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12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**
OAKLAND DIVISION

14 _____)
 15 CAROLYN JEWEL, *et al.*,)
 16)
 Plaintiffs,)
 17)
 v.)
 18)
 NATIONAL SECURITY AGENCY, *et al.*,)
 19)
 Defendants.)
 20)
 21 _____)

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

**GOVERNMENT DEFENDANTS’
 OPPOSITION TO PLAINTIFFS’
 ADMINISTRATIVE MOTION
 TO STRIKE THE GOVERNMENT’S
 SECRET SUPPLEMENTAL BRIEF**

No hearing scheduled

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1 In Plaintiffs' Administrative Motion to Strike the Government's Secret Supplemental
2 Brief, ECF No. 297 ("Plaintiffs' Motion" or Pls.' Mot."), Plaintiffs ask the Court to strike the
3 Government Defendants' September 29, 2014 classified brief. The Government Defendants
4 submitted that brief, along with a classified declaration, to provide the Court further information
5 related to Plaintiffs' Motion for Partial Summary Judgment, *see* ECF No. 261, that could not be
6 provided in a public filing. *See* Gov't Defs.' Notice of Lodging of the Classified Decl. of
7 Miriam P. of the National Security Agency and a Classified Supplement to the Gov't Defs.'
8 Opp'n and Cross-Mot. for Partial Summ. J. for *In Camera*, *Ex Parte* Review, ECF No. 287 at 2.
9 Specifically, as explained in the Government's public filing, filed concurrently, the Government
10 submitted the classified supplement at issue to explain that the Government possesses detailed
11 operational information about Upstream collection under FISA Section 702 that is necessary to
12 adjudicate Plaintiffs' claim and the Government's defenses thereto, but which is subject to the
13 assertion of the state secrets privilege in this case by the Director of National Intelligence
14 ("DNI"), and cannot be disclosed without risking exceptionally grave damage to national
15 security. *See* Gov't Defs.' Opp'n to Pls.' Mot. for Partial Summ. J. and Cross-Mot. for Partial
16 Summ. J. on Pls.' Fourth Amendment Claim, ECF No. 285, at 3–4.¹

17 Plaintiffs do not seek to strike the classified declaration filed by the Government,² just the
18 classified brief discussing that declaration. There is no support for Plaintiffs' anomalous position
19 that, while the Government may submit classified information to the Court in support of its
20 assertion of the state secrets privilege through a declaration, it may not explain to the Court, in a
21 classified manner, what role that privileged information plays in the case and, in particular,
22 address why a claim cannot be fairly adjudicated without that information. Plaintiffs' apparent

23 ¹ In light of the Government's public explanation of the purpose of the submission at issue—to
24 explain why national security information subject to the state secrets privilege would be needed
25 to litigate Plaintiffs' Fourth Amendment claim (assuming judgment is not granted for the
26 Government on the public record) but is properly privileged and excluded from the case—there
is no basis for Plaintiffs' speculation that the submission "argues the merits of the plaintiffs'
Fourth Amendment claim." Pls.' Mot. at 4.

27 ² The submission of classified declarations for *in camera*, *ex parte* review is "unexceptional" in
28 cases where the state secrets privilege is invoked. *Kasza v. Browner*, 133 F.3d 1159, 1169 (9th
Cir. 1998).

1 position is that the Court should attempt to glean, based solely on a declaration describing the
2 privileged information, how that protected national security information would impact the case.
3 The Court of Appeals has rejected that view in this very litigation. *See* Order, No. 10-15616,
4 ECF No. 58 (denying the Plaintiffs’ motion to strike the Government’s classified brief).
5 Likewise, Plaintiffs have previously, and unsuccessfully, advanced similar arguments before this
6 Court. *See* Pls.’ Letter, ECF No. 246 (arguing for restrictions on the Government’s submission
7 of classified briefs). As discussed below, there is no basis in law or reason to deprive the Court
8 of the Government’s explanation concerning the impact on the litigation of the need to protect
9 national security information that is properly before the Court through a privilege assertion.
10 Consistent with settled practice, including in this litigation, this Court should deny Plaintiffs’
11 Motion.

