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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15 IN RE NATIONAL SECURITY AGENCY)
16 TELECOMMUNICATIONS RECORDS)
17 LITIGATION)

No. M:06-cv-01791-VRW

**JOINT CASE MANAGEMENT
STATEMENT**

18 _____)
19 This Document Relates Solely To:)

Date: September 3, 2009
Time: 3:30 p.m.

20 *Shubert, et al. v. United States of America, et al.*)
(Case No. 07-cv-00693-VRW))

Telephonic Conference

Chief Judge Vaughn R. Walker

21 The plaintiffs and the Government Defendants submit the following joint case
22 management report in connection with the telephonic Case Management Conference scheduled
23 in the above-captioned action for September 3, 2009 at 3:30 p.m..

24 **BACKGROUND**

25 1. This action is one of the remaining cases in this multi-district litigation
26 proceeding brought against the United States of America and government officials. Plaintiffs'
27 complaint alleges, *inter alia*, that the Government engaged in warrantless surveillance authorized
28

1 after the 9/11 terrorist attacks. *See Shubert* Amended Compl. ¶¶ 1-2 (Dkt. 284).¹

2 2. On May 25, 2007, the Government Defendants filed a motion to dismiss or, in the
3 alternative, for summary judgment seeking dismissal or summary judgment in their favor based
4 on the Government's assertion of the state secrets and related statutory privileges. *See* Dkt. 295-
5 298. Plaintiffs filed an opposition and affidavit pursuant to Rule 56(f) of the Federal Rules of
6 Civil Procedure. *See* Dkt. 335-336. This motion was fully briefed in August 2007, and the
7 Court heard oral argument on August 30, 2007. *See* Dkt. 368.

8 3. By Order dated March 31, 2008, the Court administratively terminated the
9 Government's motion after the Ninth Circuit Court of Appeals withdrew from submission a
10 pending appeal of this Court's denial of the Government's motion to dismiss based on the state
11 secrets privilege in *Hepting v. AT&T*, 439 F. Supp. 2d 974 (N.D. Cal. 2006). The Court granted
12 the Government leave to petition the Court to reopen its motion in *Shubert* if the circumstances
13 warrant. *See* Dkt. 438.²

14 4. On May 5, 2009, plaintiffs sent a letter to the Court requesting that it deny the
15 Government's motion pursuant to the Ninth Circuit's decision in *Mohamed v. Jeppesen*, 563
16 F.3d 922 (9th Cir. April 28, 2009), and the Court's decision in *In re National Security Agency*
17 *Telecommunications Records Litigation*, 564 F. Supp. 2d 1109, 1115 (N.D. Cal. 2008). *See* Dkt.
18 610.

19 5. On May 14, 2009, the Court issued an Order noting that the Government's motion
20 had already been terminated with leave to petition for its renewal. The Court also directed the
21 Government to address the *Jeppesen* decision in any petition to renew its motion. *See* Dkt. 623.

22 6. A telephonic Case Management Conference is scheduled for September
23 3, 2009 at 3:30 p.m. The parties set forth below their respective position on further proceedings.

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25 ¹ Citations are to the docket in M: 06-1791-VRW unless otherwise indicated.

26 ² The *Hepting* case raised claims solely against telecommunication carrier defendants. The
27 Court of Appeals remanded the case for consideration of the impact of the FISA Act Amendments
28 Act of 2008 ("FAA"), which contained provisions governing the disposition of actions against
carriers alleged to have assisted the Government in intelligence activities. This Court subsequently
dismissed *Hepting* pursuant to the FAA, *see* Dkt. 639, and the *Hepting* plaintiffs have appealed.

PLAINTIFFS' POSITION

As per the Court's March 31, 2008 Order, circumstances do not warrant reopening of the government's withdrawn motion, because such a motion would be wasteful and futile in light of both *Mohamed v. Jeppesen*, 563 F.3d 922 (9th Cir. April 28, 2009), and the Court's decision in *In re National Security Agency Telecommunications Records Litigation*, 564 F.Supp.2d 1109, 1115 (N.D.Cal. 2008). In addition, the government has known for 17 months of its burden to renew its motion if it believed there were any grounds to do so. The government failed to do so and is in default of its obligation to renew its motion. It would be unfair to turn the government's default and 17-month delay into grounds for yet more delay and yet another (futile) motion. Therefore discovery should finally proceed in this case, which was filed (long before Jewel) in May 2006.

Should the Court, however, determine that the government has discharged its obligation to demonstrate that the circumstances so warrant, the Court should reinstate the government's withdrawn, May 25, 2007 motion and permit very limited, expedited briefing solely on Jeppesen.

GOVERNMENT DEFENDANTS' POSITION

The *Shubert* case raises allegations and claims against Government defendants that are nearly identical to those at issue in the *Jewel v. NSA* action (08-cv-4373-VRW)—in sum, that the Government has allegedly engaged in unlawful electronic surveillance on millions of domestic communications authorized after the 9/11 attacks. *See* Amended Complaint (Dkt. 284). The Government's motion to dismiss and for summary judgment in *Jewel* was argued on July 15, 2009.³ The Government proposes two courses for proceeding in the *Shubert* action at this stage.

