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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

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

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, *et al.*,

Defendants.

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

PLAINTIFFS CAROLYN JEWEL, ERIK KNUTZEN AND JOICE WALTON'S REPLY IN SUPPORT OF THEIR MOTION FOR ENTRY OF FINAL JUDGMENT ON THEIR FOURTH AMENDMENT INTERNET CONTENT INTERCEPTION CLAIM PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 54(b)

Date: May 22, 2015
Time: 9:00 a.m.
Courtroom 5, 2nd Floor
The Honorable Jeffrey S. White

INTRODUCTION

This Court has issued the first order in a public, adversarial Article III proceeding adjudicating whether innocent people whose communications contents are being swept up and analyzed when the government taps into the Internet backbone can seek a judicial determination of whether this action violates their Fourth Amendment rights. Indeed, the Court recognized the importance of plaintiffs' Fourth Amendment claim as raising fundamental issues of "national security and the preservation of the rights and liberties guaranteed by the United States Constitution." Order at 2:3-7, ECF No. 321.

The Court ultimately ruled that plaintiffs, and the millions of other Americans subject to the government's unprecedented and ongoing surveillance, cannot obtain judicial review of the constitutionality of this surveillance. Plaintiffs now seek to have that significant ruling reviewed by the Ninth Circuit and ask that this Court allow that review immediately, rather than having its ruling sit on the shelf as the government suggests, while the mass surveillance continues unabated, for an undetermined length of time.

This Court has the discretion to authorize immediate appellate review, and it is plain that such review will serve the public interest. Moreover, the issues raised by the Fourth Amendment interception claim arising from tapping into the Internet backbone are factually and legally distinct from the rest of the case, and consideration of it separately will aid the Ninth Circuit, as it aided this Court, in focusing on those distinct issues.

Thus, plaintiffs request that this Court find that, under Rule 54(b), there is no just reason to delay appeal of this claim and enter final judgment on the claim.

ARGUMENT

Under Rule 54(b), "[i]t is left to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980) (citation omitted). The question is whether there is any "just reason for delay[ing]" entry of judgment. Fed. R. Civ. P. 54(b). As plaintiffs Jewel, Knutzen, and Walton explain in their motion, their Fourth Amendment Internet interception claim is "ready for appeal," *Curtiss-Wright*, 446 U.S. at 8,

because the claim is legally and factually distinct from their remaining claims and the balance of equities favors an immediate appeal.

The mere number of remaining claims—the government's chief opposition point—does not provide a just reason to delay an appeal under Rule 54(b). Defs.' Opp'n at 5:3–6, ECF No. 324. Indeed, the very point of Rule 54(b) is to allow an appeal in an action involving "multiple claims." Thus entry of judgment under Rule 54(b) always permits an appeal of one claim out of many. Courts do not engage in a mechanical counting-up of the claims in a complaint or require that a claim be absolutely independent before entering certification under Rule 54(b).

Absolute independence of claims is not the governing standard under the Rule. Nor is the standard whether the adjudicated claim is "closely intertwined" with the remaining claims. The authority the government cites in asserting that the claims must not be "closely intertwined" involves an appeal from a final judgment resolving all pending claims, where the plaintiffs did not seek to have a partial judgment certified as final under Rule 54(b). Defs.' Opp'n at 7:9-10 (citing *Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 749 (9th Cir. 2008)). *Romoland* did not state that the test for Rule 54(b) is whether claims are "closely intertwined," and its discussion of Rule 54(b) is in any event dicta. *Id.* Rather, courts have embraced a "pragmatic approach," as the government itself acknowledges. Defs.' Opp'n at 6:24-26 (citing *Continental Airlines v. Goodyear Tire & Rubber Co.,* 819 F.2d 1519, 1525 (9th Cir. 1987)). This case-specific inquiry eschews bright-line rules in favor of a careful examination of the claim the district court has adjudicated in the context of the lawsuit as a whole and the relevant equities. Entry of final judgment under Rule 54(b) can be appropriate even where "the remaining claims would require proof of the *same facts* involved in the dismissed claims." *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991) (citing *Continental Airlines,* 819 F.2d at 1525) (emphasis added).

The government's unavailing arguments as to why plaintiffs' claim is "closely intertwined" with the remaining claims are thus irrelevant. Defs.' Opp'n at 7:9. Indeed, in nearly every case in which final judgment is entered on a claim under Rule 54(b), the remaining claims will be somewhat intertwined with the adjudicated claim, which is likely why they were initially brought in the same complaint.

