



1 2014. The parties stated their respective positions on a hearing date as follows: “Plaintiffs have  
2 set the hearing date for their motion as October 31, 2014. The Government Defendants object to  
3 a hearing date being set at this time, for reasons that will be explained in their response to the  
4 motion.” The Court granted the stipulation on August 4, 2014, without setting a hearing date.  
5 ECF No. 272.

6 3. The Government Defendants seek a short, two-week, extension of time to file  
7 their response to Plaintiffs’ motion. In agreeing to the September 19 deadline, the Government  
8 Defendants underestimated the amount of time it would take to respond to the motion, due to a  
9 number of factors. First, Plaintiffs’ motion implicates numerous complicated issues, such as the  
10 sufficiency of the evidence, Plaintiffs’ standing, whether the alleged surveillance activities  
11 challenged in Plaintiffs’ motion involve a seizure, whether they involve a search, and whether  
12 the alleged search and seizure are reasonable. Second, one of the attorneys representing the  
13 Government Defendants, Bryan Dearing, left the Department of Justice on September 10,  
14 2014. Third, another attorney representing the Government Defendants unexpectedly took  
15 annual leave in September due to an urgent family matter. Fourth, the Government intends to  
16 cross-move for partial summary judgment when it responds to Plaintiffs’ motion.

17 4. The Government Defendants seek until October 6, 2014 to file their response to  
18 Plaintiffs’ motion, and any cross-motion, rather than October 3 (which is two weeks from  
19 September 19), because two of the attorneys representing the Government Defendants will be  
20 observing Yom Kippur, one of the Jewish high holidays, on October 3-4.

21 5. On September 11, 2014, the Government Defendants asked Plaintiffs for their  
22 consent to extend the deadline for the Government Defendants’ response to Plaintiffs’ motion,  
23 and any cross-motion, to October 6, 2014. *See* email correspondence attached hereto as Ex. 1.

24 6. Counsel for Plaintiffs responded on September 12 that Plaintiffs would agree to  
25 an extension until October 2, but only if the Government Defendants agreed to two conditions:  
26 (1) to set a November 14, 2014 hearing date on Plaintiffs’ motion, and (2) to put the Government  
27 Defendants’ anticipated cross-motion on a separate track and not combine it with the response to  
28 Plaintiffs’ motion. *See* Ex. 1.

Government Defendants’ Administrative Motion to Extend the Time for their Response to Plaintiffs’ Motion for  
Partial Summary Judgment, *Jewel v. National Security Agency* (4:08-cv-4373-JSW)

1           7.       On September 15, 2014, the Government Defendants rejected Plaintiffs'  
2 conditions, explaining that (1) Plaintiffs did not have a basis on which to object to a mere two-  
3 week delay in the Government's response to Plaintiffs' motion, given that Plaintiffs were  
4 originally due, at their own request, to file their motion for partial summary judgment in January  
5 of this year, that Plaintiffs took that motion off the calendar without objection by the  
6 Government, and that Plaintiffs then took nearly seven months to prepare and file their motion at  
7 a time that suited their needs; (2) the Government's cross-motion for summary judgment will  
8 correspond precisely in scope to the questions raised by Plaintiffs' motion, and it would therefore  
9 be wasteful of the time and resources of all concerned for the parties to brief and then the Court  
10 to consider and rule on the motions separately; and (3) setting a hearing date at this time would  
11 be premature and contrary to the Court's stated intention to resolve the four threshold issues it  
12 identified at the September 2013 case management conference before proceeding to the merits of  
13 Plaintiffs' claims. *See* Ex. 1.

