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

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

Plaintiffs have filed a notice of appeal from a district court order granting the government partial summary judgment on a single aspect of plaintiffs' broad-ranging challenge to multiple components of the government's intelligence-gathering activities. The Court should dismiss this appeal because it lacks appellate jurisdiction over this non-final ruling, which the district court, in an order containing one conclusory sentence of reasoning, improperly certified as a partial final judgment under Federal Rule of Civil Procedure 54(b).[1]

The district court erred as a matter of law and abused its discretion in entering this certification. The partial summary-judgment order does not dispose of a single, unitary "claim" as the rule requires. *See* Fed. R. Civ. P. 54(b). Instead, the order foreclosed three of the five plaintiffs from pursuing one among many alternative

[1] Plaintiffs oppose this motion to dismiss their appeal.

theories in support of their overarching claim that the government violated the Constitution and various statutes in allegedly diverting communications from AT&T facilities to the National Security Agency (NSA). Nor did the partial summary judgment order decide an issue that is separable from the claims that remain pending before the district court. The facts that underlie the issues decided in the partial summary judgment order cut across much of the case remaining in district court, as to which, in plaintiffs' own telling, "[m]uch labor remains." Dkt. 323, at 1. If plaintiffs appeal every time the district court adjudicates a slice of the case, this Court would have to hear multiple appeals concerning a similar set of operative facts. That would contravene the rule against piecemeal appeals and inappropriately crowd this Court's busy docket with overlapping, duplicative appeals—presumably all likewise requiring expedited treatment in plaintiffs' view at least. The appeal should be dismissed.

STATEMENT

Plaintiffs in this case challenge alleged indiscriminate government intelligence-gathering activities originally authorized by the President after the 9/11 terrorist attacks. The "core component" of their suit is the allegation that the government has a "nationwide network of sophisticated communications surveillance devices attached to the key facilities of telecommunications companies such as AT&T that carry Americans' Internet and telephone communications." *Jewel* v. *National Sec. Agency*, 965 F. Supp. 2d 1090, 1098 (N.D. Cal. 2013) (citing Compl. ¶ 8 (Dkt. 1)). Plaintiffs allege, in particular, that the government has, in collaboration with AT&T, diverted the

traffic of both domestic and foreign communications carried on AT&T's facilities to the NSA. Compl. ¶¶ 50-75. Those diverted communications assertedly include the content of Internet, wire, and telephone communications, as well as routing information associated with those communications (otherwise known as "metadata"). *Id.* ¶¶ 72-75.

The complaint contains 17 counts. Counts 1, 3, and 17 seek declaratory, injunctive, and equitable relief on the ground that this asserted program of indiscriminate surveillance violates the First and Fourth Amendments and exceeds the President's Article II authority under the Constitution. Compl. ¶¶ 117, 135, 263. Counts 5, 7, 10, 13, and 16 seek declaratory, injunctive, and equitable relief on the ground that this alleged program violates a number of statutes, including the Foreign Intelligence Surveillance Act and the Administrative Procedure Act. *Id.* ¶¶ 155, 183, 220, 243, 259. The other nine counts seek damages from the government and from various government officials for allegedly violating constitutional and statutory provisions. *Id.* ¶¶ 126 (Fourth Amendment), 142 (First Amendment), 167, 197, 211 227, 243, 250, 257 (statutes).

In 2013, the district court dismissed the counts seeking declaratory and injunctive relief against the government on statutory grounds (counts 5, 7, 10, 13, and 16), and partially dismissed count 6 to the extent that count sought damages from the government. *See Jewel*, 965 F. Supp. 2d at 1112. After that, eleven counts of the

complaint remained to be finally adjudicated, including all of the counts seeking declaratory and injunctive relief, as well as damages, on constitutional grounds.

Three of the five plaintiffs then moved for partial summary judgment on one aspect of their claim against one defendant (the United States) that the alleged interception of their communications is unconstitutional. Those plaintiffs requested that the district court rule that the government's alleged ongoing and continuing interception of the content of their Internet communications violates the Fourth Amendment. Dkt 261, at 1. Plaintiffs stressed, however, that they were not seeking summary judgment on any other aspect of their case, including on their assertion that the government's ongoing alleged interception activities violated other constitutional and statutory provisions, or on their assertion that the government's alleged past interception of their Internet communications and telephone calls under Presidential authorization violated the Fourth Amendment. *Id.* The government cross-moved for partial summary judgment on plaintiffs' assertion that the government's alleged ongoing and continuing interception of their Internet communications violates the Fourth Amendment. *See* Dkt. 286.

