s preservation obligations.”);
20 *Orbit One Commc’ns, Inc.*, 271 F.R.D. at 436 n.10 (“Reasonableness and proportionality are
21 surely good guiding principles for a court that is considering imposing a preservation order.”).

22
23
24 To that end, Rule 26(b)(2)(C)(iii)’s “‘proportionality’ test for discovery” applies to the
25 preservation context, *Pippins*, 279 F.R.D. at 255, insofar as it requires courts to “limit the
26 frequency or extent of discovery,” and thus the scope of preservation, where its “burden or
27 expense . . . outweighs its likely benefit considering the needs of the case, the amount in
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1 controversy, the parties' resources, the importance of the issues at stake in the action, and the
2 importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii); U.S.
3 District Court for the Northern District of California, Guidelines for the Discovery of
4 Electronically Stored Information ("ESI"), Guideline 1.03 ("The proportionality standard set
5 forth in Fed. R. Civ. P. 26(b)(2)(C) . . . should be applied to," *inter alia*, "the preservation . . . of
6 [electronically stored information (ESI)]."); *see also Pippins*, 279 F.R.D. at 255 (citing *The*
7 *Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF.
8 J. 289, 291 (2010) ("The burdens and costs of preservation of potentially relevant information
9 should be weighed against the potential value and uniqueness of the information when
10 determining the appropriate scope of preservation. . . . Technologies to reduce cost and burden
11 should be considered in the proportionality analysis.")).² For this reason, courts considering a
12 party's preservation obligations, including whether additional preservation measures are
13 necessary, balance the burden of preserving certain information with the moving party's showing
14 of its relevance. *See, e.g., Young v. Facebook, Inc.*, 2010 WL 3564847, at *1 (N.D. Cal. Sept.
15 13, 2010); *Jardin v. Datallegro, Inc.*, 2008 WL 4104473, at *1 (S.D. Cal. Sept. 3, 2008);
16 *Columbia Pictures Indus. v. Bunnell*, 2007 WL 2080419, at *4-6, 13 (C.D. Cal. May 29, 2007);
17 *Donini Intern., SPA v. Satec, LLC*, 2006 WL 695546, at *8 (S.D.N.Y. Mar. 16, 2006).
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26 ² *See also, e.g.,* Fed. R. Civ. P. 26(b)(2)(B) (establishing additional limitations on the
27 discovery of ESI, including ESI "not reasonably accessible because of undue burden or cost");
28 *id.* Advisory Comm. Notes to 2006 Amendments (stating that such burdens and costs are
properly considered as part of the proportionality analysis).
Government Defendants' Brief Regarding Compliance with Preservation Orders, *Jewel v. National Security Agency*
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1 **II. THE PRESERVATION ORDERS IN *JEWEL* AND *SHUBERT* DO NOT**
2 **REQUIRE THE GOVERNMENT TO PRESERVE INFORMATION**
3 **RELATED TO FISC-AUTHORIZED ACTIVITIES, BECAUSE THOSE**
4 **CASES CHALLENGED ONLY ACTIVITY THAT WAS *NOT***
5 **AUTHORIZED BY THE FISC OR ANY OTHER COURT**

6 The 2007 preservation order in MDL-1791, which applied to *Shubert*, and the 2009
7 preservation order in *Jewel*, did not require the Government to preserve information related to
8 the newly FISC-authorized intelligence-gathering activities, for the fundamental reason that the
9 Plaintiffs' complaints in those cases did not challenge FISC-authorized activity, under any
10 reasonable reading. Therefore, such information would not be relevant to the claims in the
11 action. Preservation Orders at 2.

