

1 CINDY COHN (SBN 145997)  
cindy@eff.org  
2 LEE TIEN (SBN 148216)  
3 KURT OPSAHL (SBN 191303)  
4 JAMES S. TYRE (SBN 083117)  
5 MARK RUMOLD (SBN 279060)  
6 ANDREW CROCKER (SBN 291596)  
7 DAVID GREENE (SBN 160107)  
ELECTRONIC FRONTIER FOUNDATION  
815 Eddy Street  
San Francisco, CA 94109  
Telephone: 415/436-9333; Fax: 415/436-9993

8 RICHARD R. WIEBE (SBN 121156)  
wiebe@pacbell.net  
9 LAW OFFICE OF RICHARD R. WIEBE  
10 One California Street, Suite 900  
11 San Francisco, CA 94111  
Telephone: 415/433-3200; Fax: 415/433-6382

RACHAEL E. MENY (SBN 178514)  
rmeny@kvn.com  
PAULA L. BLIZZARD (SBN 207920)  
MICHAEL S. KWUN (SBN 198945)  
AUDREY WALTON-HADLOCK (SBN 250574)  
BENJAMIN W. BERKOWITZ (SBN 244441)  
JUSTINA K. SESSIONS (SBN 270914)  
KEKER & VAN NEST, LLP  
633 Battery Street  
San Francisco, CA 94111  
Telephone: 415/391-5400; Fax: 415/397-7188

THOMAS E. MOORE III (SBN 115107)  
tmoore@rroyselaw.com  
ROYSE LAW FIRM, PC  
1717 Embarcadero Road  
Palo Alto, CA 94303  
Telephone: 650/813-9700; Fax: 650/813-9777

ARAM ANTARAMIAN (SBN 239070)  
aram@eff.org  
LAW OFFICE OF ARAM ANTARAMIAN  
1714 Blake Street  
Berkeley, CA 94703  
Tel.: 510/289-1626

15 *Counsel for Plaintiffs*

16 **UNITED STATES DISTRICT COURT**  
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
18 **OAKLAND DIVISION**

19 CAROLYN JEWEL, TASH HEPTING, )  
20 YOUNG BOON HICKS, as executrix of the )  
21 estate of GREGORY HICKS, ERIK KNUTZEN )  
22 and JOICE WALTON, on behalf of themselves )  
and all others similarly situated, )

23 Plaintiffs, )

24 v. )

25 NATIONAL SECURITY AGENCY, *et al.*, )

26 Defendants. )

Case No.: 4:08-cv-4373-JSW

**IMMEDIATE ACTION REQUESTED**

**PLAINTIFFS' EMERGENCY  
APPLICATION TO ENFORCE THE  
COURT'S TEMPORARY RESTRAINING  
ORDER**

**HEARING REQUESTED FOR  
JUNE 6, 2014**

Courtroom 5, 2nd Floor  
The Honorable Jeffrey S. White

1 By this emergency application, plaintiffs seek immediate enforcement of the evidence  
2 preservation Temporary Restraining Order (the “TRO”) entered by the Court on March 10, 2014  
3 (ECF No. 189) and reaffirmed in the Court’s April 17, 2014 Amended Minute Order (ECF  
4 No. 206). Because of the urgency of this matter, plaintiffs respectfully request that the Court hear  
5 the parties on this matter on **Friday, June 6, 2014** at a time convenient to the Court. Plaintiffs  
6 have conferred with counsel for the plaintiffs in *Shubert v. Obama* and they join in this application.  
7 Plaintiffs also informed defendants, as of 10:30 am PDT today, that they are seeking this relief.  
8 Cohn Decl., Exh. E.

