

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JEFFREY S. WHITE

VIRGINIA SHUBERT, et al,)
)
Plaintiffs,)

vs.)

NO. C 07-0693 JSW

GEORGE W. BUSH, et al,)
)
Defendants.)

-----)
CAROLYN JEWEL, et al,)
)
Plaintiffs.)

vs.)

NO. C 08-4373 JSW

NATIONAL SECURITY AGENCY, et al,)
)
Defendants.)

San Francisco, California
Friday
September 27, 2013
1:30 p.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES :

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BY: ANTHONY COPPOLINO, ESQ.

P R O C E E D I N G S

1
2 **SEPTEMBER 27, 2013**

1:44 p.m.

3 **THE CLERK:** Calling Case No. C 07-693, Virginia
4 Shubert, et al versus George W. Bush, et al; and C 08-4373,
5 Carolyn Jewel, at al versus National Security Agency.

6 Counsel, please step forward to the podiums and state your
7 appearances.

8 **MR. COPPOLINO:** Good afternoon, your Honor. Anthony
9 Coppolino, Department of Justice Civil Division, for the United
10 States.

11 **THE COURT:** Good afternoon.

12 **MR. WHITMAN:** Good afternoon, your Honor. Jim
13 Whitman from the Department of Justice representing the
14 individual federal defendants.

15 **THE COURT:** Good afternoon.

16 **MR. WEIBE:** Good afternoon, your Honor. Richard
17 Weibe representing the Jewel plaintiffs.

18 **THE COURT:** Good afternoon.

19 **MR. MAAZEL:** Good afternoon, your Honor. Ilann
20 Maazel representing the Shubert plaintiffs.

21 **THE COURT:** Good afternoon.

22 **MS. COHN:** Good afternoon, your Honor. Cindy Cohn
23 representing the Jewel plaintiffs.

24 **THE COURT:** Good afternoon.

25 **MR. MOORE:** Good afternoon, your Honor. Tom Moore

1 also representing the Jewel plaintiffs.

2 **THE COURT:** All right. Welcome, counsel.

3 All right. So at this point I want to say something; that
4 I have reviewed the rather extensive joint case management
5 statement and proposed order in both of the cases, the Jewel
6 and the Shubert cases, and so I'm very familiar with the
7 parties' positions.

8 I'm also very familiar with the case, obviously, because
9 it's been -- there's a lot of history to the case.

10 So I want to go over some things. I'm going to treat
11 this -- I'm going to conduct this case management conference
12 like I do with my pretrial conferences, which really involves
13 the Court having read all the extensive briefing and filing in
14 the case, being familiar with it, tells you the way this case
15 is going to go, having taken into account all the parties'
16 different positions on different procedural and substantive
17 issues.

18 So let me just review where I think the case is. And I'm
19 going to direct the parties to jointly order a transcript. So
20 if there is something that you miss in what I'm about to say,
21 you'll have it there.

22 And what I'll do is, I'll give you -- if there is any
23 additional issues that the parties wish to raise that are --
24 haven't been raised in the papers and the Court hasn't dealt
25 with, then I will give you that opportunity; but it's a very,

1 very limited opportunity, I'll tell you right now.

2 Because, again, you did make -- all of you have made your
3 positions well known on many of the issues that I'm addressing,
4 and I'm going to give you my rulings on those essentially and
5 schedule some briefing.

6 So in the Court's order dated July 23rd the Court required
7 the parties to submit further briefing. This case raises
8 important threshold legal issues that must be addressed and,
9 accordingly, the Court set this status conference in order to
10 facilitate the required further briefing.

11 This conference is not an opportunity for the parties to
12 engage in substantive legal arguments, but, rather, for the
13 Court to set out clearly its requirements and timing for
14 additional briefing on the following subjects. And I'm
15 numbering each of those subjects. And, again, when you get the
16 transcript, you'll have these advisedly, because I'm going to
17 tell you later who is briefing what, who is filing the opening
18 brief on which issue.

19 So issue number one -- and this is, again, what I'm about
20 to give you, the subjects for the next phase of this case in
21 the additional briefing.