12 The lynchpin of the MDL cases in which the original preservation order was litigated was
13 the claim that the alleged government program to intercept telephone, Internet, and email
14 communications and communications records was done *without* the authorization of any court,
15 including the FISA court. *See, e.g., Hepting Am. Cmplt.* ¶ 2 (“This case challenges the legality
16 of Defendants’ participation in a secret and illegal government program to intercept and analyze
17 vast quantities of Americans’ telephone and Internet communications, surveillance done without
18 the authorization of a court and in violation of federal electronic surveillance and
19 telecommunications statutes, as well as the First and Fourth Amendments to the United States
20 Constitution.”), ¶ 3 (“This surveillance program, purportedly authorized by the President at least
21 as early as 2001 and primarily undertaken by the National Security Agency (“NSA”) without
22 judicial review or approval, intercepts and analyzes the communications of millions of
23 Americans.”); *Shubert* Second Amended Complaint, filed May 8, 2012, ¶ 2 (“SAC”) (MDL-
24 1791 ECF No. 771) (“Without the approval of Congress, without the approval of any court, and
25 without notice to the American people, President George W. Bush authorized a secret program to
26 Government Defendants’ Brief Regarding Compliance with Preservation Orders, *Jewel v. National Security Agency*
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1 spy upon millions of innocent Americans, including the named plaintiffs.”), ¶ 9 (“This class
2 action is brought on behalf of all present and future United States persons who have been or will
3 be subject to electronic surveillance by the National Security Agency without a search warrant, a
4 court order, or other lawful authorization since September 12, 2001.”), ¶ 55 (“Although it is true
5 that federal law requires law enforcement officers to get permission from a federal judge to
6 wiretap, track, or search, President Bush secretly authorized a Spying Program that did none of
7 those things.”), ¶ 66 (“The Program admittedly operates ‘in lieu of’ court orders or other judicial
8 authorization”), ¶ 93 (“Prior to its initiation, defendants never sought authorization from the
9 FISA Court to conduct the Spying Program.”); Master Consolidated Complaint Against MCI
10 Defendants and Verizon Defendants ¶ 3 (MDL-1791 ECF No. 125) (“This case challenges the
11 legality of Defendants’ participation in an illegal federal government program to intercept and
12 analyze vast quantities of Americans’ telephone and electronic communications and records,
13 surveillance done without any statutorily authorized permission, customers’ knowledge or
14 consent, or the authorization of a court”).

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18 Indeed, it was important for the complaints in the cases in the MDL-1791 litigation, filed
19 against telecommunications service providers, to claim that the challenged activity occurred
20 without a court order, because several federal statutes protect private parties from suit for
21 providing assistance to the Government at the direction of a court order. *See* 50 U.S.C. §1861(e)
22 (FISA); 18 U.S.C. §§ 2707(e), 2703(e) (ECPA); 18 U.S.C. § 2511(2)(a)(ii) (Wiretap Act).
23 Moreover, the factual allegations of the complaints are the facts about the presidentially-
24 authorized activities—*i.e.*, the collection of communications content and records under the
25 President’s Surveillance Program. *See Shubert* SAC ¶¶ 53-96; Master Consol. Cmplt. ¶¶ 136-
26 158; *Hepting* Am. Cmplt. ¶¶ 32-41.
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28 Government Defendants’ Brief Regarding Compliance with Preservation Orders, *Jewel v. National Security Agency*
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1 Although the Plaintiffs in *Jewel* sued the Government, not telecommunications service
2 providers, their complaint repeats at length the allegations in *Hepting*, concerns “substantially the
3 same transactions and events” (Pls.’ Motion to Relate Cases at 3), and, again, is unmistakably
4 about the presidentially-authorized intelligence activities allegedly conducted without a court
5 order. *See, e.g., Jewel* Complaint ¶ 7 (“In addition to eavesdropping on or reading specific
6 communications, Defendants have indiscriminately intercepted the communications content and
7 obtained the communications records of millions of ordinary Americans as part of the Program
8 authorized by . . . President [Bush].”), ¶ 39 (President Bush “authoriz[ed] “a range of
9 surveillance activities . . . without statutory authorization or court approval, including electronic
10 surveillance of Americans’ telephone and Internet communications (the ‘Program’)”), ¶ 76
11 (“Defendants’ above-described acquisition in cooperation with AT&T of . . . communications
12 content and non-content information is done without judicial, statutory, or other lawful
13 authorization, in violation of statutory and constitutional limitations, and in excess of statutory
14 and constitutional authority.”), ¶ 92 (“Defendants’ above-described solicitation of the disclosure
15 by AT&T of . . . communications records . . . is done without judicial, statutory, or other lawful
16 authorization, in violation of statutory and constitutional limitations, and in excess of statutory
17 and constitutional authority.”), ¶¶ 110, 120, 129, 138 (“Defendants have [acquired] . . . contents
18 of communications, and records pertaining to . . . communications . . . without judicial or other
19 lawful authorization, probable cause, and/or individualized suspicion, in violation of statutory
20 and constitutional limitations, and in excess of statutory and constitutional authority.”).³
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26 ³ Plaintiffs highlight the inclusion of the words “without . . . probable cause and/or
27 individualized suspicion” in these latter allegations. *See* Plaintiffs’ Reply Brief Re Evidence
28 Government Defendants’ Brief Regarding Compliance with Preservation Orders, *Jewel v. National Security Agency*
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1 Plaintiffs' assertion that FISC-authorized activities are at issue in *Jewel* and *Shubert* is
2 also belied by their failure to raise any challenge to such activities even after it was made public
3 that surveillance under the presidentially-authorized TSP was being transitioned to FISA
4 authority. While the Government's bulk collection of telephony metadata and Internet metadata
5 pursuant to FISC orders was secret until recently, the fact that the collection of communications
6 content that occurred under the TSP had been brought under the FISA was publicly
7 acknowledged, first when it was publicly announced in January 2007 that the TSP was being
8 transitioned to FISA orders, and secondly when Congress enacted the Protect America Act of
9 2007 (PAA) and, later, the FISA Amendments Act of 2008 ("FAA"), which included Section
10 702 of the FISA, 50 U.S.C. § 1881a. Despite the fact that these developments preceded the filing
11 of the *Jewel* complaint and Plaintiffs had knowledge of them, *see* Pls.' Rule 1006 Summary of
12 Evidence at 46 (*Jewel* ECF No. 30-1); *Clapper v. Amnesty International*, 133 S. Ct. 1138, 1146
13 (2013) (challenging legality of Section 702), they did nothing to challenge any FISA-authorized
14 activities in the *Jewel* complaint or to change their allegations in *Hepting*.
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18 Instead, the *Jewel* Plaintiffs distanced their complaint from these FISA-authorized
19 activities. In a January 2007 filing, Plaintiffs explained that the transition of the TSP to FISC
20 orders was "irrelevant" to Plaintiffs' claim of dragnet surveillance of communications, because
21 the TSP and the FISC orders involved targeted, not bulk, collection of communications. Pls.'
22 Preservation Reply at 12 (quoting Pls.' Opp. to Stay at 3-4 n.2 (MDL-1791 ECF No. 128) (Jan.
23 17, 2007)). At another point in the litigation, Plaintiffs confirmed that "none of the assistance
24 alleged in the various complaints was provided pursuant to the PAA or the FAA." Pls.' Rule
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27 ignores the overall thrust of the allegations, indeed the entire complaint, which contended the
28 activities occurred without judicial authorization of any kind.
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1 1006 Summary of Evidence at 41 (*Jewel* ECF No. 113). Plaintiffs now contend that the burden
2 was on the Government, after reading these statements, to have clarified the scope of Plaintiffs'
3 claims with them (Pls' Preservation Reply at 12-13), but the scope was in fact clear—Plaintiffs
4 were undoubtedly challenging the activities that were authorized by President Bush, not the
5 FISC. The Government was not obligated by the MDL or *Jewel* preservation orders to preserve
6 information about FISC-authorized activities that Plaintiffs themselves deemed irrelevant to their
7 claims.
8