12 It is well established that the Government may submit classified information, where
13 appropriate, in a brief addressing arguments about the state secrets privilege and its effects on the
14 litigation. Plaintiffs cite no authority to the contrary. Indeed, *Mohamed v. Jeppesen Dataplan,*
15 *Inc.*, 614 F.3d 1070 (9th Cir. 2010) (*en banc*)—the case upon which Plaintiffs’ argument
16 principally relies, *see* Pls.’ Mot. at 2–4—confirms the importance and propriety of classified
17 briefing in such cases. There, the Court of Appeals noted that “[t]he government’s classified
18 briefing and supporting declarations provide[d] more specific support for the government’s state
19 secrets contentions,” and emphasized that “[t]his information [was] crucial to [the Court’s]
20 decision.” *Jeppesen*, 614 F.3d at 1084 n.6. Thus, rather than prohibiting or restricting such
21 briefing, the Court of Appeals in *Jeppesen* underscored the importance of the Government’s
22 classified briefing.

23 Consistent with this precedent, the Ninth Circuit has rejected Plaintiffs’ contention, raised
24 in a prior appeal in this case, that *Jeppesen* limits the Government’s ability to submit classified
25 briefing in support of its assertion of the state secrets privilege. *See* Order, No. 10-15616, ECF
26 No. 58 (denying Plaintiffs’ motion to strike). Likewise, the Court of Appeals previously rejected
27 Plaintiffs’ unsupported assertions regarding due process and their reference to “secret law,” *see*
28 Pls.’ Mot. at 4–5. Indeed, Plaintiffs’ argument currently before the Court repeats nearly verbatim

1 much of the argument then rejected by the Court of Appeals. *Compare* Pls.’ Mot. at 2–5, with
2 Appellants’ Joint Mot. to Strike the Gov’t’s *Ex Parte, In Camera* Classified Brief, No. 105616,
3 ECF No. 35 at 5–12.

4 Like the Court of Appeals, this Court has not accepted Plaintiffs’ previous requests to
5 restrict or prohibit classified briefing to explain classified information that is properly before the
6 Court. In a letter to the Court, Plaintiffs challenged a previous *ex parte* submission by the
7 Government, and “[sought] a formal process to control the government’s submission of *ex parte*,
8 *in camera* proceedings.” ECF No. 246 at 1. The Government explained, in response, that the
9 Government had consistently complied with the well-established requirements for making
10 classified submissions by creating as full a public record as possible before lodging classified
11 material for the Court’s *in camera, ex parte* review, and that there was no basis for imposing the
12 additional restrictions Plaintiffs sought. *See* ECF No. 267. Thereafter, Judge Walker did not
13 impose the procedures Plaintiffs requested. Similarly, in rejecting another challenge to *ex parte*
14 submissions by the Plaintiffs raised in their prior *Hepting* action, Judge Walker emphasized that
15 “[a]lthough *ex parte, in camera* review is extraordinary, this form of review is the norm when
16 state secrets are at issue,” No. 06-672, ECF No. 171 at 5, and did not foreclose the Government
17 from submitting a classified declaration *and* a classified memorandum regarding the application
18 of the state secrets privilege for *in camera, ex parte* review, *id.* at 7. Indeed, throughout this
19 litigation, the Court has accepted for *in camera, ex parte* review, classified briefing by the
20 Government, after the Government had, as here, created as full a public record as possible before
21 lodging that material. *See, e.g.,* Gov’t Defs.’ Notice of Lodging of Supplemental *In Camera, Ex*
22 *Parte* Classified Mem. of Points and Authorities in Support of Mot. to Dismiss and for Summ. J.,
23 ECF No. 21; United States’ Notice of Lodging of *In Camera, Ex Parte* Material, No. 06-1791
24 (MDL proceedings), ECF No. 255. Thus, Plaintiffs’ Motion is contrary not only to Ninth Circuit
25 precedent, but also to the established practice of this Court throughout this litigation.

