IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Carolyn Jewel et al. Plaintiffs-Appellants, v. National Security Agency et al. Defendants-Appellees.	No. 15-16133

REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

In the motion to dismiss, we showed that the district court erred as a matter of law and abused its discretion when it certified as "final" under Federal Rule of Civil Procedure 54(b) its decision to rule out one of many numerous legal theories plaintiffs have advanced to support their claim that the government has unlawfully intercepted plaintiffs' Internet communications.

In arguing the contrary, plaintiffs ask the Court to disregard controlling Supreme Court and circuit precedent (confirmed by precedent in other circuits) holding that the partial final adjudication of a single claim is not certifiable as "final" under Rule 54(b); mischaracterize the claim they raise on appeal as "distinct" from the claims that remain in district court; and erroneously argue that this Court should "defer" to the district court's one-sentence statement in support of its Rule 54(b)

certification. If plaintiffs were correct that the partial summary judgment order is certifiable under Rule 54(b), the same reasoning would support certification of virtually any interlocutory order partially adjudicating a case.

The government is not seeking to "insulate [its] district court victory from any scrutiny by this Court," Opp. 4—the government just wants to defend that victory in one appeal, rather than in multiple appeals involving virtually the same facts and law. Settled principles of sound judicial administration require dismissal of the appeal.

A. Plaintiffs begin their opposition by asking the Court to defer resolution of the government's motion to dismiss until after briefing on the merits has occurred. The Court, however, should adhere to its normal practice of first addressing a motion to dismiss before requiring the parties to brief a case on the merits. *See* Circuit Rule 27-11(a) (pendency of a dispositive motion automatically stays briefing on the merits). As plaintiffs recognize, Opp. 3, a prior appeal in this lawsuit has already been heard by a merits panel consisting of Judges Pregerson, Hawkins, and McKeown, which is thus familiar with this case and "will be able to efficiently dispose of the motion" Opp. 3, without the need of requiring the parties first to waste considerable effort briefing merits issues that may well be mooted if the case is dismissed for lack of jurisdiction.

Plaintiffs complain that the government's motion "will disrupt and delay the expedited schedule the Court has ordered," noting that their brief is due August 4 and that they have been "diligently working to prepare their brief for filing on that date." Opp. 2. But it was plaintiffs who asked that their appeal be expedited and that the

deadline for their brief be moved up to August 4. The government pointed out the jurisdictional concerns in response to that motion, and urged that merits briefing await disposition of any motion to dismiss for lack of jurisdiction. In granting that motion, this Court was careful to note that, under Circuit Rule 27-11, the briefing schedule "ordinarily will be modified" to accommodate the pendency of a motion to dismiss; and plaintiffs have known since at least June 19 that the government intended to file such a motion.

B. Plaintiffs' arguments why the Court has jurisdiction over this appeal do not withstand scrutiny.

1. Plaintiffs repeatedly ask the Court to "defer[]" to the district court's Rule 54(b) certification. Opp. 8, 16. That request confuses the standards of review applicable to two separate issues. The question whether the district court reached a final decision on a single claim and whether the claims are separable is reviewed de novo, without deference to the district court; while the question whether the district court properly exercised its discretion in entering the certification is afforded deference on appeal. *See Curtiss-Wright Corp.* v. *General Elec. Co.*, 446 U.S. 1, 10 (1980); *Wood* v. *GCC Bend, LLC*, 422 F.3d 873, 879 (9th Cir. 2005); *Gregorian* v. *Izvestia*, 871 F.2d 1515, 1519 (9th Cir. 1989). This motion principally concerns the former matter. In any event, there is nothing for this Court to "defer" to, since the district court entered its Rule 54(b) certification in a conclusory one-sentence statement without

making the supporting factual findings this Court has long required. *See Morrison-Knudson Co.* v. *Archer,* 655 F.2d 962, 965 (9th Cir. 1981) (Kennedy, J.).

2. This Court reviews de novo the question whether the district court's Rule 54(b) partial final judgment was on a single "claim" for purposes of that rule. *See Arizona State Carpenters Pension Trust Fund* v. *Miller,* 938 F.2d 1038, 1039 (9th Cir. 1991) (citing *Curtiss-Wright Corp.,* 446 U.S. at 7).

