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6 **UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
7 **OAKLAND DIVISION**

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

Case No. 07-cv-00693-JSW

10 This Document Relates to: )

**PLAINTIFFS' BRIEF CONCERNING  
THE GOVERNMENT'S VIOLATION,  
OF THE COURT'S PRESERVATION  
ORDERS**

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

Courtroom 5, 2<sup>nd</sup> Floor  
The Honorable Jeffrey S. White

13 Plaintiffs, )

14 -against - )

15 BARACK OBAMA, et al., )  
16 Defendants. )  
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**ARGUMENT**

The arguments in *Jewel v. National Security Agency*, 08 Civ. 4373 and in this case are substantially similar. In both cases, the Government has destroyed an extraordinary amount of evidence during the pendency of a federal case. Rather than repeat the arguments set forth in the *Jewel* case, the *Shubert* plaintiffs (i) incorporate by reference the *Jewel* plaintiffs' brief, 08 Civ. 4373, Dkt. #233 (filed May 30, 2014), and (ii) set forth some additional arguments of particular interest in *Shubert*.

*Shubert* was filed on May 17, 2006. 06 Civ. 2282 (E.D.N.Y.), Dkt #1. It challenged a dragnet spying program illegally collecting the communications of millions of Americans. It alleged, for example:

- 60. Under the Spying Program, the NSA Monitors the communications of people inside the United States without probable cause to believe that the surveillance targets have committed or are about to commit any crime.
- 61. Under the Spying Program, the NSA Monitors the communications of people inside the United States without probable cause to believe that the surveillance targets are foreign powers or agents thereof.

The Fourth Amendment claim, still operative today, alleged:

- 105. By conducting, authorizing, and/or participating in the electronic surveillance of plaintiffs without reasonable suspicion or probable cause, and failing to prevent their fellow government officers from engaging in this unconstitutional conduct, defendants deprived plaintiff of rights, remedies, privileges, and immunities guaranteed under the Fourth Amendment of the United States Constitution.
- 106. In addition, defendants conspired among themselves to deprive plaintiffs of their Fourth Amendment rights, and took numerous overt steps in furtherance of such conspiracy, as set forth above.
- 107. As a direct and proximate result of the misconduct and abuse of authority detailed above, plaintiffs sustained a shocking loss of privacy, and the damages hereinbefore alleged.

Though the Complaint referred at times to searches without warrants or court orders, nothing in the claim is in any way limited only to those searches. To the contrary, the Fourth Amendment claim

1 on its face repeatedly challenged electronic surveillance “without reasonable suspicion or probable  
2 cause.” Complaint ¶¶ 60, 61, 105.

3 The Second Amended Complaint (“SAC”) was filed on May 8, 2012. 06-md-10791 Dkt. #  
4 771. It contains similar or identical allegations:

5 86. Under the Spying Program, the NSA intercepts, searches and seizes, and  
6 subjects to electronic surveillance the communications of people inside the  
7 United States without probable cause, reasonable suspicion, or any reason to  
8 believe that the surveillance targets either have committed or are about to  
commit any crime or are foreign powers or agents thereof.

9 116. By conducting, authorizing, and/or participating in the electronic  
10 surveillance of plaintiffs, and by searching and seizing the contents of  
11 plaintiffs’ communications without reasonable suspicion or probable cause,  
12 and failing to prevent their fellow government officers from engaging in this  
13 unconstitutional conduct, defendants deprived plaintiffs of rights, remedies,  
privileges, and immunities guaranteed under the Fourth Amendment of the  
United States Constitution.

14 117. In addition, defendants conspired among themselves to deprive plaintiffs of  
15 their Fourth Amendment rights, and took numerous overt steps in  
furtherance of such conspiracy, as set forth above.

16 118. As a direct and proximate result of the misconduct and abuse of authority  
17 detailed above, plaintiffs sustained a shocking loss of privacy, and the  
damages hereinbefore alleged.

18 Again, the Fourth Amendment claim, operative today, repeatedly challenges mass electronic  
19 surveillance “without reasonable suspicion or probable cause.” SAC ¶¶ 86, 116. On its face, the  
20 claim is not limited to surveillance without a court order. It says nothing at all about court orders  
21 or sources of authorization. It challenges mass surveillance without reasonable suspicion or  
22 probable cause, whether or not “authorized” by the President, or as the Government now claims,  
23 authorized by the FISC.