The district court granted the government's partial summary judgment motion and denied plaintiffs' motion. The Court held that plaintiffs had presented insufficient evidence to establish a triable issue of fact about whether they had standing to support their Internet-interception argument. In particular, the Court found insufficient the evidence plaintiffs proffered in support of their claim that their

communications are acquired as part of the NSA's Internet content-collection activities. *See* Dkt. 321, at 8. The Court also concluded, in the alternative, and based in part on the government's classified ex parte, in camera submissions in support of the state secrets privilege, that plaintiffs' arguments could not be litigated without disclosure of information that would gravely harm national security by informing the Nation's adversaries about the nature and scope of sensitive intelligence-gathering operations. *Id.* at 1, 9. The district court thus concluded that plaintiffs could not prevail based on their argument that the government's alleged ongoing interception of Internet communications violated the Fourth Amendment. *Id.* at 10. The district court did not, however, reach the viability of any of plaintiffs' alternative legal theories why the challenged government surveillance might be unlawful, such as their other Fourth Amendment arguments; their First Amendment argument; their separation-of-powers argument; or their statutory arguments. The partial summary judgment order thus did not finally dispose of any of the remaining 11 counts of the complaint.

Plaintiffs moved, over the government's objection, to certify as final the district court's partial summary judgment order adjudicating plaintiffs' argument "that the copying and searching of their Internet communications . . . violates the Fourth Amendment." Dkt. 327, at 1. The district court granted the motion. The district court's reasoning in support of that certification states, in its entirety: "The Court finds that its adjudication of this claim is a final determination and that no just reason exists for delay in entering final judgment on this claim." *Id.* at 2.

ARGUMENT

` Federal Rule of Civil Procedure 54(b) provides that "[w]hen an action presents more than one claim for relief . . . the court may direct entry of a final judgment as to one or more, but fewer than all, claims . . . only if the court expressly determines that there is no just reason for delay." A Rule 54(b) certification is subject to judicial review on appeal. The Supreme Court has explained that, on appeal, this Court should review de novo the district court's evaluation of "juridical concerns" such as "the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units." *Curtiss-Wright Corp.* v. *General Elec. Co.*, 446 U.S. 1, 10 (1980); *see Wood* v. *GCC Bend, LLC*, 422 F.3d 873, 879 (9th Cir. 2005). Even if the district court's 54(b) order survives de novo review, however, the Court should also reverse a 54(b) certification if the district court abused its equitable discretion in finding no just reason for delay. *See Curtiss-Wright*, 446 U.S. at 10; *Gregorian* v. *Izvestia*, 871 F.2d 1515, 1519 (9th Cir. 1989). The district court's 54(b) certification here should be reversed on both grounds.

I. The Partial Summary Judgment Order Did Not Dispose Of A Unitary "Claim" As Rule 54(b) Requires.

This Court reviews final judgments. *See* 28 U.S.C. § 1291. Rule 54(b) "'does not relax the finality required of each decision, as an individual claim, to render it appealable.'" *Arizona State Carpenters Pension Trust Fund* v. *Miller*, 938 F.2d 1038, 1039 (9th Cir. 1991) (quoting *Sears, Robuck & Co.* v. *Mackey*, 351 U.S. 427, 435 (1956)).

Instead, it "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 (citation and internal quotation marks omitted). As a consequence, "[t]he partial adjudication of a single claim is not appealable, despite a rule 54(b) certification." *Id.* (citation and internal quotation marks omitted).