14           8.       On September 16, 2014, Plaintiffs responded that they were unwilling to stipulate  
15 to any briefing schedule that does not include a set hearing date for Plaintiffs' motion. When the  
16 Government Defendants offered in response to include the same language from the July 29  
17 stipulation regarding the parties' positions on the setting of a hearing date (*see* ¶ 2 above), with  
18 any new date chosen by Plaintiffs for a proposed hearing based on the revised schedule,  
19 Plaintiffs still refused to consent to the Government Defendants' request for a two-week  
20 extension of time and to any attempt to consolidate briefing on the cross-motion. *See* Ex. 1.<sup>1</sup>

21           9.       The Government Defendants' request for a two-week extension to file their  
22 response to Plaintiffs' motion, along with any cross-motion, will not unduly delay this case or  
23 otherwise prejudice Plaintiffs. The Court has not yet ruled on the four threshold legal issues that  
24 it identified as necessary to resolve before proceeding to the merits, nor has it set a hearing date  
25 for argument on those issues. *See* ECF Nos. 167, 177, 185, and 203. In addition, the Court also

---

26           <sup>1</sup> Plaintiffs claim to have scheduling difficulties from November 16 through mid-  
27 December. *See* Ex. 1. The Government's proposed deadline for Plaintiffs' response/reply brief,  
28 November 3, would not, however, conflict with that. The Government would nonetheless be  
amenable to accommodating Plaintiffs' scheduling issues if it becomes necessary.  
Government Defendants' Administrative Motion to Extend the Time for their Response to Plaintiffs' Motion for  
Partial Summary Judgment, *Jewel v. National Security Agency* (4:08-cv-4373-JSW)

1 has before it briefing on whether Plaintiffs' complaint even includes the claim on which they  
2 move for summary judgment—the legality under the Fourth Amendment of intelligence-  
3 gathering activities conducted pursuant to Section 702 of the Foreign Intelligence Surveillance  
4 Act. *See* ECF Nos. 229, 233, 235, 243, and 253.

5 10. This is the Government Defendants' first request to extend the time for their  
6 response to Plaintiffs' motion for partial summary judgment.

7 WHEREFORE, the Government Defendants respectfully request that their response to  
8 Plaintiffs' motion for partial summary judgment (ECF No. 261) and any cross-motion be due on  
9 or before October 6, 2014; that Plaintiffs' reply/opposition brief be due on or before November  
10 3, 2014; and that the Government Defendants' reply brief be due on or before November 24,  
11 2014.

12 Dated: September 16, 2014

Respectfully Submitted,

13 JOYCE R. BRANDA  
14 Acting Assistant Attorney General

15 JOSEPH H. HUNT  
16 Director, Federal Programs Branch

17 ANTHONY J. COPPOLINO  
18 Deputy Branch Director

19 /s/Marcia Berman

JAMES J. GILLIGAN  
Special Litigation Counsel  
[james.gilligan@usdoj.gov](mailto:james.gilligan@usdoj.gov)

MARCIA BERMAN  
Senior Trial Counsel  
[marcia.berman@usdoj.gov](mailto:marcia.berman@usdoj.gov)

21 RODNEY PATTON  
22 Trial Attorney  
[rodney.patton@usdoj.gov](mailto:rodney.patton@usdoj.gov)

23 JULIA BERMAN  
[julia.berman@usdoj.gov](mailto:julia.berman@usdoj.gov)  
24 U.S. Department of Justice  
25 Civil Division, Federal Programs Branch  
26 20 Massachusetts Avenue, NW, Rm. 7132  
Washington, D.C. 20001  
Phone: (202) 514-2205  
Fax: (202) 616-8470

27 *Attorneys for the Government Defendants*  
28 *Sued in their Official Capacities*

Declaration of Marcia Berman in Support of  
Government Defendants' Administrative Motion to Extend the Time  
for Their Response to Plaintiffs' Motion for Partial Summary Judgment

1  
2  
3 1. I am a Senior Trial Counsel for the United States Department of Justice, Civil  
4 Division, Federal Programs Branch, and one of the attorneys of record for the Government  
5 Defendants in this case. The statements made herein are based on my personal knowledge, and  
6 on information made available to me in the course of my duties and responsibilities as counsel  
7 for the Government Defendants.

8 2. Filed with this declaration, as Exhibit 1, is a true and correct copy of the email  
9 correspondence between counsel for Plaintiffs and the Government Defendants, from September  
10 11 – 16, 2014. As described in the above Government Defendants' Administrative Motion to  
11 Extend the Time for Their Response to Plaintiffs' Motion for Partial Summary Judgment, the  
12 email correspondence provided as Exhibit 1 shows the efforts made to obtain a stipulation to  
13 extend the time for the Government Defendants' response to Plaintiffs' motion for partial  
14 summary judgment, and provides the reasons for the Government Defendants' request.