9 In its TRO, the Court ordered the government to refrain from any further destruction of  
10 evidence pending final resolution of the parties’ dispute over the government’s evidence  
11 preservation obligations: “Accordingly, it is HEREBY ORDERED that Defendants, their officers,  
12 agents, servants, employees, and attorneys, and all those in active concert or participation with  
13 them are prohibited, enjoined, and restrained from destroying *any potential evidence relevant to the*  
14 *claims at issue in this action*, including but not limited to prohibiting the destruction of any  
15 telephone metadata or ‘call detail’ records, pending further order of the Court.” ECF No. 189 at 2  
16 (emphasis added). In its Amended Minute Order, the Court reiterated that the TRO’s prohibition  
17 on any evidence destruction remains in effect until the Court has finally decided the evidence  
18 preservation dispute: “The Court extends the temporary restraining order issued on March 10,  
19 2014 until a final order resolving the matter is issued.” ECF No. 206 at 1.

20 In communications with the government this week, plaintiffs learned to their surprise that  
21 the government is continuing to destroy evidence relating to the mass interception of Internet  
22 communications it is conducting under section 702 of the Foreign Intelligence Surveillance Act.  
23 This would include evidence relating to its use of “splitters” to conduct bulk interceptions of the  
24 content of Internet communications from the Internet “backbone” network of AT&T, as described  
25 in multiple FISC opinions and in the evidence of Mark Klein and J. Scott Marcus, ECF Nos. 84,  
26 85, 89, 174 at Ex. 1.

27 Specifically, in connection with the modification of the evidence preservation briefing  
28 schedule earlier this week, plaintiffs’ counsel sought assurances from the government that no

1 evidence destruction would occur if the briefing schedule were extended. Cohn Decl. Ex. A. After  
2 initially giving a cryptic response, the government finally confirmed today that in its view the TRO  
3 does *not* require it to preserve evidence relating to Internet content interceptions and that it has not  
4 stopped the routine destruction of such evidence. Cohn Decl., Exs. B, C and D. The government  
5 stated: “The Court is presently considering whether the Government must preserve material  
6 obtained under Section 702 of FISA in the context of the Jewel/Shubert litigation. In the  
7 meantime, pending resolution of the preservation issues in this case, we have been examining with  
8 our clients how to address the preservation of data acquired under the Section 702 program in light  
9 of FISC imposed data retention limits (even though we disagree that the program is at issue in  
10 Jewel and Shubert).” This, quite plainly, means that the government has interpreted the March 10,  
11 2014 TRO as putting it under no current obligation to preserve evidence it has collected under  
12 section 702 despite the clear language of the TRO and the context in which it was entered.

13 Once again, the government has apparently secretly and unilaterally reinterpreted its  
14 obligations under the Court’s evidence preservation orders, without notice to the Court or to  
15 plaintiffs, and has determined that it need not engage in preservation of relevant evidence. This  
16 time, however, there can be no dispute that the government was aware of broad scope of the TRO  
17 and the Court’s intention that no destruction occur of evidence plaintiffs contend is relevant until  
18 the Court has decided the matter.

19 Plaintiffs request an immediate hearing before the Court on Friday, June 6, 2014 to enforce  
20 the existing TRO and to impose on the government whatever further measures are necessary to  
21 ensure that no destruction of evidence occurs before the Court has decided the pending evidence  
22 preservation dispute.

23 Dated: June 5, 2014

Respectfully submitted,

24 \_\_\_\_\_  
/s/ Cindy Cohn

25 CINDY COHN  
26 LEE TIEN  
27 KURT OPSAHL  
28 JAMES S. TYRE  
MARK RUMOLD  
ANDREW CROCKER

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

DAVID GREENE  
ELECTRONIC FRONTIER FOUNDATION

RICHARD R. WIEBE  
LAW OFFICE OF RICHARD R. WIEBE

THOMAS E. MOORE III  
ROYSE LAW FIRM

RACHAEL E. MENY  
MICHAEL S. KWUN  
BENJAMIN W. BERKOWITZ  
JUSTINA K. SESSIONS  
AUDREY WALTON-HADLOCK  
PAULA L. BLIZZARD  
KEKER & VAN NEST LLP

ARAM ANTARAMIAN  
LAW OFFICE OF ARAM ANTARAMIAN

*Counsel for Plaintiffs*