22 So, number one, the Court has already determined that
23 FISA, F-I-S-A, preempts the state secrets privilege for the
24 plaintiff's statutory claims. However, the parties have not
25 yet addressed, and the Court requires further briefing, on

1 whether FISA preempts the application of the state secrets
2 privilege to plaintiff's constitutional claims. This is a
3 narrow issue and is not, as the plaintiff's have noted, an
4 opportunity for the defendants to reargue or seek
5 reconsideration of the issues already decided by the Court. So
6 that's issue number one.

7 Issue number two is: Must the Court follow FISA's
8 procedural mechanisms when adjudicating the constitutional
9 claims?

10 Number three: Assuming the state secrets privilege does
11 not bar plaintiffs' constitutional claims, and that
12 Section 1806(f) provides the mechanism for review of submitted
13 materials, plaintiffs are tasked with the burden to establish
14 standing to sue without resulting in impermissible damage to
15 ongoing national security efforts. And I'm referring here to
16 the recent case of *Clapper versus Amnesty International USA*,
17 133 Supreme Court 1138 at 1149, Note 4, decided on -- at 2013,
18 where the Supreme Court notes that pursuant to hypothetical in
19 camera proceedings permitted under Section 1806(f), quote:

20 "Quote: The Court's post disclosure decision
21 about whether to dismiss the suit for lack of
22 standing would surely signal to the terrorist whether
23 his name was on the list of surveillance targets,
24 unquote."

25 This Court requires supplemental briefing to address

1 standing in light of the *Clapper* Court's concern about national
2 security.

3 And, lastly, issue number four. In light of the ongoing
4 disclosures and declassification of the materials involving the
5 government's continuing surveillance activities, the Court
6 requires further briefing on the impact on defendant's
7 assertion of the risks to national security presented by this
8 case. And I'll have a little bit more to say about that later.

9 So now I'm going to give you the schedule for briefing and
10 then I'll follow that with what I said before, who files first
11 on which issues.

12 So the schedule is as follows. First of all, as a
13 preamble, in order to accommodate the outstanding FOIA
14 proceeding, briefing shall not commence until after
15 October 31st, 2013. Should the FOIA issues continue to be
16 litigated and good cause is shown why the litigation may affect
17 this schedule, the Court will consider an extension of time.
18 Again, for good cause shown.

19 So with that said, the opening briefs are due on
20 December 20th, 2013. The opposition briefs are due on
21 January 31, 2014. And the reply briefs are due February 28th,
22 2014.

23 So those dates are December 20th of '13, January 31 of
24 '14, and last brief February 28th of '14.

25 And the Court will set a hearing date upon -- in a further

1 written order.

2 So now I'm going to tell you who is starting with which
3 issues, so who is going to do the opening brief.

4 The defendants will file opening briefs -- must cover in
5 their opening briefs issues one, two and four, which I have
6 outlined before.

7 And the plaintiff's opening brief is only -- must only
8 cover issue number three. So those are the opening briefs, and
9 the parties will respond and reply on the schedule that the
10 Court mentioned.

11 Now, there are other matters that I want to discuss as
12 well before I ask you if there is any -- ask the parties if
13 there is anything that they wish to address within the ambit of
14 what I said. And I have a question or two as well.

15 So pursuant to the parties' stipulation, the Court hereby
16 stays the claims against the personal capacity defendants and
17 stays the substitution of deceased plaintiff, Gregory Hicks,
18 until further order of the Court upon a showing of good cause.

19 Number two: Discovery shall not commence until resolution
20 of the threshold legal issues required further briefing, until
21 those are ruled on. However, and this is something that the
22 defendants -- the plaintiffs suggest and I think it's an
23 excellent suggestion.

24 However, the current record must be reviewed and corrected
25 or augmented as necessary. Any materials already submitted

1 ex parte by defendants must be reviewed to determine whether
2 any of those records are now declassified and should be put in
3 the public record of this case.