9 Plaintiffs consistently framed their claims as challenges to the legality of presidentially-
10 authorized activities unauthorized by any court order, until the Government recently disclosed
11 the existence of the FISC-authorized telephony and Internet metadata programs. *See, e.g.*,
12 Plaintiffs' Request for Judicial Notice at 2, 4 (*Hepting* ECF No. 20) (requesting the court take
13 judicial notice of facts including that in the fall of 2001, the President authorized the NSA to
14 launch a secret electronic surveillance program; "Under the Program, the NSA intercepts
15 communications without obtaining a warrant or any other type of judicial authorization."); May
16 1, 2006 letter from Plaintiffs to Hon. Vaughn R. Walker at 2 (*Hepting* ECF No. 94) (explaining
17 that Plaintiffs' motion for preliminary injunction contends that "defendants have received no
18 court order or other judicial authorization for this broader [surveillance] program"); Plaintiffs'
19 Case Management Statement at 1-2 (*Hepting* ECF No. 109) (Plaintiffs "contend that defendants
20 have received no court order or other judicial authorization for this broader program, and that
21 defendants have received no executive branch authorization that comports with the Foreign
22 Intelligence Surveillance Act, the Wiretap Act, or any other congressionally-established
23 procedure."); Plaintiffs' Opposition to Government Defendants' Motion to Dismiss and For
24 Summary Judgment at 6-7 (*Jewel* ECF No. 29) (certain counts of the complaint "seek equitable
25 Government Defendants' Brief Regarding Compliance with Preservation Orders, *Jewel v. National Security Agency*
26 (08-cv-4373-JSW), *Shubert v. Obama* (07-cv-693-JSW)
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1 relief against Government Officer Defendants Alexander, Holder, and Blair on the grounds that
2 they lack statutory authority for the dragnet surveillance they are conducting and that they are
3 exceeding statutory limitations on their authority.”); Plaintiffs’ Motion for Partial Summary
4 Judgment at 6-9 (*Jewel* ECF No. 83) and Plaintiffs’ Opposition to Defs.’ Third Motion to
5 Dismiss and for Summary Judgment at 2-5, 18 (*Shubert* ECF No. 76) (discussing the facts of the
6 presidentially-authorized activities).
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8 Similarly, the Government consistently articulated its understanding of Plaintiffs’ claims
9 as being about presidentially-authorized activities, not FISC-authorized activities. These
10 statements occurred on the public record, not in secret as Plaintiffs maintain (*see* Pls’
11 Preservation Reply at 2, 5, 6, 7, 9, 13). In filing after filing, the Government described Plaintiffs’
12 claims as a challenge to the alleged surveillance activities authorized by the President after the
13 9/11 attacks. But the Government also demonstrated that it believed Plaintiffs’ assertions that
14 they were not challenging FISC-authorized activities. *See, e.g.*, United States’ Reply in Support
15 of Mot. to Dismiss or, in the Alternative, for Summ. Judgment (MDL-1791 ECF No. 520) at 32
16 n.29 (“All of the claims in this litigation are premised on the alleged absence of court orders in
17 support of the alleged activities”); United States’ Response to Plaintiffs’ Mem. of Points
18 and Authorities in Response to Court’s May 17, 2006 Minute Order at 11 (*Hepting* ECF No.
19 145) (“Plaintiffs’ claims are based on their contention that the alleged surveillance activities
20 should have occurred under FISA, but allegedly did not”); Government Defendants’ Reply
21 in Support of Second Motion to Dismiss and For Summary Judgment at 10 (*Jewel* ECF No. 119)
22 (“For this proposition [that any alleged activity is ongoing], plaintiffs cite statements concerning
23 the transition of the Terrorist Surveillance Program—which they do not challenge—to FISA
24 authority in January 2007, as well as media reports concerning the FISA Amendments of 2008—
25 Government Defendants’ Brief Regarding Compliance with Preservation Orders, *Jewel v. National Security Agency*
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1 also not challenged here. . . . The 2010 Inspector General report also indicates that certain
2 classified activities authorized by the President after 9/11 in the same order have been
3 transitioned to authority of the FISA, again not challenged here.”); Appellant’s Brief in *Jewel*
4 Appeal, 2010 WL 4310707 at 7 (“Notably, plaintiffs do not challenge surveillance authorized by
5 the FISA Court. Nor do plaintiffs challenge surveillance authorized by legislation, such as the
6 FISA Amendments Act of 2008.”) (cited in Pls.’ Preservation Brief at 9).