This Court has further explained that the word "claim" as used in Rule 54(b) ""refers to a set of facts giving rise to legal rights in the claimant, not to legal theories of recovery based upon those facts." *Miller*, 938 F.2d at 1040 (*quoting CMAX, Inc.* v. *Drewry Photocolor Corp.*, 295 F.2d 695, 697 (9th Cir. 1961)). Thus, this Court has held that "alternate legal theories based on a set of facts common to the federal claim" do not give rise to a separate "claim" within the meaning of Rule 54(b). *Hasbrouk* v. *Sheet Metal Workers Local 232*, 586 F.2d 691, 694 (9th Cir. 1978); *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* v. *Pugh*, 425 F.3d 820, 827 (10th Cir. 2005); *Dalerue* v. *Kentucky*, 269 F.3d 540, 543 (6th Cir. 2001).

Under this standard, it is clear that the partial summary judgment order did not dispose of a single claim. That order merely held that three of the five plaintiffs could not prevail on their argument that the government was violating the Fourth Amendment in allegedly working with AT&T to divert Internet communications traffic from AT&T's facilities to the NSA. Dkt. 321, at 6-8. As plaintiffs themselves

noted in moving for partial summary judgment, however, *see* Dkt. 261, at 1 (noting that their motion does not concern "*past or present* violations of statutory and constitutional provisions other than the Fourth Amendment"), plaintiffs have numerous alternative theories why that exact same alleged government conduct is unlawful, including at least two other constitutional theories, which the district court has not adjudicated. *See* Compl. ¶¶ 135, 263 (claiming that the same conduct violates the First Amendment and the "separation of powers"). Two of the five plaintiffs, moreover, did not even seek summary judgment, so even the narrow theory on which the three moving plaintiffs sought summary judgment has not been finally adjudicated. This Court has squarely held that a district court errs as a matter of law where, as here, it certifies as final an adjudication of one among many alternative legal theories based on the same set of operative facts. *Hasbrouk*, 586 F.2d at 694; *accord Miller*, 938 F.2d at 1040. The district court decision in this case, which merely rules out part of one narrow legal theory as to three of five plaintiffs, represents the kind of partial adjudication of a claim that this Court has repeatedly held to be inappropriate for Rule 54(b) certification.

Beyond that, it is equally plain that 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* v. *GCC Bend LLC*, 422 F.3d 873, 882 (9th Cir. 2005) (*quoting Morrison-Knudson Co.* v. *Archer*, 655 F.2d 962, 965 (9th Cir.

1981) (Kennedy, J.)). The exact same Fourth Amendment arguments and underlying factual allegations adjudicated by the district court as to the three moving plaintiffs remain unresolved in district court as to the two nonmoving plaintiffs. Also unresolved are those same factual allegations as they relate to plaintiffs' numerous alternative theories of liability, including other theories of liability under the Fourth Amendment, and as to defendants other than the United States, which was the only defendant granted summary judgment.

The three moving plaintiffs, moreover, based their partial summary-judgment motion on declarations by Mark Klein, a former AT&T employee, and J. Scott Marcus, a supposed communications technology expert, purporting to detail how the government works with AT&T and other telecommunications providers to divert communications from AT&T facilities to the NSA. *See* Dkt. 261, at 6-9. The district court decided that those three plaintiffs could not pursue their argument that the government was violating the Fourth Amendment in assertedly conducting ongoing Internet content-collection because those declarations were insufficient to support plaintiffs' standing, and implicated information protected by the state secrets privilege.

Much the same evidence, however, is relevant—indeed central—to the bulk of the claims still remaining in district court. The Klein and Marcus declarations are what underlie the "core component" of plaintiffs' suit—that the government has a "nationwide network of sophisticated communications surveillance devices attached to key facilities of telecommunications companies such as AT&T . . . ." Compl. ¶ 8; *see*

also id. ¶¶ 55-57 (describing the government's alleged cooperation with AT&T at the "Folsom Street Facility" in San Francisco, CA), Dkt. 261, at 6-9 (same). Plaintiffs have made clear throughout this litigation that these declarations and associated factual allegations are central to their overarching claim that the government has in the past, and is currently, diverting communications traffic from telecommunications providers to the government for the purpose of conducting alleged indiscriminate surveillance. *See, e.g.*, Dkt. 84, at 3-6; *see also Jewel* v. *National Sec. Agency*, 673 F.3d 902, 910-11 (9th Cir. 2011) (relying on those allegations to hold that plaintiffs had alleged standing sufficient to withstand a motion to dismiss).