15 I declare under penalty of perjury under the laws of the United States of America that the  
16 foregoing is true and correct. Executed on September 16, 2014, at Washington, D.C.

17  
18  
19 /s/ Marcia Berman  
20 MARCIA BERMAN  
21 Senior Trial Counsel  
22 [Marcia.berman@usdoj.gov](mailto:Marcia.berman@usdoj.gov)  
23 U.S Department of Justice  
24 Civil Division, Federal Programs Branch  
25 20 Massachusetts Ave., N.W., Room 7132  
26 Washington, D.C. 20001  
27 Phone: (202) 514-2205  
28 Fax: (202) 616-8470



1           **IT IS SO ORDERED.**

2  
3           Dated: \_\_\_\_\_

\_\_\_\_\_  
4           JEFFREY S. WHITE  
5           UNITED STATES DISTRICT JUDGE

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**From:** [David Greene](#)  
**To:** [Gilligan, Jim \(CIV\)](#)  
**Cc:** [Richard Wiebe](#); [Berman, Marcia \(CIV\)](#); [Cindy Cohn](#); [Iann M. Maazel](#); [Thomas E. Moore III \(tmoore@moorelawteam.com\)](#); [Stephanie Shattuck](#); [Andrew Crocker](#); [Patton, Rodney \(CIV\)](#); [Berman, Julia \(CIV\)](#)  
**Subject:** Re: Jewel -- pls" motion for partial summ. judgment  
**Date:** Tuesday, September 16, 2014 2:22:44 PM

---

Dear Jim,

We understand your position. You asked for an extended briefing schedule for our motion brought 2 months ago and calendared based upon your wishes and we offered to do so, by extending that briefing schedule to accommodate your new position with a corresponding hearing date (November 14) according to the Northern District Rules (which require setting a hearing date as part of noticing a motion).

You rejected our offer because you want to maintain your objection to the setting of a hearing date and because you want us also to accommodate a cross motion, something we just learned about even though you could have told us in July. We have scheduling difficulties that start on November 16 and go through mid-December and we don't think that it's appropriate for you to insist that we provide the briefing schedule for that cross-motion, especially given that we just learned of its existence.

So if you wish to bring this to Judge White you can, but please do describe our position correctly.

Thanks,

David Greene  
Senior Staff Attorney  
Electronic Frontier Foundation  
815 Eddy St.  
San Francisco, CA 94109  
415-436-9333 x. 143

DavidG@eff.org

On 9/16/14 7:09 AM, Gilligan, Jim (CIV) wrote:

> Hi David,

>

> Thanks for getting back to us. Actually, the Government has consistently objected to a hearing date being set for Plaintiffs' summary judgment motion, and there currently is no court-ordered hearing date. In our July 29, 2014 stipulation, the parties stated their respective positions: "Plaintiffs have set the hearing date for their motion as October 31, 2014. The Government Defendants object to a hearing date being set at this time, for reasons that will be explained in their response to the motion." We would agree to including similar language in a stipulation extending our response date to Oct. 6, with Plaintiffs picking a new proposed hearing date based on the revised schedule, and the Government continuing to state its objection. Please let us know if this is acceptable to Plaintiffs by 2:00 EST today, so that if we are unable to agree, we can file an extension motion today.

>

> Thanks.

>

> Jim

>

> James J. Gilligan



> Special Litigation Counsel  
> Civil Division, Federal Programs Branch  
> U.S. Department of Justice  
> P.O. Box 883  
> Washington, D.C. 20044  
>  
> Tel: 202-514-3358  
>

> -----Original Message-----

> From: David Greene [<mailto:davidg@eff.org>]  
> Sent: Tuesday, September 16, 2014 12:58 AM  
> To: Gilligan, Jim (CIV)  
> Cc: Richard Wiebe; Berman, Marcia (CIV); Cindy Cohn; Ilann M. Maazel; Thomas E. Moore III  
> (tmoore@moorelawteam.com); Stephanie Shattuck; Andrew Crocker; Patton, Rodney (CIV); Berman, Julia (CIV)  
> Subject: Re: Jewel -- pls' motion for partial summ. judgment

> Hi Jim

> Both Rick and Cindy are on the road so I am responding in their stead.