4 So by no later than December 20th, 2013 the defendants
5 shall file revised declarations and exhibits to accurately
6 reflect all of the information that has now been declassified
7 or disclosed, as the Court believes that the defendants are in
8 a better position to ascertain those things and represent them
9 to the Court than the plaintiffs are.

10 And what I'm going to do is the following. I'm going in
11 addition allow the plaintiffs to respond to that filing.

12 Ms. Ottolini, let's pick a date about two weeks after
13 December 20th?

14 **THE CLERK:** That would be January 3rd, your Honor.

15 **THE COURT:** And what I would like is simply a -- this
16 is not a response that's required. It might simply be you have
17 nothing to say, but given all that's happened and all that's
18 happened and all that's been put in the public -- in the public
19 domain in light of disclosures, both by government people and,
20 also, others, it may be that with all due good faith, the
21 defendants don't include certain things that the plaintiffs
22 believe should be disclosed. You can respond and then I will
23 issue orders accordingly as to whether or not further
24 disclosures or corrections to the filed documents and
25 declarations should be filed by the defendants. I don't need a

1 reply on that because I suspect there is not going to be a lot
2 of controversy as to that issue.

3 So I have a question of the parties. I'm going to ask the
4 parties' positions regarding the recently filed and related
5 *First Unitarian Church versus NSA* case, which is Case No.
6 13-3287 with particular -- I'm particularly interested in any
7 overlap or coordination with that case's schedule. So if
8 anybody -- which one of you wants to talk about that first?

9 **MR. WEIBE:** I will speak to that, since I'm counsel
10 in both cases.

11 **THE COURT:** Yes.

12 **MR. WEIBE:** There is a case management conference
13 scheduled in that case, as your Honor probably knows, for
14 November 8th.

15 **THE COURT:** Yes.

16 **MR. WEIBE:** And that may be a better forum to present
17 possible coordination to the Court, given that we have been
18 presented with a lot of new information here today, and it may
19 make more sense to put that over until that time.

20 **THE COURT:** That's fine. But I wanted to tee that up
21 for you.

22 **MR. WEIBE:** Yeah.

23 **THE COURT:** Do the defendants have anything they want
24 to say on that issue? Are you content to wait until -- I don't
25 know if you're involved in that, counsel?

1 **MR. COPPOLINO:** We are, your Honor. We're
2 representing the government in that case as well.

3 We certainly don't object to the related case. I think
4 it's already been related to the Court.

5 There is a response to the complaint due on the 11th of
6 November, and we would anticipate at that time filing a
7 response to the complaint, most likely a dispositive motion.
8 So that will be in the mix on our side as well.

9 I'm not sure what else, you know, you've inquired about
10 that I could discuss.

11 **THE COURT:** Well, do you have any objection to
12 discussing the coordination issues at the case management
13 conference in the *First Unitarian Church* case?

14 **MR. COPPOLINO:** No. I think that makes sense, your
15 Honor. It will be right before we file, so we will be quite
16 far down the road on what we plan to do in response to the
17 complaint.

18 But, nonetheless, I think it would be. It -- I don't see
19 any objection to any reason not to discuss how the cases are to
20 be coordinated. You may find they go off on different tracks
21 anyway.

22 **THE COURT:** Okay. Well, we'll discuss it at that
23 time.

24 So the next question is -- I've finished the Court's
25 agenda. Is there anything -- do the parties have anything

1 further they wish to address, again, without arguing
2 substantive legal positions or issues that we haven't
3 discussed? Because this is what the Court believes is the
4 appropriate negotiation step to be able to move the case along.

5 Anything you want to discuss?

6 **MR. WEIBE:** Yes, there is, your Honor.

7 With respect to the issue that you've asked the plaintiffs
8 to brief, issue number three, there are a couple of points of
9 clarification that we'd seek from the Court.

10 The first point is, obviously, as the Court has ruled, we
11 have not had any discovery at this point. We believe that
12 there is non-secret evidence that would be relevant to proving
13 our standing that we can't obtain without discovery. And so
14 we're put in a conundrum to brief this issue at this time to
15 show how we can prove our claim with non-secret evidence
16 potentially when we haven't had access to the tools of
17 discovery to obtain that evidence. That's one point on that
18 issue.