The partial summary judgment order addresses the question whether those facts suffice to show plaintiffs' standing at the summary judgment stage, but only as to part of one of their Fourth Amendment theories on behalf of some plaintiffs and against only one of numerous other defendants. The district court still has to apply the legal principles articulated in the summary judgment order to each alternative legal theory plaintiffs present as to each defendant, which may require different analysis. For example, plaintiffs contend not only that the government's current intelligence-gathering activities conducted under the authority of the Foreign Intelligence Surveillance Act violate the Fourth Amendment, but also that past activities conducted solely under Presidential authorization do as well. *See* Dkt. 325, at 3. Similarly, the question whether those declarations implicate information protected by the state-secrets privilege remains to be determined under each of plaintiffs' remaining

theories, which seem to be based on the same factual allegations. *See id.* The issues addressed in the partial summary judgment order thus cut across much of the case, both factually and legally. Plaintiffs' "legal right to relief stems largely from the same set of facts and would give rise to successive appeals that would turn largely on identical and interrelated facts," a scenario this Court has held counsels strongly against upholding a 54(b) certification. *Wood*, 422 F.3d at 880.

To be sure, "claims certified for appeal do not need to be separate and independent from the remaining claims so long as resolving the claims would streamline the ensuing litigation." *Noel* v. *Hall*, 568 F.3d 743, 747 (9th Cir. 2009) (internal quotation marks omitted). Here, however, resolving on appeal the slice of the case adjudicated by the district court would not streamline the litigation, because it would necessitate hearing multiple appeals concerning the application of each of plaintiffs' numerous alternative legal theories to overlapping operative facts. The facts relevant to the district court's partial summary judgment order "overlap substantially" with the remaining issues in district court, as we have explained. *Gregorian*, 871 F.2d at 1520. It does not make sense for this Court to consider piecemeal appeals concerning a common set of operative facts and supporting evidence for each of plaintiffs' numerous alternative legal theories—which could well mean that this Court would be hearing appeals in this case for years to come.

It is also true that factual overlap between the issues decided in the partial summary judgment order and the case that remains in district court is not complete.

For example, plaintiffs contend not only that the government is diverting Internet traffic from AT&T facilities to the NSA, but also that the government is collecting telecommunications records from AT&T and other providers in violation of a number of statutory and constitutional provisions, including the Fourth Amendment. *See* Dkt. 325, at 4. This Court's 54(b) precedents, however, reflect that, at a minimum, the Court should hear one set of operative and closely-intertwined set of facts at a time on appeal. *See Wood*, 422 F.3d at 881-82. Any appeal on plaintiffs' allegations that the government is currently diverting Internet traffic from AT&T facilities should wait until the district court has adjudicated all of the legal theories associated with that basic set of facts.

II The District Court Abused Its Discretion In Directing Entry Of Judgment Without Making Any Supporting Factual Findings.

Even apart from juridical concerns, the district court abused its discretion in finding, in one conclusory sentence, that there was no just reason for delaying entry of final judgment on plaintiffs' Internet-interception claims.

This Court, in an opinion by then-Judge (now Justice) Kennedy, has explained that the district court "should not direct entry of judgment under Rule 54(b) unless it has made specific findings setting forth the reasons for its order." *Morrison-Knudson*, 655 F.2d at 965. "Those findings should include a determination whether, upon any review of the judgment entered under the rule, the appellate court will be required to

address legal or factual issues that are similar to those contained in the claims still pending before the trial court." *Id.* The district court made no such findings; the sum total of its reasoning was this: "The Court finds that its adjudication of this claim is a final determination and that no just reason exists for delay in entering final judgment on this claim." Dkt 327, at 2.

This Court has noted that the absence of such findings is not a jurisdictional defect "as long as [the Court] can independently determine the propriety of the order." *Noel*, 568 F.3d at 747 n.5. We have already shown that the district court's order was legally erroneous given the substantial overlap between the issues adjudicated in the partial summary judgment order and the remainder of the case in district court. But even if the Court disagrees with our analysis, the basis for the district court's determination is far from clear, given the breadth and complexity of the case. This Court should, at a minimum, remand the case to the district court to make the specific factual findings required by Rule 54(b) in order to facilitate this Court's appellate review.