Plaintiffs declare that "the government defendants' conception that a Rule 54(b) judgment must be a 'unitary' claim is a made-up one for which they cite no authority and which this Court has rejected." Opp. 11. The government did not invent that standard—the requirement that a Rule 54(b) judgment be a single claim flows directly from the text of the rules, which permit entry of partial final judgment only as to "one or more . . . claims." Fed. R. Civ. P. 54(b). Controlling Supreme Court and Circuit precedent, as well as the precedent of other circuits, confirm that fundamental requirement. *See* Mot. 6-7. As we showed in our motion, *id.*, this Court has explained that Rule 54(b) "'does not relax the finality required of each decision, as an individual claim, to render it appealable.'" *Miller*, 938 F.2d at 1039 (quoting *Sears, Robuck & Co.* v. *Mackey*, 351 U.S. 427, 435 (1956)). Instead, the rule "'allows a judgment to be entered if it has the requisite degree of finality as to an individual claim in a multiclaim action.'" *Id.* at 1040 (quoting *Sussex Drug Products* v. *Kanasco, Ltd.*, 920 F.2d 1150, 1154 (3d Cir. 1990)); *see Hasbrouk* v. *Sheet Metal Workers Local 232,* 586 F.2d 691, 694 (9th Cir. 1978)*; Jordan* v. *Pugh*, 425 F.3d 820, 827 (10th Cir. 2005)*;*

Dalerue v. *Kentucky*, 269 F.3d 540, 543 (6th Cir. 2001). Plaintiffs characterize this substantial and controlling authority as "rigid and outmoded," Opp. 10, but that is wrong and no warrant for disregarding controlling authority or creating a circuit split.

Plaintiffs make no attempt to argue that the partial summary judgment order disposed of a single claim. It did not. While it is often difficult to isolate a single "claim" in a suit, *see Continental Airlines, Inc.* v. *Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987), it is simple to do so where, as here, the order under review disposed merely of one of several "alternate legal theories based on a set of facts common to the federal claim," which do not give rise to separate "claims" within the meaning of Rule 54(b). *Hasbrouk*, 586 F.2d at 694; *accord Miller*, 938 F.2d at 1040 (holding that a "single set of facts giving rise to a legal right of recovery under several different remedies" is not a separate "claim" under Rule 54(b)); *Jordan*, 425 F.3d at 827; *Dalerue*, 269 F.3d at 543.

The partial summary judgment order here fits that description perfectly. As plaintiffs note, that order merely ruled out their argument "that the government defendants' suspicionless interception and searching of plaintiffs' Internet communications . . . violates [the] Fourth Amendment." Opp. 6. Plaintiffs do not and cannot dispute that the district court did not adjudicate any of the three moving plaintiffs' alternative theories for why the same alleged government conduct is unlawful. Those alternative theories contend that the same conduct violates the First Amendment, the separation of powers, and the Foreign Intelligence Surveillance Act.

Dkt. 261, at 1 (plaintiffs' summary judgment motion); Mot. 3 (describing the various alternative theories of liability in plaintiffs' complaint). Plaintiffs' claim that the government has unlawfully intercepted their Internet communications is not close to being finally adjudicated in district court. Plaintiffs were thus correct when they told the district court that their motion was "one for partial summary judgment, and it advance[ed] just a portion of one of the numerous claims alleged in the complaint." Dkt. 294, at 35 (plaintiffs' reply in support of their partial summary judgment motion). For this reason alone the appeal should be dismissed for lack of jurisdiction.

The very same Fourth Amendment argument adjudicated by the district court as to the three moving plaintiffs, moreover, remains unadjudicated as to the two plaintiffs who did not move for summary judgment. *See* Mot. 8. Plaintiffs respond that one of the nonmoving plaintiffs is dead, and the other is not an "AT&T Internet customer." Opp. 14. But plaintiffs do not mention that they moved to substitute another plaintiff to represent the interests of the deceased plaintiff. *See* Dkt. 261, at 1 n.1. And the fact that those two remaining plaintiffs "are not current AT&T customers," *id.*; *see* Opp. 14, does not change the fact that those two nonmoving plaintiffs are asserting the exact same Fourth Amendment argument against the exact same alleged government conduct, which remains unadjudicated. Although plaintiffs now emphasize that "the factual basis of plaintiffs' summary judgment motion was the government's interception of the Internet communications of AT&T customers," Opp. 13, their theory below was in fact much broader, and asserted that the

government had gained "access to the entire stream of domestic and international communications . . . carried on the fiber-optic cables of" not just AT&T but "the nation's leading telecommunications carriers." Dkt. 261, at 6; *see also id.* at 4 (describing plaintiff's theory that "[a]lmost all ordinary Internet traffic travels at some point over the Internet backbone—high-capacity, long-distance fiber-optic cables controlled by major Internet providers such as AT&T"). The Fourth Amendment issues that remain in district court thus involve the very same factual allegations and legal theory that is the basis of plaintiffs' appeal and are not limited to a single telecommunications carrier.

2. This Court should also review de novo whether the "similarity of legal or factual issues" between the portion of the Fourth Amendment claim adjudicated in the partial summary judgment order and the issues that remain in district court "'weigh[s] heavily against entry of judgment'" under Rule 54(b). *Wood*, 422 F.3d at 882 (*quoting Morrison-Knudson*, 655 F.2d at 965).