Nevertheless, the remaining claims are not "closely intertwined" in the ways alleged by the government. It is not enough for the government simply to assert that because plaintiffs must demonstrate standing for all their claims, standing is an issue in common between the Fourth Amendment claim the Court has decided and plaintiffs' remaining claims. It is well established that standing is a determination specific to each claim, and the presence or absence of standing for one claim does not determine whether standing exists for another claim. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

The government points to the fact that only three plaintiffs moved for partial summary judgment on the Fourth Amendment Internet interception claim, asserting that the remaining two plaintiffs have "closely intertwined'' Internet interception claims relying on the same AT&T evidence. Defs.' Opp'n at 7:22-15. But, as plaintiffs explained in the Complaint and in their summary judgment papers, this is not so because plaintiffs Tash Hepting and Gregory Hicks, unlike the moving plaintiffs, are not current AT&T Internet customers, and plaintiff Hicks is deceased. Compl. ¶¶ 20-21; Pls.' Mot. for Partial Summ. J. at 1:27 n.1, ECF No. 261.

The government also points to the plaintiffs' remaining claims for dragnet collection under the discontinued President's Surveillance Program. Defs.' Opp'n at 8:8-22. Contrary to the government's assertion, however, these claims do not involve the same factual and legal issues as those involved in plaintiffs' claims for ongoing Internet interception. Because those surveillance activities were conducted in defiance of the limitations imposed by Congress in FISA, the legal issues are fundamentally different. And even if plaintiffs were to rely on some of the same evidence in support of these claims, such as the Klein declaration, the government's arguments that such evidence is stale would hold no weight since the Klein declaration is contemporaneous with the President's Surveillance Program. Nor would consideration of any state secrets defense to these claims involve the same legal considerations, since the government has made extensive public statements about these discontinued surveillance programs. *See, e.g.,* Charlie Savage, *Declassified Report Shows Doubts About Value of N.S.A.'s Warrantless Spying*, N.Y. Times (Apr. 24, 2015).[1]

[1] Available at: http://www.nytimes.com/2015/04/25/us/politics/value-of-nsa-warrantless-spying-is-doubted-in-declassified-reports.html.

Similarly, plaintiffs' claims against the individual capacity defendants go to their past conduct, since these defendants are all now former government officials.

Plaintiffs' other Fourth Amendment claims, such as those for ongoing collection of telephone records, are both legally and factually distinct, as the government acknowledges. Defs.' Opp'n at 8:25-26 n.3. The government notes only that similar *records* claims by other plaintiffs are under submission in this Court and the Ninth Circuit. Defs.' Opp'n at 9:20-23 n.3. But that has simply no bearing on the appropriateness of allowing an immediate appeal of plaintiffs' Internet *content* interception claim.

Allowing an appeal of this claim will thus expedite the final resolution of this case by presenting this claim cleanly to the appellate courts for decision, while allowing this Court to move forward with the remaining claims in a manner suited to the specific legal and factual issues they raise.

Finally, the public interest weighs heavily in favor of entry of judgment. The question of whether individuals whose communications are intercepted and automatically scanned by machines have standing to challenge the interception and scanning is one of fundamental importance to the hundreds of millions of Americans subject to the government's surveillance programs. The Second Circuit has recently affirmed that standing exists whenever the government machine-scans a person's communication information. *Am. Civil Liberties Union v. Clapper*, No. 14-42-cv, 2015 WL 2097814, at *8-10 (2d Cir. May 7, 2015). An appeal in this case will serve the public interest by presenting the Ninth Circuit with the opportunity to address this important question. The government's assertion that the public debate over surveillance programs is proceeding "robustly, including in Congress, apart from this lawsuit," Defs.' Opp'n at 9:14–10:1, is inapposite as to the surveillance at issue here; the current congressional debate has been limited to telephone records collection under section 215 of the Patriot Act.

As the Court recognized in its order, the Constitution calls upon the courts to adjudicate difficult questions about the balance between national security and individual rights. Guidance from the Ninth Circuit will provide needed certainty not only in this case, but other to courts in similar matters, as well as to the executive and legislative branches. This is not a run-of-the-mill

case involving a commercial dispute, but rather a determination of first impression concerning fundamental constitutional rights. The balance of equities and the public interest favors allowing an appeal now.

CONCLUSION

For the reasons stated above, plaintiffs respectfully request that the Court enter final judgment pursuant to Rule 54(b) on plaintiffs' Fourth Amendment Internet content interception claim.

Dated: May 8, 2015

Respectfully submitted,

/s/ Andrew Crocker
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