19 **THE COURT:** All right. Before we get to the next
20 point, what's the government's position on that?

21 **MR. COPPOLINO:** Well, your Honor, our position is
22 that you've addressed the issues, I think, in a manner that we
23 would find acceptable and as we set forth in the case
24 management conference, we think that these threshold issues
25 that you have identified -- and particularly number four, which

1 is the one directed at us to update the status of the national
2 security information issues on this case -- should precede any
3 discovery and that if discovery were to occur, particularly
4 discovery that is directed at telecom companies or former
5 senior officials of the intelligence community, that that is
6 going to immediately become the number one dispute in the case
7 and immediately lead to protective order motions, which is
8 going to wipe out this schedule and these issues. So there is
9 a practical consideration as well.

10 But I agree with the Court that all of these issues --
11 and, in particular, the most important one for us is number
12 four -- should be addressed first. You should have a briefing
13 on the ongoing national security issues involved with
14 litigating this case before discovery occurs. That's our
15 position.

16 **THE COURT:** Well, I'm not going to reconsider my
17 position on discovery. You'll just have to do the best you
18 can. The request is denied.

19 What's the next concern?

20 **MR. WEIBE:** The next issue is that even in briefing,
21 that on the record of what the government now concedes is
22 public, we won't have that information until they file on
23 November 20 -- or on December 20th, and we -- but we're
24 supposed to file on December 20th, too. So, again, we're in a
25 conundrum of not being able to --

1 **THE COURT:** Stop. You're right. I think your
2 position is correct, and I think we need to change the schedule
3 because I think to make this a more -- a full and more robust
4 presentation of the issues, we need to have time -- we need to
5 change the schedule so that the plaintiffs file on issue number
6 three after the government files on issue number four and,
7 also, corrects the record as I have directed.

8 So we should then -- we're going to need to then give
9 the -- on issue number four, I'm going to have a separate
10 opening brief schedule for January 31st, is what --

11 **MR. WEIBE:** Is that issue number three, your Honor?

12 **THE COURT:** Issue number -- yes.

13 **MR. WEIBE:** Our issue?

14 **THE COURT:** Yes, issue number three. And then we'll
15 give a concomitant amount of time to the government, two weeks
16 thereafter, to file their response.

17 **THE CLERK:** Two weeks?

18 **THE COURT:** Yes.

19 **THE CLERK:** Would be February 14th.

20 **THE COURT:** And one week later to file a reply.

21 **THE CLERK:** February 21st.

22 **THE COURT:** All right.

23 **MR. COPPOLINO:** Your Honor, excuse me. Let me just
24 clarify. I'm sorry if I'm a little thick.

25 So on December 20th the government addresses issues one,

1 two and four.

2 **THE COURT:** Correct.

3 **MR. COPPOLINO:** The plaintiffs address issue three
4 for their opening brief on January 31.

5 **THE COURT:** Correct.

6 **MR. COPPOLINO:** Okay. So then the next brief, I take
7 it, would be the government's response to the plaintiff's
8 January 31 filing, and you set that for February 14?

9 **THE COURT:** Correct.

10 **MR. COPPOLINO:** And then I kind of lost the --

11 **THE COURT:** And the reply, the plaintiff's reply a
12 week thereafter.

13 **MR. COPPOLINO:** So is there nothing left on the 28th
14 any more?

15 **THE CLERK:** Yes. That's your reply.

16 **THE COURT:** That's the reply brief on the other
17 issues. I've just split, split out that issue because I think
18 that the plaintiff's have made a very good point on the order
19 in which the Court set this.

20 **MR. COPPOLINO:** I'm sorry, your Honor.
21 December 20th, our opening. January 31, their opening on
22 number three. February 20 --

23 **THE CLERK:** And their opposition, right? Am I
24 correct?

25 **THE COURT:** And their opposition to the issue --

1 brief on issue number four.

2 **MR. COPPOLINO:** Very well. February 21, government's
3 reply. February 28th, plaintiff's reply?

