CASE NO. 15-16133

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAROLYN JEWEL, ERIK KNUTZEN, AND JOICE WALTON,

PLAINTIFFS-APPELLANTS,

V.

NATIONAL SECURITY AGENCY, *ET AL.*,

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, NO. 08-CV-04373-JSW
THE HONORABLE JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE, PRESIDING

PLAINTIFFS-APPELLANTS' REPLY IN SUPPORT OF THEIR MOTION TO EXPEDITE BRIEFING AND HEARING ON APPEAL

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ARGUMENT

1. Plaintiffs-appellants' motion to expedite the briefing and hearing of the appeal should be granted. Plaintiffs appeal a judgment in favor of the government defendants-appellees on plaintiffs' claim that defendants' post-9/11 mass interception and searching of plaintiffs' Internet communications violates their Fourth Amendment rights. *See Jewel v. NSA*, 673 F.3d 902, 910 (9th Cir. 2011). The government defendants do not contest plaintiffs' showing of good cause and do not object to the proposed briefing schedule, which in accordance with defendants' request preserves the full amount of time (30 days) allotted to them under the current court-ordered briefing schedule between the filing of plaintiffs' opening brief and the filing of defendants' answering brief.

2. The Court should reject the government defendants' suggestion that, notwithstanding defendants' failure to contest plaintiffs' showing of good cause for expediting the appeal, the Court should nonetheless refuse to decide plaintiffs' motion to expedite until the passage of time renders the motion moot. The government defendants state that a month from now they intend to file a motion to dismiss the appeal for lack of jurisdiction on the ground that judgment was improperly entered under Federal Rule of Civil Procedure 54(b). Under plaintiffs' proposed expedited briefing schedule, plaintiffs would file their opening brief on appeal on August 4, yet the government defendants propose that plaintiffs' motion to expedite be held in abeyance until an indefinite time after August 10, the date on which they propose to file their reply in support of their motion to dismiss. At that point, the mere passage of time will have mooted plaintiffs' motion to expedite.

3. The government's potential motion to dismiss lacks merit. Below, the government defendants moved for partial summary judgment on plaintiffs' Fourth

Amendment Internet interception claim. ECF No. 286. After the district court granted summary judgment to defendants on this claim (ECF No. 321), plaintiffs moved for entry of judgment under Rule 54(b) (ECF Nos. 323, 325). Defendants fully and vigorously litigated in the district court their objections to entry of judgment. ECF No. 324. The district court—the court most familiar with plaintiffs' claims, with the history of proceedings in this lawsuit, and with its own order granting partial summary judgment that is the subject of this appeal—carefully examined defendants' objections to the entry of judgment pursuant Rule 54(b) and found their objections to be without merit. *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 US 1, 10 (1980) (district court is "the one most likely to be familiar with the case and with any justifiable reasons for delay[ing]" entry of judgment under Rule 54(b)). It entered judgment, concluding that its partial summary judgment order had completely and finally resolved plaintiffs' claim that defendants' post-9/11 mass interception and searching of their Internet communications violates their Fourth Amendment rights. ECF Nos. 327, 328.

At bottom, the government defendants seek to enjoy the fruits of their summary judgment victory in district court while insulating it from any review by this Court until the numerous claims remaining in the district court are finally resolved at some indefinite time in the future. Interjecting a fruitless motion to dismiss into the appellate process will only further delay final resolution of the appeal and of the lawsuit as a whole, which has been pending for seven years now while the challenged searches and seizures continue. The public interest weighs instead in favor of an early resolution by this Court of plaintiffs' appeal of their claim, which as this Court has recognized, "challenges conduct that strikes at the

heart of a major public controversy involving national security and surveillance." *Jewel*, 673 F.3d at 912.

4. There is a better way to proceed. This Court ordinarily resolves questions of its appellate jurisdiction over a Rule 54(b) judgment as part of its decision on the merits of the appeal. *See, e.g.*, *Noel v. Hall*, 568 F.3d 743, 747 & n.1 (9th Cir. 2009); *Texaco v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991); *Gregorian v. Izvestia*, 871 F.2d 1515, 1518 (9th Cir. 1989); *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1524 (9th Cir. 1987). Any motion to dismiss by defendants challenging the Rule 54(b) judgment here would properly be referred to the merits panel because it would be "a motion to dismiss an appeal for lack of jurisdiction that involves legal issues intricately bound up in the merits of the appeal." 9th Cir. General Orders, Appendix A, at 57(a). Motions panels of this Court and the other Courts of Appeals regularly refer motions to dismiss for lack of jurisdiction to the merits panel that will decide the appeal. *See, e.g.*, *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 837 (9th Cir. 2004); *In re Nat'l Mortgage Equity Corp. Mortgage Pool Certificates Litig.*, 821 F.2d 1422, 1423 (9th Cir. 1987); *In re Victor Technologies Sec. Litig.*, 792 F.2d 862, 863 (9th Cir. 1986); *Elliott v. Archdiocese of New York*, 682 F.3d 213, 218 (3d Cir. 2012) (motions panel referred question of appellate jurisdiction over Rule 54(b) judgment to merits panel). Moreover, even when a motions panel denies a motion to dismiss for lack of jurisdiction, its decision is not dispositive and may be revisited by the merits panel. *United States v. Houser*, 804 F.2d 565, 567-69 (9th Cir. 1986).

Accordingly, the most efficient course is for defendants to brief any jurisdictional challenge in their answering brief on the merits, and not as a separate motion to dismiss. At the very least, the filing of any motion to dismiss by the government defendants should not occur until after plaintiffs file their opening brief; otherwise, plaintiffs would be faced with the burden of responding to the motion to dismiss while they are preparing their opening brief.

CONCLUSION

1. Plaintiffs' motion to expedite the briefing and argument in this appeal should be granted.

2. Defendants should raise any challenge to appellate jurisdiction in their answering brief, and not as a separate motion to dismiss.

Dated: June 23, 2015

Respectfully submitted,

/s/ Richard R. Wiebe

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 23, 2015.

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

Dated: June 23, 2015 /s/ Richard R. Wiebe