8 The Government also informed the Court in classified filings of its understanding of
9 Plaintiffs’ claims—most pertinently in the 2007 preservation declaration and memorandum it
10 submitted. As clearly stated in that declaration and memorandum, the NSA was preserving,
11 pursuant to its litigation preservation obligations, a range of documents and information
12 concerning the presidentially-authorized activities at issue in the Plaintiffs’ complaints, but not
13 information about activities conducted pursuant to FISC orders. The Government specifically
14 explained that “[b]ecause Plaintiffs have not challenged activities occurring pursuant to an order
15 of the FISC, this declaration does not address information collected pursuant to such an
16 authorization or any retention policies associated therewith.” Redacted NSA Decl. ¶ 12 n.4; *see*
17 *also* Redacted Mem. at 3 n.4. The submission specifically addressed telephony and Internet
18 metadata, explaining that metadata collected under presidential authorization had been
19 segregated from that collected under FISC order, and that NSA was preserving the metadata
20 collected under presidential authorization prior to the entry of the FISC orders. Redacted NSA
21 Decl. ¶¶ 23-24; Redacted Mem. at 4, 8, 10. *See also, e.g.*, Redacted NSA Decl. ¶ 6 (NSA is
22 preserving “Internet and telephony metadata collected under the Presidential authorization”).
23 The Government further described the FISC telephony metadata and Internet metadata orders as
24 “important limitation[s] on the scope of potentially relevant evidence” Redacted Mem. at 9,
25 Government Defendants’ Brief Regarding Compliance with Preservation Orders, *Jewel v. National Security Agency*
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1 11. At the time the parties were litigating the preservation order, the existence of these activities
2 was highly classified, thus the Government could have provided this detailed discussion of what
3 it was and was not preserving only to the Court, not the Plaintiffs.⁴