> If we understand you correctly, the government's position now is that there should be no hearing date set for plaintiffs' motion for summary judgment, regardless of any briefing schedule we may agree to. We cannot agree to any proposal that does not include a set hearing date.

> David Greene  
> Senior Staff Attorney  
> Electronic Frontier Foundation  
> 815 Eddy St.  
> San Francisco, CA 94109  
> 415-436-9333 x. 143

> DavidG@eff.org

> On 9/15/14 7:29 AM, Gilligan, Jim (CIV) wrote:

>> Hi Rick,

>> I'm afraid your response both oversimplifies the scope and complexity  
>> of the issues raised by Plaintiffs' pending summary judgment motion,  
>> and seeks to impose conditions on a modest request for additional time  
>> that would unacceptably multiply and complicate the proceedings.

>> Plaintiffs' pending motion for summary judgment does not present a  
>> single discrete issue, as you say, but implicates numerous issues  
>> concerning the sufficiency of the evidence, Plaintiffs' standing,  
>> whether the alleged surveillance activities challenged in Plaintiffs'  
>> motion involve a seizure, whether they involve a search, whether the  
>> alleged search and seizure are reasonable, and whether the state secrets  
>> doctrine bars relief. Please also recall that Plaintiffs were  
>> originally due, at their own request, to file their motion for partial  
>> summary judgment in January of this year, that Plaintiffs took that

>> motion off the calendar without objection by the Government, and that  
>> Plaintiffs then took nearly seven months to prepare and file their  
>> motion at a time that suited their needs. Under these circumstances,  
>> it is difficult to understand on what basis Plaintiffs could object to  
>> the short two-week extension the Government is now seeking.

>>  
>>  
>>

>> We cannot agree to put the Government's cross-motion for summary  
>> judgment on a separate track, or to setting a hearing date (on either  
>> motion) in advance of the Court's consideration of the threshold  
>> jurisdictional issues the parties briefed earlier this year. The  
>> Government's cross-motion for summary judgment will correspond  
>> precisely in scope to the questions raised by Plaintiffs' motion. It  
>> would therefore be wasteful of the time and resources of all concerned  
>> for the parties to brief and then the Court to consider and rule on  
>> the motions separately. We do not believe, either, that the Court would agree to  
>> split the proceedings in that fashion. And the Government's view  
>> remains that setting a hearing date at this time would be premature  
>> and contrary to the Court's stated intention to resolve the four  
>> threshold issues it identified at the September 2013 status conference  
>> before proceeding to the merits of Plaintiffs' claims.

>>  
>>  
>>

>> We are still prepared to submit an agreed-upon schedule to the Court  
>> for our opposition and cross-motion, Plaintiffs' opposition/reply, and  
>> the Government's reply. If Plaintiffs are willing to proceed in this  
>> fashion, please submit a proposed date for Plaintiffs'  
>> opposition/reply no later than the close of business today so that we  
>> may file a stipulation and proposed order with the Court no later than  
>> Tuesday (September 16). If Plaintiffs are unwilling to proceed on  
>> this basis, then on Tuesday we will file a motion with the Court  
>> seeking an extension until October 6 to file our cross-motion and  
>> opposition, a corresponding extension until November 3 for Plaintiffs  
>> to file their opposition/reply, and a due date of November 24 for  
>> the\*\*Government's reply.

>>  
>>  
>>

>> Please let us know as soon as you can how Plaintiffs wish to proceed.

>>  
>>  
>>

>> Jim

>>  
>>  
>>

>> James J. Gilligan

>>  
>>  
>>

>> Special Litigation Counsel

>>  
>>  
>>

>> Civil Division, Federal Programs Branch  
>> U.S. Department of Justice  
>> P.O. Box 883

>>

>> Washington, D.C. 20044

>>

>>

>>

>> Tel: 202-514-3358

>>

>>

>>

>> \*From:\* Richard Wiebe [<mailto:wiebe@pacbell.net>]

>> \*Sent:\* Friday, September 12, 2014 6:27 PM

>> \*To:\* Berman, Marcia (CIV); Cindy Cohn; Ilann M. Maazel; Thomas E.