First, the Court could hold further proceedings in *Shubert* in abeyance until resolution of the Government's pending dispositive motion in *Jewel*. The Government's current state secrets and statutory privilege assertions in *Jewel* encompass the allegations at issue in *Shubert*, and its

³ The Government's response to a supplemental brief filed by plaintiffs (Dkt. 38 in 08-cv-04373-VRW) is due on September 3, 2009. *See* Order (Dkt. 40 in 08-cv-04373-VRW)

1 pending motion in *Jewel* addresses the *Jeppesen* decision at length.⁴ Thus, a ruling by the Court
2 on the Government's pending motion in *Jewel* may impact further proceedings in *Shubert*.
3 Second, alternatively, to place the *Shubert* action in the same posture as *Jewel*, the Government
4 could renew its dispositive motion in *Shubert*. In any event, further proceedings in *Shubert*
5 should not be undertaken before consideration and resolution of the issues raised in the
6 Government's prior dispositive motion and privilege assertion in *Shubert*, and/or its pending
7 motion in *Jewel*—even if it is necessary to formally renew and resubmit a dispositive motion in
8 *Shubert* at this time.

9 Plaintiffs' contention that the Government is in "default" of any obligation to renew its
10 prior motion in this case is meritless. The Court's Order of March 31, 2008 (*see* Dkt. 438)
11 terminated the prior motion based on the status of the *Hepting* appeal and did not set a fixed
12 deadline for renewal of that motion. *Hepting* was remanded on September 21, 2008. *See* Dkt.
13 378 in 06-cv-372-VRW (entering remand mandate). Thereafter, proceedings in this MDL
14 focused on resolution of over forty lawsuits involving claims raised against telecommunications
15 carrier defendants, as well as lawsuits brought by the Government against state governmental
16 entities, and both sets of lawsuits were resolved by the Court in June 2009. *See* Dkt. 639
17 (dismissing claims against carrier defendants) and Dkt. 640 (entering summary judgment for the
18 Government in state cases). At no point in the interim did the *Shubert* plaintiffs seek to advance
19 their lawsuit, including while cross-cutting issues were being addressed in *Jewel*. In addition, in
20 its Order of May 2009 (*see* Dkt. 623), the Court again did not set a deadline for the Government
21 to seek renewal of its motion in *Shubert*. Thus, there is no bar at this point for the Court to either
22 address the Government's motion in *Jewel* before proceeding here, or to renewal of the
23 Government's prior dispositive motion to place this case on par with *Jewel*.

24 Finally, the Government also notes that the *Shubert* First Amended Complaint may seek

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26 ⁴ During proceedings in *Jewel*, the Government set forth at length why the *Jeppesen* decision
27 should not foreclose consideration of the Government's privilege assertion at this stage, particularly
28 where plaintiffs have identified the detailed discovery they seek in a Rule 56(f) affidavit, *see* Dkt.
336, and the information sought is subject to the Government's privilege assertions. *See*
Government Defendants' Reply Brief in *Jewel* (Dkt. 31 in 08-cv-04373-VRW) at 16-21; *see also*
Transcript, July 15, 2009, at 24-25.

1 to raise so-called “Bivens” claims against certain defendants in their personal capacity. *See* Am.
 2 Compl. ¶¶ 109-112. The Amended Complaint does not clearly identify whether particular
 3 defendants are being sued in their official and/or personal capacity, nor the specific allegations
 4 made against any defendant in their personal capacity. But to the extent such personal capacity
 5 claims are being raised against some or all the individual defendants, they would present the
 6 same issues now being addressed by the Court in *Jewel* concerning whether personal capacity
 7 claims can be considered before resolution of the Government’s state secrets privilege assertion.
 8 *See* Individual Capacity Defendants’ Motion to Stay in *Jewel* and Plaintiffs’ Opposition thereto
 9 (Dkts. 32 and 42). The Court is set to hear argument on that issue in *Jewel* on September 17,
 10 2009. This question should also be resolved before any further proceedings in *Shubert*.⁵

11 **SIGNED AS TO THEIR RESPECTIVE POSITIONS:**

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26
 27
 28 ⁵ In part for this reason, it may be more efficient to address case management proceedings
 in *Shubert* in connection with the hearing in *Jewel* on September 17, 2009, because the cases are so
 closely related.

DECLARATION PURSUANT TO GENERAL ORDER 45, § X.B

I, ANTHONY J. COPPOLINO, hereby declare pursuant to General Order 45, § X.B, that I have obtained the concurrence in the filing of this document from each of the other signatories listed above and below. I declare under penalty of perjury that the foregoing declaration is true and correct.

Executed on August 27, 2009, in the City of Washington, District of Columbia

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