26 Although Plaintiffs argue for new procedural restrictions based on Section 1806(f) of the
27 Foreign Intelligence Surveillance Act, *see* Pls.’ Mot. at 2, 4–5, nothing in Section 1806(f) limits
28 the Government’s ability to submit a classified brief for *ex parte* review. Assuming, *arguendo*,

Government Defendants’ Opposition to Plaintiffs’ Administrative Motion to Strike the Government’s Secret
Supplemental Brief, *Jewel v. National Security Agency* (4:08-cv-4373-JSW)

1 Section 1806(f) displaces the state secrets privilege, it would not apply unless and until Plaintiffs
2 can first demonstrate—*without* the benefit of national security information over which the DNI
3 has asserted privilege—that they are “aggrieved persons” challenging the lawfulness of
4 “electronic surveillance.” *See* Government Defendants’ Supplemental Brief on Threshold Legal
5 Issues as Ordered by the Court at the September 27, 2013 Status Conference, ECF No. 167 at 8–
6 11. That is, to bring themselves within the reach of Section 1806(f), Plaintiffs must establish that
7 they have been targets of or subject to the NSA intelligence-gathering activity they seek to
8 challenge; for all of the reasons explained in the Government’s Opposition to Plaintiffs’ Partial
9 Motion for Summary Judgment, Plaintiffs cannot make such a showing here. Moreover, the
10 procedures set forth in Section 1806(f) would then apply if the Attorney General, in his
11 discretion, chose to invoke this provision in the face of a motion by Plaintiff seeking discovery
12 of sensitive national security information. And, regardless, nothing in Section 1806(f) limits the
13 Government’s ability to submit an *ex parte* brief if that were necessary to explain further to a
14 court the basis for a submission under those procedures.³ In sum, as with the Government’s
15 previous *in camera*, *ex parte* submissions related to the assertion of the state secrets privilege in
16 this case, Section 1806(f) would not apply to bar the submission of a classified brief for *ex parte*
17 review.

18 Nor do the Federal or Local Rules support Plaintiffs’ argument that the Government’s
19 submission of its classified brief was improper. Plaintiffs cite Federal Rule of Civil Procedure
20 6(c)(1) and Local Rule 7-2 as the bases for their Motion. *See* Pls.’ Mot. at 1. Even if the service
21 requirements set forth for written motions in Federal Rule of Civil Procedure 6(c)(1) and Civil

22 ³ *See, e.g., United States v. Abu-Jihaad*, 630 F.3d 102, 130 (2d Cir. 2010), *cert. denied*, 131 S.
23 Ct. 3062 (2011) (in applying Section 1806(f) court conducted *in camera* review not only of the
24 challenged orders, applications and materials related to the surveillance but “the government’s
25 classified Memorandum in Opposition to the Defendant’s Motion for Suppression of FISA
26 Evidence and Motion for Disclosure of FISA Applications, Orders and Related Materials and an
27 Adversary Hearing” as well as related classified declarations); *United States v. Mahamud*, 838
28 F.Supp.2d 881, 884, 885 (D. Minn. 2012) (applying Section 1806(f), noting the government had
submitted a classified memorandum, among other materials, *ex parte*, *in camera*, in opposition to
the defendant’s motion to suppress evidence obtained pursuant to FISA); *United States v.*
Hussein, 2014 WL 1682845, at *1, 4 (S.D. Cal. Apr. 29, 2014) (same); *United States v. Omar*,
2012 WL 2357734 (D. Minn. June 20, 2012) (same).

1 Local Rule 7-2 applied to the supplemental submission at issue here, Rule 6(c)(1) expressly
2 excludes matters which may be heard *ex parte* from that requirement. *See* Fed R. Civ. P.
3 6(c)(1)(A), (1)(C).

4 In sum, there is no support for Plaintiffs' argument that the Government may not submit a
5 classified supplement discussing information subject to a state secrets privilege assertion before
6 the Court. For the foregoing reasons, the Court should deny the Plaintiffs' Motion.⁴

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8 Dated: October 28, 2014

Respectfully Submitted,

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26 ⁴ In addition to Plaintiffs' Motion discussed herein, on October 24, 2014, Plaintiffs filed an
27 administrative motion to file under seal their combined reply in support of their motion for
28 partial summary judgment and opposition to the Government Defendants' cross-motion for
partial summary judgment, *see* ECF No. 294. The Government Defendants do not oppose the
Plaintiffs' request to file their combined reply and opposition under seal.

1 administrative motion, it is hereby ORDERED that the Plaintiffs' administrative motion is
2 DENIED.

3 **AND IT IS SO ORDERED.**

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6 Dated: _____

7 JEFFREY S. WHITE
8 UNITED STATES DISTRICT JUDGE
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