4 Following this submission, the Court entered a preservation order that contained language
5 consistent with the Government's classified submission. The parties were instructed to preserve
6 evidence "that may be relevant to this action" and that there was a reasonableness limitation to
7 preservation. Nov. 6, 2007 Preservation Order (MDL-1791 ECF No. 393) at 3 (preservation
8 includes taking "reasonable" steps to prevent the destruction of information "reasonably
9 anticipated to be subject to discovery . . ."). The Court directed counsel "to inquire of their
10 respective clients if the business practices of any party involve the routine destruction . . . of such
11 materials and, if so, direct the party, *to the extent practicable for the pendency of this order*,
12 either to (1) halt such business processes; (2) sequester or remove such material from the
13 business process; or (3) arrange for the preservation of complete and accurate duplicates or
14 copies of such material, suitable for later discovery if requested." *Id.* (emphasis added).
15 Moreover, Plaintiffs' contention that the Court entered a preservation order "that matched the
16 one Plaintiffs sought" and that this shows that the Court determined the Government's
17 preservation efforts to be inadequate (Pls.' Preservation Reply at 9-10) is wrong on both counts.
18 The limiting language of "to the extent practicable for the pendency of this order" was not in the
19 Plaintiffs' proposed preservation order, but rather was added by the Court. *See* Plaintiffs'
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25 ⁴ *See also* Redacted Certification of the Attorney General at ¶ 88 (*Jewel* ECF No. 219)
26 ("[A]ny attempt to delineate between [redacted] for certain periods of time under overlapping or
27 consecutive authority—[redacted] based on presidential authorization, then based on [redacted]
28 FISC Orders, PAA Directives, or FISA Act of 2008 Directives—would necessarily risk the
disclosure of intelligence activities that were and still are being undertaken pursuant to legal
authority that is not being challenged in this case . . .").
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1 Proposed Interim Order to Preserve Evidence (MDL-1791 ECF No. 375). And instructing the
2 parties to preserve what they reasonably believe is relevant to the claims and defenses is by no
3 means an indictment of the Government's viewpoint on the scope of the claims and what was
4 and was not relevant.⁵

5
6 Plaintiffs' argument in support of their effort to recast their complaints as challenging
7 FISC-authorized activities, in a transparent attempt to capitalize on recent official disclosures
8 concerning those activities, is unpersuasive. Plaintiffs first point to the statement in their Rule
9 56(f) declaration that they intended to take discovery regarding the fact of carriers' interception
10 and disclosure of the communications and communications records of customers. Pls.' Opening
11 Preservation Br. at 7; Pls.' Preservation Reply at 11. But that indicates nothing more than that
12 they seek discovery concerning an allegation in the complaint that records were collected
13 pursuant to presidential authorization in "the Program," and does not indicate Plaintiffs are
14 challenging a FISC-authorized collection or records, nor does it undermine the Government's
15 understanding of Plaintiffs' claims.
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18 Plaintiffs also point to references to now declassified FISC activities wholly out of
19 context in an effort to show their complaints must challenge activities undertaken *with* judicial
20 authority. Plaintiffs cite references they made to "post-FISC transition surveillance" in the Joint
21 Case Management Statement filed by the parties on September 20, 2013 (*Jewel* ECF No. 159).
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24 ⁵ In fact, the Court did not question the Government's approach to preservation or
25 instruct the Government to preserve information related to the FISC-authorized programs, which
26 had been described by the Government to the Court repeatedly in classified declarations in
27 support of the state secrets privilege dating back to 2006. Nor did it take Plaintiffs up on their
28 suggestion that the Court may "wish to make more specific requirements of the . . . government
in an *ex parte*, *in camera* order . . . based on the presumably more specific information it has
received from the government *in camera*, *ex parte*." Plaintiffs' Reply in Support of Motion for
Order to Preserve Evidence at 3 (MDL-1791 ECF No. 392).

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1 Pls.’ Preservation Br. at 7. But those references concern what Plaintiffs claim to be the
2 Government’s official disclosures following the unauthorized disclosures that began in June
3 2013—the subject the joint statement was supposed to address—and which prompted the Court
4 to require further briefing on the national security issues in this case. *See* Jt. Statement at 4-5.
5 Plaintiffs further argue that in the Government’s section of the joint statement, “rather than
6 asserting its current, cramped claims about the scope of the *Jewel* claims, the government instead
7 conceded that ‘Plaintiffs claim this alleged ‘dragnet’ surveillance included collection of the
8 content of telephone and Internet communications as well as communications records.’ Pls.’
9 Opening Preservation Br. at 7-8. But in the immediately preceding sentence, the Government
10 specifically referred to the activities authorized by President Bush. Jt. Statement at 33 (“In the
11 above-captioned *Jewel* and *Shubert* cases, Plaintiffs allege that, following the 9/11 terrorist
12 attacks, then-President George W. Bush authorized the National Security Agency (NSA) to
13 undertake, with the assistance of major telecommunications companies, indiscriminate
14 warrantless surveillance of the communications of millions of Americans.”). Nothing stated by
15 the Government remotely concedes that the *Jewel* Complaint challenges judicially-authorized
16 FISC activities.
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20 Nor did the Government concede that Plaintiffs’ claims included the FISC-authorized
21 activities in the now-declassified declarations they submitted in the *Jewel* and *Shubert* cases.
22 Pls.’ Preservation Br. at 8-9; Pls.’ Preservation Reply at 11. Plaintiffs badly misconstrue these
23 declarations in making this argument. Those declarations, submitted in support of the
24 Government’s state secrets privilege assertion prior to the recent disclosures, simply provided the
25 Court with a then-classified fact: that the presidentially-authorized activities that were being
26 challenged in *Jewel* and *Shubert* had been subsequently transitioned to FISC-authorized
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1 activities. The Government’s then-classified declarations consistently described Plaintiffs’
2 claims as being about the presidentially-authorized activities only. *See, e.g.*, 2009 Redacted
3 NSA Decl. ¶ 3 (*Jewel* ECF No. 172-5) (“In sum, plaintiffs allege that, after the 9/11 attacks, the
4 NSA received presidential authorization to engage in surveillance activities far broader than the
5 publicly acknowledged ‘Terrorist Surveillance Program’ (‘TSP’), which involved the
6 interception of specific international communications involving persons reasonably believed to
7 be associated with al Qaeda and affiliated terrorist organizations. Plaintiffs allege that the NSA,
8 with the assistance of telecommunications companies including AT&T, has indiscriminately
9 intercepted the content and obtained the communications records of millions of ordinary
10 Americans as part of an alleged presidentially-authorized ‘Program’ after 9/11.”); 2013 NSA
11 Unclassified Decl. at ¶ 18 (*Jewel* ECF No. 169) (“In sum, plaintiffs allege that, after the 9/11
12 attacks, the NSA received presidential authorization to engage in ‘dragnet’ communications
13 surveillance in concert with major telecommunications companies. . . . Plaintiffs allege that,
14 pursuant to presidential authorization and with the assistance of telecommunications companies
15 (including AT&T and Verizon), the NSA indiscriminately intercepted the content and obtained
16 the communications records of millions of ordinary Americans.”).

