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15	1	DISTRICT COURT	
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17)	
18	CAROLYN JEWEL, et al.,) Case No. 4:08-cv-04373-JSW	
19	Plaintiffs,	STIPULATION AND [PROPOSED] ORDER TO RESET BRIEFING	
20	V.) BRIEFING SCHEDULE REGARDING) REQUIRED DESTRUCTION OF	
21	NATIONAL SECURITY AGENCY, et al.,) UPSTREAM COMMUNICATIONS) PREVIOUSLY ACQUIRED BY	
22	Defendants.) BY DEFENDANT NSA	
23	Defendants.	Hon. Jeffrey S. White Courtroom 5, 2nd Floor	
24		Oakland Courthouse	
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28	Chimaletian and Dannes of Colored D. (D. C. C.)	_	
	Stipulation and Proposed Order to Reset Briefing Schedule Regarding Required Destruction of Upstream Communications Previously Acquired by Defendant NSA. <i>Jewel v. National Security Agency</i> (4:08-cv-04373-JSW)		

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Stipulation and Proposed Order to Reset Briefing Schedule Regarding Required Destruction of Upstream Communications Previously Acquired by Defendant NSA, *Jewel v. National Security Agency* (4:08-cv-04373-JSW)

1. Pursuant to Local Rule 6-2, the parties respectfully request a brief extension and revision of the briefing schedule set for the parties' submissions to be filed if the parties cannot reach agreement regarding the NSA's compliance with minimization procedures approved on April 26, 2017, by the Foreign Intelligence Surveillance Court (FISC), requiring the NSA to destroy, as quickly as practicable, all raw Upstream Internet communications data acquired on or before March 17, 2017, that exist in NSA's institutionally managed repositories. *See* Apr. 26, 2017 FISC Mem. Op. and Order, ECF No. 358-1 at 23–24. The Plaintiffs will also address the evidence preservation issues more generally, including specifically whether "factually or legally that the government is properly complying with preservation orders." *See* Tr. of Further CMC (May 19, 2017), 23:5-7.

RECITALS

- 2. On April 26, 2017, the FISC issued an order approving changes to the Section 702 Upstream program, including revised minimization procedures requiring that the NSA destroy, as quickly as practicable, all raw Upstream Internet communications data acquired on or before March 17, 2017, that exist in all of NSA's institutionally managed repositories. *See* Mem. Op. and Order, ECF No. 358-1 at 23–24.
- 3. The Government Defendants¹ filed a public version of their *ex parte*, *in camera* notice regarding the changes to the Section 702 Upstream Program in the instant case on April 28, 2017. *See* ECF No. 350. As explained in Government Defendants' notice, the NSA has not and will not subject raw Upstream Internet communications data in its central repository to the accelerated age off process until the Plaintiffs have had a reasonable opportunity, if they so wish, to challenge the intended destruction of the data before this Court, and the Court has resolved any such challenge made. *See* ECF No. 350-1.

¹ The Government Defendants are the National Security Agency (NSA); the Department of Justice; the United States of America; Donald J. Trump, in his official capacity as President of the United States; Daniel Coats, in his official capacity as Director of National Intelligence; Admiral Michael S. Rogers, in his official capacity as Director of the NSA; and Jefferson B. Sessions, III, in his official capacity as Attorney General of the United States.

- 4. At the May 19, 2017, status conference, this Court ordered that if, after the parties confer, the Plaintiffs object to the accelerated destruction of the raw data in the NSA's central repository, on the ground that the data should be preserved for purposes of this litigation, the parties should submit simultaneous briefing regarding that issue, beginning on June 9, 2017, followed by submissions on June 23, 2017, and June 30, 2017. *See* Tr. of Further CMC (May 19, 2017), 23:22–25:24.
- 5. Additionally, Plaintiffs believe that the Court authorized them to address the question of evidence preservation more generally, noting that this includes whether "factually or legally that the government is properly complying with preservation orders." *See* Tr. of Further CMC (May 19, 2017), 23:5-7. The parties briefed preservation issues extensively in 2014, but the Court did not rule on either this question or the question of any applicable remedies. The Government does not understand the Court to have invited further briefing on the parties' broader preservation dispute at this time and submits that such briefing should await the resolution of the immediate preservation issue concerning Upstream Internet communications and of the pending discovery issues.
- 6. The parties are conferring regarding this matter, and it is not yet certain whether briefing will be necessary. However, should briefing be needed, the parties respectfully request that the briefing schedule be adjusted to provide for staggered, rather than simultaneous briefing, with a two business day extension for the due date for opening brief. Specifically, the parties seek the following schedule:

Government Defendants' opening brief: June 13

Plaintiffs' opening brief: June 20

Government Defendants' response: June 27

Plaintiffs' response: July 3

7. In addition to providing the parties additional time to reach agreement regarding this matter without significantly extending the briefing schedule originally ordered by the Court,

1 the proposed schedule would conserve the Court's and the parties' resources, resulting in four 2 total submissions regarding this matter, rather than the six originally contemplated. 3 8. The parties have not previously requested extensions of the briefing schedule 4 discussed herein, and the modifications proposed by the parties would not otherwise affect the 5 schedule for this case. **STIPULATION** 6 Pursuant to Local Rule 6-2 the parties hereby respectfully request that the Court enter the 7 following revised briefing schedule for the parties' briefs to be submitted if they cannot reach 8 9 agreement regarding the Government Defendants' accelerated age-off of all raw Upstream 10 Internet communications data acquired on or before March 17, 2017, that exist in NSA's central repository or the more general issue of evidence preservation by the Government: 11 June 13: Government Defendants' opening brief 12 June 20: Plaintiffs' opening brief 13 June 27: Government Defendants' responsive submission 14 July 3: Plaintiffs' responsive submission 15 16 17 Dated: June 9, 2017 18 Respectfully submitted, 19 Cindy Cohn (SBN 145997) CHAD A. READLER 20 cindy@eff.org Acting Assistant Attorney General David Greene (SBN 160107) 21 Lee Tien (SBN 148216) ANTHONY J. COPPOLINO Kurt Opsahl (SBN 191303) Deputy Branch Director Mark Rumold (SBN 279060) 22 Andrew Crocker (SBN 291596) JAMES J. GILLIGAN 23 Jamie L. Williams (SBN 279046) Special Litigation Counsel James S. Tyre (SBN 083117) 24 ELECTRONIC FRONTIER FOUNDATION 25 26 Richard R. Wiebe (SBN 121156) RODNEY PATTON wiebe@pacbell.net Senior Counsel 27 LAW OFFICE OF RICHARD R. WIEBE Stipulation and Proposed Order to Reset Briefing Schedule 28 Regarding Required Destruction of Upstream Communications Previously Acquired by Defendant NSA, Jewel v. National Security Agency (4:08-cv-04373-JSW)

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10	DECLARATION PURSU	ANT TO LOCAL RULE 5-1
12	I, Julia Berman, hereby declare pursuan	t to Local Rule 5-1 that I have obtained
13	Plaintiffs' concurrence in the filing of this document from Cindy Cohn, counsel for	
14	Plaintiffs.	
	Executed on June 9, 2017, in Washington	on, D.C.
15		
16 17		<u>/s/ Julia A. Berman</u> JULIA A. BERMAN
18		Counsel for the Government Defendants
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PURSUANT TO STIPULATION, it is ORDERED that the briefing schedule regarding preservation of Upstream Internet communications subject to destruction requirements under NSA minimization procedures shall be in accordance with the parties' Stipulation. The briefing schedule ordered at the May 19, 2017, case management conference is vacated. IT IS SO ORDERED. Huy Swhits Dated: _ June 12, 2017 United States District Judge Stipulation and Proposed Order to Reset Briefing Schedule

Regarding Required Destruction of Upstream

Communications Previously Acquired by Defendant NSA, *Jewel v. National Security Agency* (4:08-cv-04373-JSW)