4 **MS. COHN:** No. I think it's the other way around.

5 **MR. COPPOLINO:** I'm sorry. I got lost.

6 **THE COURT:** Let me have my courtroom deputy restate
7 the dates here.

8 **THE CLERK:** Correct me if I'm wrong. For the
9 defendant's opening brief, it's due December 20th, 2013.

10 The opposition to that brief is due January 31st, 2014.

11 And the reply to that brief is due February 28th, 2014.

12 For the plaintiff's opening, their opening is due
13 January 31st 2014.

14 The opposition to that filing is February 14, 2014.

15 And the reply to that is February 21st, 2014.

16 **THE COURT:** Right. And you have the briefing on the
17 rest of the -- the rest of the briefing, as I stated it before,
18 with respect to the other issues; issues one, two and four.
19 All right?

20 What's your next issue that you would like to bring up,
21 counsel?

22 **MR. WEIBE:** Thank you, your Honor, by the way, for
23 that adjustment in the briefing schedule.

24 **THE COURT:** It makes absolute sense. I think it's
25 correct.

1 **MR. WEIBE:** Now, just so the record is clear, it's
2 our understanding that the defendants will both be providing
3 revised declarations and assertions regarding state secrets, as
4 well as going back and redacting and providing public versions
5 of whatever is now public in the earlier secret declarations,
6 is that correct?

7 **THE COURT:** Yes. They will essentially be filling in
8 the blanks, as it were, based upon declassifications and public
9 disclosures.

10 And then, also, remember that issue number -- so number
11 three has to do withstanding, but they are also briefing issue
12 number four, which is the impact of that -- of those
13 disclosures and declassifications. So they are doing both of
14 those things.

15 **MR. WEIBE:** Yes, your Honor.

16 **THE COURT:** And then you'll have your record on
17 standing. And I know you disagree, but you'll have to file
18 based upon what has been -- is now in the record.

19 And if for some reason the briefing indicates this is an
20 impossible task and we need discovery, we'll have to then get
21 into the state secrets issues, but for now this is the way the
22 Court requires compartmentalizing the issues.

23 **MR. WEIBE:** Understood, your Honor.

24 A couple of slight tweaks, if I could suggest, to the
25 schedule?

1 **THE COURT:** Yes.

2 **MR. WEIBE:** You had said that we would have
3 January 3rd to respond to the December 20th filing we just
4 talked about.

5 **THE COURT:** 31st.

6 **MR. WEIBE:** This is -- not the briefing, but you said
7 that in response to their revised assertion of the state
8 secrets privilege, which we were just talking about.

9 **THE COURT:** Yes.

10 **MR. WEIBE:** If we could have two weeks to respond to
11 that, which would be January 3rd.

12 **THE COURT:** Okay. I meant the 31st would be --

13 **THE CLERK:** It is at the moment set as January 3rd
14 for number -- in other matters number two on the second page.

15 **THE COURT:** For number two, right.

16 **THE CLERK:** On the second page, in other matters.

17 **THE COURT:** Yes. In other matters is -- yes, this is
18 under -- that's -- okay.

19 What I'm talking about that's going to happen on
20 January 3rd is simply a response to the government's exposition
21 about what is now public. So you -- the Court's view is you
22 could easily look at that and say: Yeah, that's all public,
23 but there's more stuff that they haven't -- you know, that's
24 been declassified and there is a properly citable source, and I
25 would simply expect you to give some counter or additional

1 designations.

2 **MR. WEIBE:** Exactly, your Honor. And all I wanted to
3 suggest with respect to that was to respectfully request from
4 the Court an additional week, January 10th, in light of the
5 holiday period.

6 **THE COURT:** Fine. You've got it.

7 **MR. WEIBE:** Thank you, your Honor.

8 **THE COURT:** You're on a roll now.

9 **MR. WEIBE:** I tell you...

10 **MR. COPPOLINO:** I'm sorry. I don't see anything that
11 was due on January 3rd.