CONCLUSION

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

Respectfully submitted,

Douglas N. Letter
(202) 514-3602

H. Thomas Byron III
(202) 616-5367

/s/ Henry C. Whitaker
Henry C. Whitaker
(202) 514-3180
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 7256
Washington, D.C. 20530

JULY 2015

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 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
Henry C. Whitaker

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CAROLYN JEWEL, ET AL.,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, ET AL.,

Defendants.

No. C 08-04373 JSW

VIRGINIA SHUBERT, ET AL.,

Plaintiffs,

v.

BARACK OBAMA, ET AL.,

Defendants.

/

No. C 07-00693 JSW

ORDER GRANTING MOTION FOR ENTRY OF FINAL JUDGMENT ON FOURTH AMENDMENT CLAIM

Pursuant to Federal Rule Civil Procedure 54(b) and to its Order dated February 10, 2014 granting the motion for summary judgment filed by defendants National Security Agency, United States Department of Justice, Barack H. Obama, Michael S. Rogers, Eric H. Holder, Jr., and James R. Clapper, Jr. (in their official capacities) (collectively, "Government Defendants"), the Court HEREBY ENTERS judgment in favor of each of these Government Defendants and against Plaintiffs Carolyn Jewel, Erik Knutzen, and Joice Walton on their claim that the copying and searching of their Internet communications is conducted without a warrant or any individualized suspicion and, accordingly, violates the Fourth Amendment.

The Court finds that its adjudication of this claim is a final determination and that no just reason exists for delay in entering final judgment on this claim. Accordingly, the Clerk is HEREBY ORDERED to enter partial judgment dismissing the claim that Government Defendants are violating the Fourth Amendment rights of Plaintiffs by copying and searching the contents of Plaintiffs' Internet communications.

IT IS SO ORDERED.

Dated: May 20, 2015

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

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v.

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No. C 07-00693 JSW

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Now before the Court is the motion filed by Plaintiffs Carolyn Jewel, Erik Knutzen, and Joice Walton, on behalf of themselves and all other individuals similarly situated ("Plaintiffs") for partial summary judgment on their claim for relief which challenges the interception of their Internet communications as a violation of the Fourth Amendment ("Fourth Amendment Claim" or "Claim"). Also before the Court is the cross-motion for partial summary judgment on Plaintiffs' Fourth Amendment Claim filed by Defendants National Security Agency, United States Department of Justice, Barack H. Obama, Michael S. Rogers, Eric H. Holder, Jr., and James R. Clapper, Jr. (in their official capacities) (collectively, "Government Defendants").

Having considered the parties' papers, including the Government Defendants' classified brief and classified declarations, and the parties' arguments, the Court DENIES Plaintiffs'

motion for partial summary judgment and GRANTS the Government Defendants' cross-motion for partial summary judgment.[1]

The issues raised by the pending motions and additional briefing now before the Court compel the Court to examine serious issues, namely national security and the preservation of the rights and liberties guaranteed by the United States Constitution. The Court finds the predicament delicate and the resolution must strike a balance of those significant competing interests.

Based on the public record, the Court finds that the Plaintiffs have failed to establish a sufficient factual basis to find they have standing to sue under the Fourth Amendment regarding the possible interception of their Internet communications. Further, having reviewed the Government Defendants' classified submissions, the Court finds that the Claim must be dismissed because even if Plaintiffs could establish standing, a potential Fourth Amendment Claim would have to be dismissed on the basis that any possible defenses would require impermissible disclosure of state secret information.

BACKGROUND

Plaintiffs allege that as part of a system of mass surveillance, the Government Defendants receive copies of their Internet communications, then filter the universe of collected communications in an attempt to remove wholly domestic communications, and then search the remaining communications for search terms called "selectors" for potentially terrorist-related foreign intelligence information.

The Government has described the collection of communications pursuant to Section 702 of the Foreign Intelligence Surveillance Act ("Section 702") in several public reports. Upon approval by the Foreign Intelligence Surveillance Court of a certification under Section 702, NSA analysts identify non-U.S. persons located outside the United States who are reasonably believed to possess or receive, or are likely to communicate, foreign intelligence information designated in the certification. (*See, e.g.*, NSA Civil Liberties and Privacy Office

[1] Having not relied on Plaintiffs' proposed order submitted after the hearing on the motions, the Court DENIES Defendants' motion to strike it.