Plaintiffs err in asserting that their Fourth Amendment "Internet-interception claim is legally and factually distinct from their other remaining claims." Opp. 8. Plaintiffs admit that their partial summary judgment motion only challenged one aspect of the government's "Internet-interception" activities: so-called "Upstream" Internet collection. *See* Opp. 6. Although the scope of plaintiffs' case is a continually moving target, it apparently now includes challenges to numerous other aspects of the government's alleged "Internet-interception" activities. This case began as a challenge

to alleged presidentially authorized mass surveillance, including Internet surveillance, *see Jewel* v. *National Security Agency*, 673 F.3d 902, 906 (9th Cir. 2011), which plaintiffs admit was not at issue or adjudicated in the partial summary judgment order, though plaintiffs' challenge to that alleged presidentially authorized surveillance is apparently based on the same declarations that were the basis for the partial summary judgment order they now seek to appeal, *see* Dkt. 84, at 3-6. Plaintiffs now purport to use this case as a vehicle to challenge any and all purported "mass spying activities . . . regardless of the purported authority under which those activities were conducted." Dkt. 233, at 10. The expanded version of plaintiffs' case includes challenges to activities undertaken pursuant to statutory authority under the Foreign Intelligence Surveillance Act, of which the "Upstream" collection addressed in the partial summary judgment order is only a part. In addition to "Upstream" collection, for example, the government also conducts "PRISM" collection of Internet content,[1] and plaintiffs are careful to note that their partial summary judgment motion did not challenge other aspects of the government's ongoing Internet collection activities under FISA Section 702, *see* Opp. 6 (noting that their motion was limited to the "Upstream collection program").

[1] For a discussion of the two programs, see Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Authorized by Section 702 of the Foreign Intelligence Surveillance Act* 7 (July 2, 2014), *available at* https://www.pclob.gov/library/702-Report.pdf.

It is thus clear that the sliver of plaintiffs' challenge to the government's "Internet-interception activities" adjudicated at this stage by the district court massively overlaps with several unadjudicated claims that remain to be litigated in district court. The adjudicated claim is not "separable from the others" and the "nature of the claim [is] such that" this Court "would have to decide the same issues more than once." *Wood*, 446 F.3d at 878 n.2. If plaintiffs' view of Rule 54(b) were correct, this Court could in the future have to hear potentially numerous separate appeals involving essentially the same factual and similar legal issues including:

- Whether the three moving plaintiffs have a viable First Amendment argument that the government's ongoing "Upstream" Internet-interception activities are unlawful.

- Whether the three moving plaintiffs have a viable separation-of-powers argument that the government's ongoing "Upstream" Internet-interception activities are unlawful.

- Whether the three moving plaintiffs have viable statutory arguments that the government's ongoing "Upstream" Internet-interception activities are unlawful.

- Whether the two nonmoving plaintiffs have each of the same claims listed above, as well as a viable Fourth Amendment argument that the government's ongoing "Upstream" Internet-interception activities are unlawful (any one of which would apparently merit a separate appeal).

- Whether plaintiffs have a viable Fourth Amendment argument—or First Amendment, or separation-of-powers argument, or statutory argument, any one of which would apparently merit a separate appeal—that the government's alleged past Internet-interception activities under presidential authorization were unlawful.

- Whether plaintiffs have a viable Fourth Amendment argument—or First Amendment, or separation-of-powers argument or statutory argument, any one of which would apparently merit a separate appeal—that the individual defendants sued in their personal capacities participated in unlawful alleged past Internet-interception activities under presidential authorization.

And all of that is true even granting plaintiffs their dubious assertion that their "Internet content" claims are distinct from their challenges to the collection of Internet metadata, telephone content, and telephone records. *See* Opp. 12.

It would not advance the efficient resolution of this litigation for the Court to permit plaintiffs to carve up their case into tiny bites in this manner. Plaintiffs cannot have it both ways: take an immediate appeal now on the slice of the case the district court partially adjudicated, while at the same time pursuing closely related legal theories and factual allegations in district court, thus leaving all of their options open in the event they lose the appeal. The price of getting an appealable partial final judgment under Rule 54(b) is first to submit at least one closely related set of facts and evidence to the district court for final decision on all relevant legal theories. Plaintiffs have not come close to doing so.

CONCLUSION

The Court should dismiss the appeal for lack of jurisdiction. Alternatively, the Court should reverse the Rule 54(b) certification because the district court did not make the necessary factual findings in its certification order.

Respectfully submitted,

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JULY 2015

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2015, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Henry C. Whitaker
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