12 **THE COURT:** Yes. It was the -- it was only the
13 plaintiffs' response to your further disclosures.

14 **MR. COPPOLINO:** I see.

15 **THE COURT:** Which I called other matters. That's all
16 that it is, because I don't think that's going to take a lot of
17 time and there may not be any such filing. If the government
18 does a complete and expansive job, there should be nothing for
19 the plaintiff to say in addition to that; but I don't feel it's
20 appropriate not to give them an opportunity to chime in on that
21 as well.

22 Anything further, counsel?

23 **MR. WEIBE:** Yes, there is. Would the Court be open
24 -- you've asked us to address our standing in issue number
25 three.

1 **THE COURT:** Right.

2 **MR. WEIBE:** And there is one part of one claim where
3 we think we can prove our standing with public evidence. And
4 that's our Fourth Amendment claim, to the extent it goes to the
5 current ongoing internet interceptions.

6 Would the Court be open to us briefing that issue as part
7 of our briefing on number three?

8 **THE COURT:** Yes.

9 **MR. WEIBE:** Thank you, your Honor.

10 **THE COURT:** As it relates to standing, yes.

11 **MR. WEIBE:** As part of a partial summary judgment
12 motion.

13 **THE COURT:** Yes. You can call it whatever you want,
14 but, yes, you certainly can do that.

15 **MR. WEIBE:** Thank you, your Honor.

16 **MR. COPPOLINO:** Excuse me. If I may interject, your
17 Honor?

18 **THE COURT:** Yes.

19 **MR. COPPOLINO:** Are we setting a schedule on that or
20 are they just going to fold that into the --

21 **THE COURT:** They are going to fold that into the
22 existing schedule with respect to issue number three.

23 **MR. WEIBE:** Yes.

24 **MR. COPPOLINO:** Thank you, your Honor.

25 **MR. WEIBE:** One final point on that schedule for

1 issue number three.

2 It's currently January 31st, plaintiff's opening.
3 February 14th, plaintiff's -- or defendant's opposition.
4 February 21st, plaintiff's reply.

5 Could we extend the reply to February 28th, which is when
6 the defendant's reply is due.

7 **THE COURT:** All right. It's granted.

8 **MR. WEIBE:** Thank you, your Honor.

9 **THE COURT:** All right?

10 **MR. WEIBE:** With the Court's permission, could I
11 consult with my team?

12 **THE COURT:** Of course. Of course. Just go ahead.
13 Please do.

14 **MR. WEIBE:** I just want to make sure --

15 **THE COURT:** You can do the same thing, of course.
16 All of you can do that.

17 (Discussion held off the record amongst counsel.)

18 **THE COURT:** Any further issues from the plaintiff
19 that you wish to bring up in light of the Court's statements.

20 **MR. WEIBE:** Not at this time, your Honor.

21 **THE COURT:** Counsel?

22 **MR. COPPOLINO:** Just one issue, your Honor. Thank
23 you.

24 So on the question on the review of the declarations, and
25 Mr. Weibe, I think, clarified that you want not only revised

1 declarations, but declassified -- declassified and public
2 version of the prior declaration that we submitted to the
3 Court, is that correct?

4 **THE COURT:** That's correct.

5 **MR. COPPOLINO:** One issue I need to clarify and
6 request is that that reply to the declarations that were filed
7 with this Court, with your Honor, in 2012. In this litigation
8 there have been prior assertions of the state secrets privilege
9 in Shubert and in Jewel, I believe, in 2007 and 2009.

10 So what I understood, and I'd like a clarification, is
11 that if we could provide the declassified version of the 2012
12 filing, that would bring everything up to date as to what is
13 declassified as of 2012 if we just focused on those classified
14 declarations.

15 **THE COURT:** As opposed to which ones?

16 **MR. COPPOLINO:** As opposed to going back and having
17 to do a classification review on two prior sets of classified
18 declarations, which would basically triple the amount of work
19 that we would have to do and call into question whether we
20 could actually do it simultaneous with filing our brief on the
21 20th.