20 To the extent the declarations discussed the fact that the presidentially-authorized
21 activities transitioned to orders of the FISC, they did so to show that disclosing or confirming
22 these activities under Presidential authorization in order to litigate Plaintiffs’ claims would risk
23 the disclosure of ongoing, highly classified intelligence operations authorized by the FISC,
24 causing exceptional harm to national security. For instance, the NSA’s declarant explained in
25 2012 as follows:
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1 While the plaintiffs' allegations are focused on the period immediately following
2 9/11, and seek to challenge alleged activities undertaken pursuant to presidential
3 authorization, the sources and methods used by NSA at that time continue to be
4 used under subsequent authorizations. To expose a source and method, based on
5 its use during one period of time, under one authority, would compromise, if not
6 destroy, NSA's ability to use that method today. All of the presidentially
7 authorized activities being challenged in this lawsuit (starting in July 2004) were
8 placed under other FISA authority and have been subject to Congressional
9 oversight. The need to protect these sources and methods continues to exist
10 notwithstanding plaintiffs' challenge to the lawfulness of their use under
11 presidential authorization.

12 2012 Redacted NSA Decl. ¶ 52 (*Jewel* ECF No. 172-8). *See also id.* at ¶¶ 7, 34, 37, 84; 2007
13 2007 Redacted DNI Decl. ¶ 3 (*Jewel* ECF No. 172-1); 2007 Redacted NSA Decl. ¶¶ 62-64
14 (*Jewel* ECF No. 172-2); 2009 Redacted DNI Decl. ¶ 40-41 (*Jewel* ECF No. 172-4); 2009
15 Redacted NSA Decl. ¶¶ 26-27, 57- 67 (*Jewel* ECF No. 172-5); 2012 Redacted DNI Decl. ¶ 56-57
16 (*Jewel* ECF No. 172-7).

17 In sum, the claims in *Jewel* and the MDL litigation, including *Shubert*, were clearly
18 directed at presidentially-authorized NSA intelligence activities, unauthorized by a court order,
19 and the Government correctly construed its preservation obligations as limited to such activities.
20 Nonetheless, rather than remaining silent on its assessment of what information should be
21 preserved, the Government, at the time of the first preservation motion, specifically informed the
22 Court in a detailed, classified filing of precisely how it was satisfying its preservation
23 obligations, and in particular the fact that it was only preserving those materials related to the
24 presidentially-authorized activities, not to FISC-authorized activities, consistent with Plaintiffs'
25 claims. In these circumstances, where the complaints challenged alleged surveillance activities
26 undertaken without judicial authorization and in violation of statutory requirements, including
27 under the FISA, and where the Government expressly advised the Court of its preservation steps
28 before the entry of the preservation order, Plaintiffs' contention that the preservation obligations
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1 in *Jewel* and *Shubert* extended to preserving data that were collected pursuant to judicial order,
2 subject to statutory requirements set forth in the FISA (including requirements to minimize the
3 retention of such records), is entirely without merit.