>> Moore III ([tmoore@moorelawteam.com](mailto:tmoore@moorelawteam.com)); Stephanie Shattuck; David Greene;

>> Andrew Crocker

>> \*Cc:\* Gilligan, Jim (CIV); Patton, Rodney (CIV); Berman, Julia (CIV)

>> \*Subject:\* Re: Jewel -- pls' motion for partial summ. judgment

>>

>>

>>

>> Hi Marcy,

>>

>> As you know, plaintiffs originally proposed a briefing schedule that  
>> would have given the government five weeks to brief the issue, with a  
>> hearing in early October. To accommodate the government, plaintiffs  
>> agreed to the government's request for additional time and extended  
>> that schedule to one that gives the government eight weeks to respond  
>> to our motion, with the hearing date extended to October 31. The  
>> dates the parties stipulated to were those proposed by the government,  
>> which plaintiffs accepted as proposed, and plaintiffs believe the time  
>> is ample given the narrow scope of plaintiffs' motion. Plaintiffs'  
>> motion raises a single discrete issue: whether the government's mass  
>> interception of Internet communications violates the Fourth Amendment.  
>> Plaintiffs first briefed this issue to the Court in March 2006, over  
>> eight years ago, in their motion for a preliminary injunction in the  
>> related /Hepting/ action, so the government has long been on notice of  
>> it. Finally, plaintiffs do not believe that the government's proposed  
>> summary judgment motion provides any basis for further delaying their  
>> motion. The government could have brought its proposed motion at any  
>> time, and cannot fairly ask plaintiffs to delay their motion on  
>> account of it. The government's motion can and should proceed on a separate track.

>>

>> Nevertheless, plaintiffs are willing to accommodate the government's  
>> request on the following schedule and with two conditions:

>>

>> Government's opposition due date: October 2, 2014 Plaintiffs' reply

>> due date: October 30, 2014 Hearing date: November 14, 2014

>>

>> The two conditions are:

>>

>> 1. The government agrees to the November 14, 2014 hearing date on  
>> plaintiffs' motion, and will not seek to postpone, vacate, modify, or  
>> extend the hearing date.

>>

>> 2. The government will proceed with any motion of its own separately,  
>> with a separate briefing schedule and hearing date mutually agreeable  
>> to the parties, and will not seek to consolidate or combine it with  
>> plaintiffs' motion.

>>

>> I'll be out next week so please be sure to include the EFF'rs on this  
>> email in your reply.

>>

>> Thanks,

>>

>> Rick

>>

>>

>>

>> Law Office of Richard R. Wiebe

>>

>> One California Street, Suite 900

>>

>> San Francisco, CA 94111

>>

>> 415-433-3200

>>

>> fax 415-433-6382

>>

>> On 9/11/2014 2:33 PM, Berman, Marcia (CIV) wrote:

>>

>> Hi Cindy - we are writing to seek your consent to a short extension  
>> of time on our response to plaintiffs' motion for partial summary  
>> judgment (currently due Sept. 19). We unfortunately underestimated  
>> the amount of time it would take to respond to the motion, due to  
>> vacation schedules, the unexpected departure of one of the attorneys  
>> on our team (Bryan Dearing left DOJ yesterday), and the fact that  
>> we intend to cross-move for summary judgment. We'd like to ask the  
>> Court for an additional two weeks, but since Friday, October 3, is  
>> the beginning of Yom Kippur, one of the Jewish high holidays, and  
>> Sept. 25 is Rosh Hashanah, we would ask for our deadline to be  
>> extended until Monday, October 6. If this is agreeable to you,  
>> please propose a date for your response/reply brief, and we will  
>> then propose one for our reply (and we will of course draft a stip.  
>> for your review).

>>

>>

>>

>> Thanks very much, and hope all is well.

>>

>>

>>

>> Marcy

>>

>>

>>

>>

>>

>>

>>