22 Because to simplify the point, since we're revising the
23 declarations we provided in 2012 and declassifying, those two
24 processes go hand-in-hand. If we then have to go back and do
25 the 2007 and '09 versions, that would really compound the work.

1 What you would get, if we just focused on the 2012
2 filings, is a revised state secrets assertion declaration and
3 the declassified 2012 version, and that would reflect the state
4 of the record as of December 20th, 2013. And it would simplify
5 matters, as opposed to having to do a line-by-line review of
6 two prior sets of declarations prior to the ones that you saw.
7 These were the ones that were submitted to Judge Walker.

8 **THE COURT:** All right. What's your view on that?

9 **MR. WEIBE:** Your Honor, we believe that it's proper
10 to declassify all of the prior declarations, and let me tell
11 you why.

12 It's a matter of fundamental due process. These are
13 matters that are in the record in the case. If there is no
14 longer any justification for keeping them secret, we believe
15 they should be declassified and made matters of public record
16 and for us to see -- and I think it's not just a theoretical
17 concern.

18 One of the things that has come out in the recent
19 declassification of the FISA Court orders have been a number of
20 instances where the FISA Court has found that the government
21 has presented things in a misleading light to it. And we
22 have -- we should have the right to see what has been presented
23 to the Court prior in this case, what is a matter of record in
24 this case to the extent that it's no longer secret.

25 **MR. COPPOLINO:** None of these declarations, your

1 Honor, are before the Court for any particular decision, I
2 would point out, other than the final operative one.

3 And the other issue I would make -- point I would make is
4 that with the declassification decisions made in December of
5 2013, you will have the most up-to-date declassified record at
6 that point.

7 If you decide to go the route they have suggested, it
8 would just increase the workload at the same time we're
9 preparing our briefing on issues one, two, four. So, perhaps,
10 if you go that route, we would need to decouple these processes
11 a bit, because we're trying to get the submission to the Court
12 on the issues that you will be deciding and having not to focus
13 on declassifying particular documents.

14 **THE COURT:** Well, I think -- I would rather have a
15 fulsome record here, so I'm going to require that all the
16 previous declarations be declassified and presented to the
17 Court. All of them, without exception, because I want a full
18 record in this Court. We're deal with some cutting edge issues
19 and I want to make sure that the factual record is the one that
20 the Court could properly consider.

21 I'm not going to kind of buy a pig in a poke here. I'm
22 not ascribing any bad faith to the government, but there has
23 been so much material that has come out, that it's very
24 possible, maybe even probable, that to the extent that the
25 plaintiffs could make out a prima facie showing of standing,

1 they need the fulsome record in order to do that.

2 With the government's resources, I'm not changing the
3 schedule and I'm requiring the full record. Everything that
4 this -- that's been withheld from this Court based upon state
5 secrets or classification that is no longer legally subject to
6 those classifications will be identified.

7 **MR. COPPOLINO:** Thank you, your Honor.

8 **THE COURT:** That's the Court's ruling.

9 **MR. COPPOLINO:** Thank you, your Honor.

10 And we're talking about the ex parte in camera state
11 secrets privileged declarations in Shubert and Jewel, the two
12 cases?

13 **THE COURT:** That's correct. That's correct.

14 Anything further?

15 **MR. COPPOLINO:** I don't believe so, your Honor.

16 **THE COURT:** Anything further?

17 **MR. WEIBE:** Not from the Jewel plaintiffs.

18 **THE COURT:** I'm sorry. I didn't mean to exclude you
19 folks.

20 **MR. MAAZEL:** And not from the Shubert plaintiffs,
21 your Honor.

22 **THE COURT:** All right. Very well. Then I think this
23 is the way to proceed. And I think this will get us whatever
24 the next stage of this case is, either in this Court or another
25 Court. This will get -- at least from this Court's

1 perspective, I think it will get us to a logical next step in
2 this case.

3 Thank you for your appearance, counsel.

4 **MR. WEIBE:** Thank you, your Honor, for your attention
5 than effort.

6 **THE COURT:** Thank you.

7 (Proceedings adjourned.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Wednesday, September 27, 2013