4 Indeed, Plaintiffs' position fails to appreciate the circumstances facing the Government
5 after the FISC orders were implemented. Despite the fact that Plaintiffs had challenged alleged
6 presidentially-authorized activities undertaken *without* judicial orders and *outside of* FISA
7 limitations, the Government knew at the time the 2007 preservation order was being litigated that
8 two of those activities (Internet and telephony metadata collection) had already transitioned to
9 FISC-approved classified programs, and so advised the Court in a classified filing. And by the
10 time the *Jewel* Complaint had been filed in September 2008, the third presidentially-authorized
11 activity (the collection of content) had also publicly transitioned to FISA without any challenge
12 from Plaintiffs. The transition of these activities to FISC authorization was intended to address
13 the core concern that presidentially-authorized surveillance programs be placed under judicial
14 supervision and subjected to statutory requirements—the very concern raised in the MDL-1791
15 litigation and in *Jewel*. Plaintiffs nevertheless take the position that the Government could only
16 have met its preservation obligations in *Jewel* and *Shubert* if it indefinitely suspended the
17 restrictions on the retention of data imposed by the FISC—the Article III court vested by
18 Congress with jurisdiction to issue orders authorizing foreign intelligence surveillance activities
19 and enforcing statutory restrictions on the retention of data under the FISA—just as they were
20 being put in place, on the assumption that the *Jewel* Plaintiffs might later claim that the FISC
21 lacked authority to implement those activities. Plaintiffs' position is nothing more than post-hoc
22 second-guessing of the preservation efforts undertaken in connection with *Jewel* and *Shubert*,
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1 unsupported by their own complaints and the record of this case when the preservation orders
2 were litigated.⁶

3 **III. THE GOVERNMENT HAS COMPLIED FULLY WITH THE PRESERVATION**
4 **ORDERS ISSUED IN *JEWEL* AND *SHUBERT*, AND CONTINUES TO DO SO**

5 The Government has met its common law preservation obligations and complied fully
6 with the preservation orders entered in *Jewel* and *Shubert*, which require reasonable and
7 proportional steps to prevent the destruction of information “reasonably anticipated to be subject
8 to discovery.” Preservation Orders at 3; *see also* cases cited *supra* at 10-11. It has done so by
9 diligently identifying the government agencies and components likely to have information that
10 may be potentially relevant to this litigation, issuing specific notices to those entities as to their
11 preservation duties, and by confirming that those entities are indeed preserving a range of
12 documents and information related to the NSA intelligence activities authorized by President
13 Bush after 9/11 that may be relevant to the Plaintiffs’ claims. Further details regarding these
14 considerable efforts are set forth in the redacted NSA Declaration of Miriam P. (“NSA Miriam P.
15 Decl.”) and the Declaration of Anthony J. Coppolino (“Coppolino Decl.”), filed concurrently
16 with this brief.⁷

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19 On the same day the *Shubert*/MDL Litigation preservation order was issued (November
20 6, 2007), counsel for the official capacity Government Defendants (“counsel for the
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23 ⁶ It is also worth noting the implications of Plaintiffs’ position—that the Government
24 should have taken steps to supersede the order of an Article III court and preserve a substantial
25 quantity of communication records for the past eight years while this lawsuit has been pending.
The terms of this Court’s preservation order, weighed against the allegations of the *Jewel* and
Shubert complaints, do not require or support that position.

26 ⁷ A classified version of the NSA declaration of Miriam P. has been made available for
27 the Court’s *ex parte*, *in camera* review. All citations herein are to the redacted version of this
declaration.

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1 Government” or “Government counsel”) sent that order to the NSA, the agency whose activities
2 were centrally at issue in that case and which had already undertaken preservation efforts prior to
3 the entry of the order. *See* Coppolino Decl. ¶ 7 & n.2. Shortly thereafter, counsel for the
4 Government sent to the NSA a preservation notice that provided background on the case, again
5 attached and discussed the Court’s preservation order, and explained the NSA’s duty to preserve
6 a range of information consistent with those orders. *Id.* ¶¶ 7, 17-18. Counsel for the
7 Government undertook the same efforts two years later with respect to the preservation order
8 entered on November 16, 2009 in *Jewel*. *See id.* ¶¶ 17-18. At no time has counsel for the
9 Government advised NSA that its preservation obligations under these orders have expired. *Id.* ¶
10 20.
11
12