Report, NSA's Implementation of FISA Section 702 at 4 (Apr. 16, 2014) ("Civil Liberties Report")). Once designated by the NSA as a target, the NSA tries to identify a specific means by which the target communicates, such as an e-mail address or telephone number. That identifier is referred to a "selector." Selectors are only specific communications accounts, addresses, or identifiers. (*See id*; *see also* Privacy and Civil Liberties Oversight Board Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act ("PCLOB Report") at 32-33, 36.) According to the Government's admissions, an electronic communications service provider may then be compelled to provide the Government with all information necessary to acquire communications associated with the selector, a process called "tasking." (*Id.* at 32-33; *see also* Civil Liberties Report at 4-5.)

One process by which the NSA obtains information related to the tasked selectors is known as the Upstream collection program. Through a Section 702 directive, this program compels the assistance of the providers that control the telecommunications backbone within the United States. (*See* PCLOB Report at 35.) Under the Upstream collection program, tasked selectors are sent to domestic electronic communications service providers to acquire communications that transit the Internet backbone. (*See id.* at 36-37.) Internet communications are filtered in an effort to remove all purely domestic communications, and are then scanned to capture only those communications containing the designated tasked selectors. (*Id.* at 37.) "Unless [communications] pass both these screens, they are not ingested into governmental databases." (*Id.*)

Plaintiffs contend that the copying and searching of their private Internet communications is conducted without a warrant or any individualized suspicion and, accordingly, violates the Fourth Amendment. The Fourth Amendment prohibits the Government from intercepting, copying, or searching through communications without a warrant issued by a neutral and detached magistrate, upon probable cause, particularly describing the place to be searched and the things to be seized. Judicial warrants based on particularity and probable cause are especially crucial in electronic surveillance, where searches

and seizures occur without leaving a trace and where the threat to privacy is especially great. *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 313 (1972).

In their motion for partial summary judgment, Plaintiffs seek adjudication as to their Fourth Amendment Claim with regard only to the NSA's acknowledged Upstream collection of communications pursuant to Section 702. The Government Defendants contend that Plaintiffs' evidence is insufficient to establish standing, and that even assuming standing, either there can be no Fourth Amendment violation on the facts in the record as a matter of law, or alternatively, that the state secrets privilege requires dismissal of Plaintiffs' Fourth Amendment Internet surveillance claim.

The Court shall address other additional specific facts as necessary in the remainder of this Order.

ANALYSIS

A. Summary Judgment Standard.

Summary judgment is appropriate when the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). "[A]t the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. A fact is "material" if it may affect the outcome of the case. *Id.* at 248. The party moving for summary judgment bears the initial responsibility of identifying those portions of the record which demonstrate the absence of a genuine issue of a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party meets this initial burden, the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In the absence of such

facts, "the moving party is entitled to a judgment as a matter of law." *Celotex*, 477 U.S. at 323; *see also Keenan*, 91 F.3d at 1279.

B. Standing.

Defendants contend that Plaintiffs have not submitted evidence sufficient to establish that they have standing to challenge the alleged ongoing collection of communications by the NSA. As Defendants admit, the Government has acknowledged the existence of the Upstream collection process which involves the collection of certain communications as they transit the Internet backbone network of telecommunications service providers. However, the technical details of the collections process remain classified.

In order to prevail on their motion for summary judgment, Plaintiffs must support each element of their claim, including standing, "with the manner and degree of evidence required at the successive stages of the litigation." *Bras v. Cal. Pub. Utils. Comm'n*, 59 F.3d 869, 872 (9th Cir. 1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Plaintiffs must proffer admissible evidence establishing both their standing as well as the merits of their claims. *See* Fed. R. Civ. P. 56(c); *see also In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385 (9th Cir. 2010) (holding that the court's ruling on summary judgment must be based only on admissible evidence). If Plaintiffs are unable to make a showing sufficient to establish an essential element of their claim on which they bear the burden at trial, summary judgment must be granted against them. *See Celotex Corp.*, 477 U.S. at 322.

