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14 **UNITED STATES DISTRICT COURT**
 15 **NORTHERN DISTRICT OF CALIFORNIA**
 16 **SAN FRANCISCO DIVISION**

17 FIRST UNITARIAN CHURCH OF LOS
 18 ANGELES, *et al.*,
 19 Plaintiffs,
 20 v.
 21 NATIONAL SECURITY AGENCY, *et al.*,
 22 Defendants.
 23

Case No: 3:13-cv-03287 JSW

**PLAINTIFFS' NOTICE OF EX
 PARTE MOTION AND EX PARTE
 MOTION FOR A TEMPORARY
 RESTRAINING ORDER TO
 PREVENT THE GOVERNMENT
 FROM DESTROYING EVIDENCE**

Date: March 10, 2014
 Time: 1:30 p.m.
 Courtroom 11, 19th Floor
 The Honorable Jeffrey S. White

26 **IMMEDIATE RELIEF REQUESTED**
 27 **CRITICAL DATE: TUESDAY MORNING, MARCH 11, 2014**

NOTICE OF EX PARTE MOTION

PLEASE TAKE NOTICE that on Monday, March 10, 2014 at 1:30 p.m., or as soon thereafter as they may be heard by the Court at Courtroom 11, 19th Floor, 450 Golden Gate Ave., San Francisco, CA, plaintiffs will move ex parte for a temporary restraining order and, after a hearing has been held, an order prohibiting, enjoining, and restraining defendants National Security Agency, United States of America, Department of Justice, Barack H. Obama, Keith B. Alexander, Eric H. Holder, Jr., and James R. Clapper, Jr. (in their official capacities) (collectively, the “government defendants”) and all those acting in concert with them from destroying any evidence relevant to the claims at issue in this action, including but not limited to prohibiting the destruction of any telephone metadata or “call detail” records.

Notice of this motion has been given to opposing counsel. Attached to the Cohn Declaration filed herewith as Exhibit E are email exchanges between parties’ counsel between on February 26, 2014, and this morning, March 10, 2014, in which plaintiffs have consistently stated their intentions to seek relief from this court unless the government clarifies its intention to preserve all relevant evidence in the two cases consistent with its obligations in both cases and the preservation order in *Jewel v. NSA* that reaches the same telephonic records at issue in *First Unitarian Church v. NSA*.

This matter became an emergency matter because on Friday, March 7, based on a mistaken belief that no preservation order existed for the material at issue, and without consultation with plaintiff or this Court, the FISC denied the government’s motion to be allowed to preserve the telephone records it had collected. Late Friday, the government served notice in the *First Unitarian* case that it intended to begin destroying the records.

REASONS WHY RELIEF SHOULD BE GRANTED

The government defendants have given notice that they plan to begin destroying telephone metadata (“call detail record”) evidence relevant to this lawsuit tomorrow, **Tuesday Morning, March 11, 2014**. ECF No. 85 in *First Unitarian v. NSA*, No. 13-cv-3287-JSW. Plaintiffs respectfully request that the Court **today** issue an immediate temporary restraining order to prevent the destruction of evidence before the Court has an opportunity to determine whether destruction of

1 this evidence is contrary to the Court’s November 16, 2009 evidence preservation order (ECF
2 No. 51) or otherwise contrary to the government defendants’ discovery obligations.

3 The purpose of a TRO is to preserve the status quo and prevent irreparable harm “just so long
4 as is necessary to hold a hearing, and no longer.” *Granny Goose Foods, Inc. v. Brotherhood of*
5 *Teamsters*, 415 U.S. 423, 439 (1974). This is exactly what is needed here.

6 There has been litigation challenging the lawfulness of the government’s telephone metadata
7 collection activity, Internet metadata collection activity, and upstream collection activity pending in
8 the Northern District of California continuously since 2006. The government has been under
9 evidence preservation orders in those lawsuits continuously since 2007.

10 The first-filed case was *Hepting v. AT&T*, No. 06-cv-0672 (N.D. Cal). It became the lead
11 case in the MDL proceeding in this district, *In Re: National Security Agency Telecommunications*
12 *Records Litigation*, MDL No. 06-cv-1791-VRW (N.D. Cal). On November 6, 2007, this Court
13 entered an evidence preservation order in the MDL proceeding. ECF No. 393 in MDL No. 06-cv-
14 1791-VRW. One of the MDL cases, *Virginia Shubert, et al., v. Barack Obama, et al.* No. 07-cv-
15 0603-JSW (N.D. Cal.), remains in litigation today before this Court, and the MDL preservation order
16 remains in effect today as to that case.