24 On November 6, 2007, this Court entered a Preservation Order. MDL 06 Civ. 1791 Dkt.  
25 #393. The order was granted at plaintiffs’ request, and over the Government’s objection. *Id.* at 1.  
26 It is a broad order, requiring the Government “to preserve evidence that *may* be relevant to this  
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1 action,” including “documents, data and tangible things.” *Id.* at 2. “Documents, data and tangible  
2 things is to be interpreted *broadly*,” and “Preservation is to be interpreted *broadly* to accomplish  
3 the goal of maintaining the integrity of *all* documents, data and tangible things reasonably  
4 anticipated to be subject to discovery.” *Id.* at 2-3 (emphasis added).

5 Notwithstanding its (i) now-undisputed common law obligations to preserve evidence, *see*  
6 Dkt. #118, Gov’t Br. 10 (collecting cases), and (ii) the undisputed language of the Preservation  
7 Order, MDL 06 Civ. 1791 Dkt. #393, the Government has now admitted to destroying evidence in  
8 this case for a period of years, a practice of evidence destruction that (as the *Jewel* plaintiffs’ brief  
9 notes) was discovered by plaintiffs only by happenstance. Faced with this massive discovery  
10 violation, the Government now suggests (without actually arguing) that it was somehow not  
11 “practicable” to preserve the evidence. The suggestion is not serious. Nowhere does the  
12 Government explain why it would have been impracticable to maintain the evidence. Nor did the  
13 Government once make this impracticability argument during the many years it was destroying the  
14 evidence. Any argument about impracticability is waived.

15 To the contrary, the Government made a conscious choice to destroy the evidence based on  
16 its own secret decision to reinterpret the *Shubert* and *Jewel* complaints as narrowly as possible.  
17 Rather than “preserve evidence that *may* be relevant to this action,” MDL Dkt. #393 at 2, for  
18 example evidence that “*may*” be relevant to a surveillance program that collects communications  
19 “without reasonable suspicion or probable cause,” Complaint ¶¶ 60, 61, 105; SAC ¶¶ 86, 116, the  
20 Government destroyed evidence it *knew* was relevant to the action.

21 As noted by the *Jewel* plaintiffs, the Government’s post-hoc reinterpretation of the *Shubert*  
22 and *Jewel* complaints is belied by its own, now-partially declassified sworn declarations,  
23 repeatedly asserting that plaintiffs put allegedly *FISC-authorized* activities at issue in these  
24 litigations. *See* 08 Civ. 4373, Dkt. #233, at 16-17. As recently as *one month* ago, in *this case*, the  
25 Acting Deputy Director of the National Security Agency, Frances Fleisch, swore under oath that  
26 the *Shubert* and *Jewel* “Plaintiffs seek relief in this litigation that would prohibit such collection  
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1 activities, *even though they were later transitioned to FISC-authorized programs and remain so to*  
2 *the extent the programs continue.*” 08 Civ. 4373, Dkt. #227, Fleisch Decl. at ¶ 27 (emphasis  
3 added). One month ago, the Government told this Court that plaintiffs *are* challenging “FISC-  
4 authorized programs.” *Id.* Now the Government claims plaintiffs are *not* challenging FISC-  
5 authorized programs, permitting the Government to destroy evidence in this litigation about FISC-  
6 authorized programs. The Government’s ever-shifting claims and representations to this Court are,  
7 to put it mildly, troubling. Its destruction of evidence is indefensible.

8 Finally, the Government suggests that plaintiffs somehow must have known the  
9 Government was destroying evidence in violation of its discovery obligations, because the “TSP”  
10 program “was being transitioned to FISA authority,” and plaintiffs allegedly only challenge actions  
11 not under FISA authority. Gov’t Br. 16. The argument is meritless, because (i) plaintiffs have  
12 always challenged a massive dragnet, collecting communications of millions of people without  
13 probable cause or reasonable suspicion, a dragnet that transcends the Government’s “TSP” (which  
14 they describe as a targeted program affecting a discrete number of people with links to terrorist  
15 groups), and (ii) as the Government admitted just a month ago, plaintiffs are challenging  
16 indiscriminate surveillance, whether or not under “FISA authority,” *see supra*.

17 For the reasons set forth in the *Jewel* plaintiffs’ brief, an adverse inference against  
18 defendants is necessary and appropriate. 08 Civ. 4373, Dkt. #233, at 20-21. The *Shubert* plaintiffs  
19 submit that this sanction should take the form of a rebuttable presumption that plaintiffs’  
20 communications were collected by the Government as part of the surveillance program. The  
21 destruction of evidence in this case was not accidental. It was not for a short period. It was not for  
22 only a few documents. It was wilful destruction of a massive amount of evidence for years.  
23 Defendants controlled the evidence; defendants destroyed the evidence. Anything less than a  
24 rebuttable presumption would unfairly penalize plaintiffs deprived of the Government’s evidence  
25 through no fault of plaintiffs.  
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