13 As noted above, in litigating the Plaintiffs’ motion for an order to preserve evidence in
14 the MDL Litigation, the NSA informed the Court in October 2007 in a classified filing about its
15 efforts to preserve documents and information that were potentially relevant to the claims and
16 issues in that litigation, Redacted NSA Decl. ¶¶ 2, 13, explained the various steps taken to ensure
17 that NSA personnel cleared to possess information related to the presidentially-authorized
18 activities were preserving “documents contained in their files and on their computer systems that
19 relate to these activities,” *id.* ¶ 13, and described the documents and information (in paper and
20 electronic form) that the NSA was, in fact, preserving. *See, e.g., id.* ¶ 6. Numerous categories of
21 documents and information were being preserved related to the Presidentially-authorized
22 surveillance programs, including, but not limited to, Presidential authorizations and re-
23 authorizations; legal opinions and analyses; communications; TSP tasking and probable cause
24 information; content of communications intercepted under the TSP; intelligence reports
25 containing TSP information; Internet and telephony metadata collected under the Presidential
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1 authorizations; requests that NSA task that metadata for analysis to obtain information on
2 terrorist contacts; reports of metadata analysis; briefing and oversight materials; guidance used
3 by NSA analysts concerning how to designate, use, and protect TSP information in intelligence
4 reports; and technical information concerning the manner in which the Presidentially-authorized
5 activities were implemented. *Id.* ¶¶ 6, 13-28; Declass. Mem. at 4-5.

6
7 The NSA continues to preserve these documents and information, as explained in greater
8 detail in the redacted NSA declaration filed concurrently with this brief. *See* NSA Miriam P.
9 Decl. ¶¶ 27-45. Since this Court's preservation order of March 19, 2014, NSA's Office of
10 General Counsel has taken diligent steps to reconfirm that NSA personnel cleared to possess
11 information related to the presidentially-authorized activities continue to preserve the material
12 described above, *see id.* ¶¶ 25-26, reconfirm the exact location of such materials and the media
13 by which they are maintained, *see id.* ¶¶ 30-31, 33-34, 36-42, and has preserved additional
14 potentially relevant documents and information that the NSA has identified since its October
15 2007 declaration was filed. *See id.* ¶¶ 26, 43-44. The NSA's Office of General Counsel has not
16 lifted the litigation holds it imposed after *Shubert* and *Jewel* were filed, and has continued to
17 advise (and remind) its personnel that they must preserve all documents and information,
18 regardless of the medium in which they exist, related to the intelligence activities authorized by
19 President Bush after 9/11 that are or may be relevant to the Plaintiffs' claims. *Id.* ¶¶ 22, 24, 45.

20
21
22 In addition to instructing the NSA as to its preservation obligations under the orders in
23 *Shubert* and *Jewel* shortly after each was entered, *see* Coppelino Decl. ¶¶ 7, 16, Government
24 counsel also issued preservation notices to the Executive Office of the President (EOP) related to
25 these cases on December 14, 2007 and December 10, 2009, respectively, that provided
26 background on these cases, attached and discussed the Court's preservation orders, and explained
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1 the EOP's duty to preserve a range of information consistent with those orders. *See id.* ¶¶ 12-14,
2 16-20. In each of these notices, counsel for the Government described the allegations contained
3 in the complaints, and instructed the EOP to determine if they possessed any information that
4 was potentially relevant to these matters and to preserve that information in accordance with the
5 Court's order. *Id.* The EOP also was instructed, on both occasions, that its duty to preserve
6 evidence potentially relevant to these cases would continue until the Civil Division of the
7 Department of Justice advised it otherwise, and it has not been so advised. *Id.* ¶¶ 14, 20. Near
8 the end of President George W. Bush's term in office, Government counsel made follow-up
9 inquiries and confirmed that EOP materials subject to the preservation notices would be
10 transferred to the custody of the National Archives and Records Administration (NARA) at the
11 conclusion of the administration. *Id.* ¶ 22. Thereafter, counsel for the Government confirmed
12 that these materials were indeed transferred to NARA and that NARA continues to preserve
13 them. *Id.* ¶¶ 23-24.

16 Counsel for the Government Defendants also issued similar preservation notices (with the
17 same attachments) related to *Shubert* and *Jewel* on December 11, 2007 and December 10, 2009,
18 respectively, to components within the Department of Justice reasonably likely to possess
19 potentially relevant documents and information. *Id.* ¶¶ 8, 16. These recipients also were
20 informed that their component's duty to preserve evidence potentially relevant to the case would
21 continue until the Civil Division of the Department of Justice advised them otherwise, and they
22 have not been so advised. *Id.* ¶¶ 11, 20. Since this Court's order of March 19, 2014, counsel for
23 the Government has met with the records managers at these various components and with the
24 Director of the Office of Records Management Policy at the Department of Justice to discuss
25 their policies and practices for the retention of records and to confirm, *inter alia*, that documents
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1 and information potentially relevant to these cases continue to be preserved for both current and
2 former personnel. *See id.* ¶¶ 26-31.

3 **CONCLUSION**

4 For the foregoing reasons, the Government respectfully submits that it has complied with
5 the preservation orders in *Jewel* and *Shubert*.

7 Dated: May 9, 2014

Respectfully Submitted,

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