17 In 2008, movants filed this action—*Jewel v. NSA*—and this Court related it to the *Hepting*
18 action. This Court entered an evidence preservation order in *Jewel*. ECF No. 51. The *Jewel*
19 evidence preservation order remains in effect as of today.

20 The government has never sought to seek clarification of its preservation obligations
21 regarding telephone metadata records from this Court or raised the issue with plaintiffs. Instead, the
22 government defendants chose to raise the issue of preservation of telephone metadata records in an
23 ex parte proceeding before the Foreign Intelligence Surveillance Court, without any notice to
24 plaintiffs and without mentioning its obligations with regard to the same telephone records in *Jewel*
25 *v. NSA* and *Shubert v. Obama*. Plaintiffs learned of the government’s motion by reading the news
26 media, and asked counsel for the government defendants to explain why they had not told the FISC
27 about the *Jewel* evidence preservation order. *See* Cohn Decl, Exh. E.

1 Indeed, the government is aware and has acknowledged that destruction of the information in
2 question may conflict with the preservation orders issued in this and related cases: “While the
3 Court’s Primary Order requires destruction of the BR metadata no longer than five years (60 months)
4 after its initial collection, such destruction could be inconsistent with the Government’s preservation
5 obligations in connection with civil litigation pending against it. Accordingly, to avoid the
6 destruction of the BR metadata, the Government seeks an amendment to the Court’s Primary Order
7 that would allow the NSA to preserve and/or store the BR metadata for non-analytic purposes until
8 relieved of its preservation obligations, or until further order of this Court under the conditions
9 described below.” Government’s Motion for Second Amendment to Primary Order, FISC No. BR
10 14-01 (February 25, 2014). Although the government’s motion in the FISC did not discuss the
11 preservation order in *Jewel*, this preservation order includes *the same* records at issue in *First*
12 *Unitarian*.

13 **LEGAL STANDARD FOR TEMPORARY RESTRAINING ORDER**

14 “A plaintiff seeking a [TRO] must establish that he is likely to succeed on the merits, that he
15 is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities
16 tips in his favor, and that an injunction is in the public interest.” *Network Automation, Inc. v.*
17 *Advanced Sys. Concepts*, 638 F.3d 1137, 1144 (9th Cir. 2011) (quoting *Winter v. Natural Res.*
18 *Defense Council, Inc.*, 555 U.S. 7 (2008)).

19 **A. Likelihood of Success**

20 The *Jewel* preservation order required the Government to “preserve evidence that may be
21 relevant to this action.” The *Jewel* complaint alleged unlawful and unconstitutional acquisition of
22 call-detail records, including the “call-detail records collected under the National Security Agency
23 (NSA) bulk telephony metadata program” that the Government proposed to destroy.

24 Plaintiffs sought, among other relief, an injunction “requiring Defendants to provide to
25 Plaintiffs and the class an inventory of their communications, records, or other information that was
26 seized in violation of the Fourth Amendment.” Complaint, Prayer for Relief. This would be
27 impossible if the records are destroyed. While the Plaintiff ultimately want the call-detail records
28

1 destroyed at the conclusion of the case, there is no doubt the call-records “may be relevant” in the
2 interim.

3 The Jewel order also required the Government to cease “destruction, recycling, relocation, or
4 mutation of such materials.” Thus, the proposed destruction would be in direct violation of the
5 Jewel preservation order.

6 **B. Irreparable Harm**

7 If the government proceeds with its planned destruction of evidence, the evidence will be
8 gone. This is by definition irreparable.

9 **C. Balance of Equities**

10 While the Government contends it is required by the FISC to destroy the records
11 immediately, the FISC order belies this assertion. The FISC denied the government's motion
12 without prejudice to bringing another motion with additional facts and the FISC plainly was not
13 informed of the preservation order in Jewel or even of its existence. The FISC clearly contemplated
14 that the evidence destruction could wait while the government prepared and filed another motion,
15 and continue until the Court considered and ruled on the motion.

16 **D. Public Interest**

17 These records are both an affront to the rights of millions of Americans and proof of their
18 violation. Plaintiffs have no objection to severe restrictions on the Government’s right to access and
19 use the information, which will address the public interest in the documents being destroyed.
20 However, it remains in the public interest to wait a short period of time before taking action, so that
21 the fate of the documents can be addressed in an orderly fashion.

22 The necessity for this ex parte application could have been easily avoided had the
23 government defendants followed the discovery and evidence preservation practices customary in this
24 District. They could have, but did not, raised the issue of preserving telephone metadata records in
25 the CMC statement meet-and-confer process in September 2013 (three months after the government
26 defendants publicly acknowledged the phone records program), or at the Case Management
27 Conference itself on September 27, 2013. They could have, but did not, raised this issue in the CMC
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