"To establish Article III Standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty International USA*, --- U.S. --- , 133 S. Ct. 1138, 1147 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010)). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is *certainly* impending." *Id.* (citing *Lujan*, 504 U.S. at 565 n.2) (emphasis in original). Thus, the Supreme Court has "repeatedly reiterated that 'the threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not

sufficient." *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis in original)).

In *Clapper*, the Court found that allegations that plaintiffs' communications were intercepted were too speculative, attenuated, and indirect to establish injury in fact that was fairly traceable to the governmental surveillance activities. *Id.* at 1147-50. The *Clapper* Court held that plaintiffs lacked standing to challenge NSA surveillance under FISA because their "highly speculative fear" that they would be targeted by surveillance relied on a "speculative chain of possibilities" insufficient to establish a "certainly impending" injury. *Id.*

Here, Plaintiffs have sufficiently demonstrated that they are AT&T customers. (*See* Declaration of Carolyn Jewel at ¶¶ 2-5; Declaration of Erik Knutzen at ¶¶ 2-6; Declaration of Joice Walton at ¶¶ 2-6.) In addition, Plaintiffs allege that, as AT&T customers, all of their Internet communications have been collected and amassed in storage. *See Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 991-92 (N.D. Cal. 2006) ("AT&T and the government have for all practical purposes already disclosed that AT&T assists the government in monitoring communication content."). The record suggests that AT&T currently aids the Government in the collection of information transported over the Internet. (*See* AT&T Transparency Report dated 2014.) If the governmental program is sufficiently large and encompassing to include the mass collection of all Internet communications, the question of whether any specific communication was specifically targeted is not the relevant inquiry. *See Klayman v. Clapper*, 957 F. Supp. 2d 1, 26-28 (D.D.C. 2013) (granting standing to individual plaintiffs to challenge NSA collection of their telephone records from Verizon after finding "strong evidence" that NSA collected Verizon metadata for the last seven years and ran queries that necessarily analyzed that data); *see also Smith v. Obama*, 24 F. Supp. 3d 1005, 1007 n.2 (D. Idaho 2014) (finding that plaintiff, a Verizon customer, had standing to bring an action based on collection of telephone metadata). "As FISC Judge Eagan noted, the collection of virtually all telephony metadata is 'necessary' to permit the NSA, not the FBI, to do the algorithmic data analysis that allow the NSA to determine 'connections between known and unknown international terrorist operatives.'" *ACLU v. Clapper*, 959 F. Supp. 2d 724, 746 (S.D.N.Y. 2013) (citing *In re*

Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things from [REDACTED], amended clip op. at 22-23); *see also id.* at 748 ("[A]ggregated telephony metadata is relevant because it allows the querying technique to be comprehensive. . . . Armed with all the metadata, NSA can draw connections it might otherwise never be able to find.").

The creation of a large surveillance program designed to "intercept all or substantially all of its customers' communications, . . . necessarily inflicts a concrete injury that affects each customer in a distinct way, depending on the content of that customer's communications and the time that customer spends using AT&T services." *Hepting*, 439 F. Supp. 2d at 1001. In this matter, the Ninth Circuit has held that although the harm alleged by Plaintiffs is widely shared, that does not necessarily render it a generalized grievance. *See Jewel v. Nat'l Sec. Agency*, 783 F.3d 902, 909-10 (9th Cir. 2011) ("[W]e conclude that Jewel alleged a sufficiently concrete and particularized injury, Jewel's allegations are highly specific and lay out concrete harms arising from the warrantless searches."). Accordingly, the Court finds that, as Plaintiffs have provided evidence that they are AT&T customers who send Internet communications, they have crossed the threshold requirement to establish that, should the program work as alleged, their communications would be captured in a dragnet Internet collection program.

However, the question whether Plaintiffs can establish standing to pursue their Fourth Amendment claim against the Government Defendants for constitutional violations goes beyond whether they, as individuals and AT&T customers with Internet communications, can proffer evidence of generalized surveillance of Internet communications. Although the public and admissible evidence presented establishes that Plaintiffs are indeed AT&T customers with Internet communications and would fall into the class of individuals surveilled, the evidence at summary judgment is insufficient to establish that the Upstream collection process operates in the manner in which Plaintiffs allege it does.

In their attempt to establish the factual foundation for their standing to sue on their Fourth Amendment Claim, Plaintiffs rely in large part on the declarations of Mark Klein and their proffered expert, J. Scott Marcus, as well as other former AT&T and NSA employees to

present the relevant operational details of the surveillance program. Plaintiffs assert that the declarations support the contention that all AT&T customers' Internet communications are currently the subject of a dragnet seizure and search program, controlled by or at the direction of the Government. However, having reviewed the record in its entirety, the Court finds the Plaintiffs' evidence does not support this claim.

Plaintiffs principally rely on the declaration of Klein, a former AT&T technician who executed a declaration in 2006 about his knowledge and perceptions about the creation of a secure room at the AT&T facility at Folsom Street in San Francisco. However, the Court finds that Klein cannot establish the content, function, or purpose of the secure room at the AT&T site based on his own independent knowledge. *See* Fed. R. Civ. P. 56(c)(4). The limited knowledge that Klein does possess firsthand does not support Plaintiffs' contention about the actual operation of the Upstream data collection process. Klein can only speculate about what data were actually processed and by whom in the secure room and how and for what purpose, as he was never involved in its operation. In addition, Plaintiffs' expert, Marcus, relies exclusively on the observations and assumptions by Klein to formulate his expert opinion. Accordingly, his testimony about the purpose and function of the secure equipment at AT&T and assumed operational details of the program is not probative as it not based on sufficient facts or data. *See* Fed. R. Evid. 702(b). The Court finds that Plaintiffs have failed to proffer sufficient admissible evidence to support standing on their claim for a Fourth Amendment violation of interference with their Internet communications. In addition, without disclosing any of the classified content of the Government Defendants' submissions, the Court can confirm that the Plaintiffs' version of the significant operational details of the Upstream collection process is substantially inaccurate.

In addition, having reviewed the classified portion of the record, the Court concludes that even if the public evidence proffered by Plaintiffs were sufficiently probative on the question of standing, adjudication of the standing issue could not proceed without risking exceptionally grave damage to national security. The details of the Upstream collection process that are subject the Government's assertion of the state secrets privilege are necessary to

address the defenses against Plaintiffs' theory of standing as well as to engage in a full and fair adjudication of Government Defendants' substantive defenses against the Claim. The Court has reviewed the classified brief submitted by the Government and finds that its legal defenses are persuasive, and must remain classified.

Disclosure of this classified information would risk informing adversaries of the specific nature and operational details of the Upstream collection process and the scope of the NSA's participation in the program. Notwithstanding the unauthorized public disclosures made in the recent past and the Government's subsequent releases of previously classified information about certain NSA intelligence gathering activities since 2013, the Court notes that substantial details about the challenged program remain classified. The question of whether Plaintiffs have standing and the substantive issue of whether there are Fourth Amendment violations cannot be litigated without impinging on that heightened security classification. Because a fair and full adjudication of the Government Defendants' defenses would require harmful disclosures of national security information that is protected by the state secrets privilege, the Court must exclude such evidence from the case. *See Mohamed v. Jeppesen DataPlan, Inc.*, 614 F.3d 1070, 1083 (9th Cir. 2010) (holding that "application of the privilege may require dismissal" of a claim if, for example, "the privilege deprives the plaintiff of information needed to set forth a prima facie case, or the defendant of information that would otherwise give the defendant a valid defense to the claim"). Addressing any defenses involves a significant risk of potentially harmful effects any disclosures could have on national security. *See Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

The Court is frustrated by the prospect of deciding the current motions without full public disclosure of the Court's analysis and reasoning. However, it is a necessary by-product of the types of concerns raised by this case. Although partially not accessible to the Plaintiffs or the public, the record contains the full materials reviewed by the Court. The Court is persuaded that its decision is correct both legally and factually and furthermore is required by the interests of national security.

CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiffs' motion for partial summary judgment and GRANTS the Government Defendants' cross-motion for partial summary judgment regarding the allegations of Fourth Amendment violations challenging the possible interception of Plaintiffs' Internet communications.

IT IS SO ORDERED.

Dated: February 10, 2015

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE