No. 14-17574

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TODD S. GLASSEY AND MICHAEL E. MCNEIL,

Plaintiffs-Appellants,

v.

MICROSEMI INC., INTERNET ENGINEERING TASK FORCE, THE INTERNET SOCIETY, UNITED STATES, APPLE INC., CISCO INC., EBAY INC., PAYPAL, INC., GOOGLE INC., JUNIPER NETWORKS, MICROSOFT CORP., ORACLE INC., AND NETFLIX, INC.,

Defendants-Appellees,

ANSWERING BRIEF OF THE UNITED STATES OF AMERICA

Appeal from the United States District Court, Northern District of California
District Court Case No. CV-14-03629 WHA
District Judge William H. Alsup

MELINDA HAAG
United States Attorney
ALEX G. TSE
Chief, Civil Division
WARREN METLITZKY
Assistant United States Attorney

450 Golden Gate Ave, Box 36055
San Francisco, CA 94102-3495
Telephone: (415) 436-7025
Facsimile: (415) 436-6748

Attorneys for Defendant-Appellee
UNITED STATES OF AMERICA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

STATEMENT OF JURISDICTION

Plaintiffs-appellants Todd S. Glassey and Michael E. McNeil (collectively, "plaintiffs") filed this action in the Northern District of California on August 11, 2014. On November 12, 2014, plaintiffs filed their Second Amended Complaint ("SAC") against defendants-appellees United States of America ("United States" or " the government"), Microsemi Corporation, Internet Engineering Task Force, The Internet Society, Apple Inc., Cisco Systems, Inc., eBay Inc., PayPal, Inc., Google Inc., Juniper Networks, Inc., Microsoft Corporation, Oracle Corporation, and Netflix, Inc. (collectively, "technology defendants"). The SAC includes patent infringement, antitrust, copyright and pendent state law claims against the technology defendants, for which the district court had original subject matter jurisdiction under 28 U.S.C. § § 1331, 1337(a) and 1367(a). The various claims against the United States are explained in detail below in the Statement Of Facts; the court had jurisdiction based on 28 U.S.C. § § 1331 and 1346. On December 11, 2014, the district court issued an Order To Show Cause as to why the SAC should or should not be dismissed. SER 7. After the parties responded, the court dismissed plaintiffs' complaint on December 29, 2014. SER 8-15.[1] Judgment was entered the same day. SER 16.

[1] "ER" refers to plaintiffs' Excerpts of Record. ECF No. 26.
"SER" refers to defendants' joint Supplemental Excerpts of Record, filed herewith.

Plaintiff filed a timely notice of appeal to the Ninth Circuit Court of Appeals on December 29, 2014. SER 275. The December 29, 2014 judgment from which plaintiffs appeal is an appealable final order, and this court has jurisdiction under 28 U.S.C. § 1291. *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1151 (9th Cir. 1989).

Notably, in addition to their Ninth Circuit appeal, plaintiffs also appealed to the D.C. Circuit, an appeal which was then docketed in the Federal Circuit on February 11, 2015, as appeal No. 15-1326. SER 276-77.

Plaintiffs have challenged this court's jurisdiction in filings in both the Ninth Circuit and the Federal Circuit, contending that the Federal Circuit has exclusive jurisdiction under 28 U.S.C. § 1295(a)(1) because plaintiffs' claims purport to arise under the patent laws. Plaintiffs filed at least three motions to dismiss this appeal or to transfer this appeal to the Federal Circuit. 9th Cir. ECF Nos. 4, 13, 18. Defendants opposed plaintiffs' motions on the grounds that plaintiffs do not have standing to pursue their purported patent and copyright infringement claims in the Federal Circuit. ECF No. 16. As explained in the technology defendants' Answering Brief ("Tech Defs.' Br.") at 9-16, plaintiffs do not own the patent that they claim to assert, nor are they able to identify a registered copyright they own that is alleged to be infringed. Accordingly, the district court lacked original

jurisdiction over plaintiffs' patent and copyright infringement claims. SER 281-84; ECF No. 16-1 at 11-13; ECF No. 16-2, Ex. B.

On March 2, 2015, defendants moved to dismiss the Federal Circuit appeal for lack of appellate jurisdiction under 28 U.S.C. § 1295(a)(1) or any other basis. SER 278. On June 10, 2014 the Federal Circuit dismissed plaintiffs' appeal, concluding that it lacks jurisdiction over plaintiffs' appeal because the "operative complaint, to the extent we can make out its allegations, asserts patent infringement but recognizes that the [plaintiffs] do not own the patent in question and seeks on various non-patent grounds to void the settlement agreements that had transferred any ownership interest they had in the patent to Microsemi Inc." SER 282.

On June 11, 2015, this court "referred [plaintiffs' motions to transfer (ECF Nos. 13, 18)] to the merits panel assigned to this appeal for whatever consideration the panel deems appropriate." ECF No. 36 at 1. Should the court consider plaintiffs' various motions regarding the Ninth Circuit's jurisdiction, they should be denied for the reasons set for in the Federal Circuit's June 10 Order and in defendants' opposition to plaintiffs' motion. ECF Nos. 16 & 16-2, Ex. A.

STATEMENT OF ISSUES ON APPEAL

1) Did the district court abuse its discretion in dismissing plaintiffs' "utterly frivolous" eighty-page Second Amended Complaint after plaintiffs were

given three opportunities to file a proper complaint, were provided with a lengthy court order explaining the defects in the prior complaint, had an opportunity to review defendants' motions to dismiss and defendants' oppositions to plaintiffs' dispositive motions, were warned that failure to plead a plausible case would result in dismissal, and then were given another opportunity to respond to the district court's order to show cause, and yet nevertheless failed to cure the defects previously identified by the court?

2) Did the district court correctly rule that plaintiffs did not meet their burden to establish that the United States waived its sovereign immunity as to any of plaintiffs' claims by failing to identify specific statutory provisions where the United States consented to be sued?

3) Did the district court correctly rule that plaintiffs failed to meet their burden of establishing constitutional standing for plaintiffs' claims that they suffered a taxable "fraud loss" and that they were damaged by some form of FISA (or related) warrant?

4) Did the district court correctly rule that it lacked subject matter jurisdiction to issue a declaratory judgment that plaintiffs are entitled to take a multi-trillion dollar loss on their 2014 taxes as a result of "fraud losses" from inadmissible foreign patents?

5) Did the district court properly enter judgment in favor of all defendants, including the technology defendants, and properly deny plaintiffs' various "dispositive" motions?

6) Should this court permit plaintiffs to raise issues on appeal and requests for relief that were not before the district court and were raised for the first time on appeal?

STATEMENT OF THE CASE

Plaintiffs initially filed a complaint against Microsemi in the district court on August 11, 2014. SER 17-48.

I. First Amended Complaint

On August 25, 2014, plaintiffs filed a First Amended Complaint ("FAC"), adding new defendants, including numerous federal agencies and departments such as the Departments of Defense, Commerce, Energy, Transportation and Treasury, the Patent and Trademark Office, the National Telecommunications Infrastructure Administration, the Securities and Exchange Commission, the Internal Revenue Service, the "US Intelligence Community" and the President of the United States. SER 52-54. Plaintiffs also "larded" the record with more than a thousand pages of exhibits. SER 4, 8. Plaintiff also filed a motion for a three-judge panel, which the district court denied. SER 1.

II. The District Court Strikes The First Amended Complaint And Gives Plaintiffs A Final Chance To Plead Their Best And Most Plausible Case.

Before the United States answered the FAC or filed a motion to dismiss, the district court *sua sponte* struck the FAC. SER 2-6. The district court observed that "[t]he first amended complaint is fifty pages," and that plaintiffs had "larded the record with voluminous 'exhibits.'" SER 3, 4. The court's order noted that plaintiffs had previously filed five separate lawsuits in the district. SER 3. The court also noted that plaintiffs prior litigation in this district involved the same subject matter, and that plaintiffs voluntarily dismissed their action after the district court issued an order to show cause whether the court had subject matter jurisdiction. SER 3.

After reviewing the FAC on its merits, the court stated that "[t]he first amended complaint suffers from so many deficiencies that it would be hopeless to proceed." SER 4. Addressing only "a few of the fundamental difficulties" with the FAC, the district court ruled that (1) plaintiffs failed to allege any claim whatsoever against various defendants; (2) plaintiffs failed to state any plausible claim for relief, stating that "[p]laintiffs' pleading is so bare that most of the allegations necessary to state the litany of claims referenced in passing are missing"; (3) plaintiffs' claims, many of which dated back to the late 1990s, are time barred; and (4) plaintiffs lacked standing. SER 5. The court warned that "[t]his order highlights some of the fundamental difficulties with plaintiffs' first

amended complaint but there are many more." SER 5. The court then instructed plaintiffs to file a second amended complaint that "must cure the deficiencies identified herein." SER 5. It warned that "failure to do so may well result in dismissal with prejudice. Plaintiffs must plead their best and most plausible case and *further opportunities to plead will not likely be allowed*." SER 5-6 (emphasis added).

III. Plaintiffs File An 80-Page Second Amended Complaint.

On November 12, 2014, plaintiffs filed a second amended complaint followed by the "corrected" SAC filed the next day. SER 91-170. Despite the court's previous warning about both the length and incoherence of the FAC, the SAC is eighty (80) pages long, and is composed of 269 paragraphs. SER 91-170.

The SAC alleges a host of contract, patent, copyright and antitrust violations against the technology defendants, and is described in detail in the technology defendants' Answering Brief at 3. The SAC recognize that at least some of their claims "sounded Looney originally." SER 133. Plaintiffs' allegations against the United States are in Count 9 of the SAC. SER 162-63. There, plaintiffs allege violations of 19 U.S.C. Section 2904, "reciprocal nondiscriminatory treatment of International Patent (and IP complaints), FISA abuse, NAFTA violation, Violation of TRIPS and PCT agreements." SER 162-63, ¶¶ 253-257.

IV. Plaintiffs Immediately File Numerous "Dispositive" Motions Including A Motion For Permission To Take A Multi-Trillion Dollar Tax Loss And A Motion To Quash A Non-Existent National Security Warrant.

After filing the SAC, plaintiffs next filed numerous "dispositive" motions against the technology defendants and against the United States. SER 294-96, Dkt. Nos. 118, 122, 123, 137, 138. At the same time, multiple technology defendants moved to dismiss the SAC. SER 295-96, Dkt. Nos. 142 & 153. Two of plaintiffs' motions were directed at the United States.

First, plaintiffs filed a "fraud loss" motion, entitled "Summary Motion For Partial Summary Judgment Of Count 1 Acknowledging IRC165 Fraud Losses On South African, Japanese, Korean, Australian, Brazilian, Canadian, and EU Filings Of US6370629." SER 184-96. Plaintiffs' fraud loss motion requested that the district court declare that plaintiffs were entitled to take a more than $4 trillion loss on their 2014 taxes. The United States opposed this motion on the grounds that plaintiffs had not established a waiver of the government's sovereign immunity, and that the district court lacked jurisdiction to issue declaratory or injunctive relief over a tax matter. SER 249-53.

Second, plaintiffs filed a Motion To Quash FISA Or Related (Foreign Issued) Warrant In This Matter, in which plaintiffs speculated that some unidentified form of 'national security' warrant had issued from some unidentified government entity at some unidentified time. SER 230-46. The United States

opposed this motion, arguing that plaintiffs had not established Article III standing. SER 254-59. The United States also opposed the motion on the grounds that plaintiffs had not demonstrated that the United States had waived its sovereign immunity, and thus could not be sued civilly by individual plaintiffs. SER 256 n.2.

V. The District Court Issues An Order To Show Cause.

With defendants' motions to dismiss and plaintiffs' myriad dispositive motions still pending, the district court issued an order to show cause as to why the SAC should or should not be dismissed. SER 7. Per the court's order, the United States and the technology defendants responded separately, and plaintiffs responded as well. SER 296.

VI. The District Court Dismisses The SAC And Denies Plaintiffs' Motions.

On December 29, 2014, the district court issued an order denying all of plaintiffs' motions and striking the SAC with prejudice. SER 8-15. The court stated that "[t]wenty defendants, including the United States, and seven law firms should not be dragged into incurring the expense of this *hopeless and utterly frivolous* lawsuit." SER 14 (emphasis added). In its Order dismissing the SAC, the district court first outlined the procedural history of the case, including plaintiffs' prior lawsuits over the patents at issue where plaintiffs voluntarily dismissed each suit. SER 9-10. The court then addressed the infirmities in each of plaintiffs' "dispositive" motions, denying each motion. SER 10-14.

A. The District Court Denies Plaintiffs' Motions, Including Their "Fraud Loss" and FISA-Related Motions.

The court first addressed the motions directed at the United States. As to plaintiffs' FISA-related motion, the district court held that "[n]o motion to quash "FISA or related warrants" could possibly be justified on this record." SER 10. The court ruled that plaintiffs lacked standing, explaining that "[p]laintiffs' theory, to the extent comprehensible, is farfetched. Their contention that it is possible that FISA warrants may exist and that those warrants (if they exist) were issued to an unidentified 'attorney' which then could create a 'conflict of interest' that offends the Constitution is rejected." SER 10.

The court also denied plaintiffs' partial summary judgment motion for "fraud loss." It stated, "[p]laintiffs move to take a multi-trillion dollar 'fraud loss' on their 2014 taxes based on 'loss of access' to their 'intellectual property rights' based on 'abandoned' patent applications allegedly filed in foreign countries." SER 10. The court denied plaintiffs' request for judicial notice of various foreign patents on the grounds that they were not properly authenticated. SER 10-11. The court then denied plaintiffs' partial summary judgment motion because "t]his Court lacks jurisdiction over the 'tax' matter plaintiffs brought." SER 11.

B. The District Court Dismisses The SAC As "Utterly Frivolous."

After denying plaintiffs' motions, the district court addressed the Order To Show Cause. The court stated that "months have passed and plaintiffs have utterly

failed to file a pleading that states a plausible claim." It ruled that none of plaintiffs' complaints—including the SAC—complied with the pleading requirements of Federal Rule of Civil Procedure 8. SER 14 ("None of plaintiffs' pleadings (Dkt. Nos. 1, 6, 112) satisfied *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)"). The court noted that it had already given plaintiffs at least one chance to correct the deficiencies in their complaint, and that they had been warned about the potential consequences: "Plaintiffs are now on their second amended complaint, after their prior pleading was stricken for a multitude of reasons. At that time, plaintiffs were warned that failure to plead their best and most plausible case could result in dismissal with prejudice." SER 14 (internal record citations omitted). The court reasoned that "it is now hopeless to continue with this lawsuit. There are too many fundamental problems with plaintiffs' pleading so only a few will be called out now." SER 14.

The court dismissed the claims against the United States, ruling that "plaintiffs have failed to establish that the United States has waived its sovereign immunity, or that they have standing to sue the United States." SER 14. The court also articulated some of the other bases for dismissing the complaint against the

technology defendants: lack of standing, lack of antitrust injury, and statute of limitations. SER 14. [2]

Finally, the court found that "granting leave to amend would be futile." SER 14. It reasoned that "[p]laintiffs have failed to cure the multitude of defects previously identified, despite having had an opportunity to review the then-pending six motions to dismiss and the prior order striking the complaint." SER 14. The court then struck the SAC and entered judgment for all defendants.[3] SER 15 & 16.

VII. Plaintiffs Appeal The Judgment.

Despite the district court's warning to plaintiffs that their case was "hopeless and utterly frivolous," plaintiffs immediately filed their notice of appeal to this court. *See* SER 275. As explained above, plaintiffs also appealed to the Court of Appeals for the D.C. Circuit, which was later docketed as an appeal in the Federal Circuit. SER 276-77. On June 11, 2015, the Federal Circuit dismissed plaintiffs' appeal, ruling that it lacked jurisdiction over an appeal where plaintiffs did not own

[2] Plaintiffs do not plead when the actions that give rise to their claims against the United States occurred. Plaintiffs' time-barred claims likely include some or all of the claims against the United States.

[3] There is some ambiguity in the court's order. In the text of the order, the district court stated that it was granting defendants' motions to dismiss. SER 14. At the time the district court issued its OSC, the United States had not yet moved to dismiss plaintiffs' complaint. However, in the Conclusion section of the court's order, the court did not grant defendants' motions. Instead, it denied plaintiffs' motions and struck the SAC with prejudice. SER 15.

the patents at issue. This Ninth Circuit appeal is the only pending appeal from the district court's judgment.

STATEMENT OF FACTS

As described in the technology defendant's brief and incorporated herein, plaintiffs' allege that they own intellectual property rights that are infringed by virtually every computer network in the world. *See* Tech Defs' Br. at 3, 5-8. The following facts are relevant only to the claims against the United States.

I. Facts Related To Plaintiffs' Claim For Failure To Prosecute Patent Fraud.

Plaintiffs appear to allege that they were the victims of fraud by Microsemi relating to certain foreign patents. Appellants' Opening Brief, ECF No. 23 ("AOB") at 6, ¶ 13; AOB at 10 ¶ 24. This claim implicates the United States because, according to plaintiffs, the United States refused to criminally prosecute "a patent fraud based EEA and Sherman Act complaint." SER 162, ¶¶ 255-56; *see also* SER 124, ¶¶ 102-3. Specifically, plaintiffs contend that the "US Government refused to prosecute a fraud and antitrust complaint that was filed with the FBI Sacramento office and also sent to Special Agent Manny Alvarez (presumably from the FBI) as well as to "major case intake in Washington D.C." SER 162, ¶ 255. Plaintiffs also allege that the United States "refused to apply the requirements of the NAFTA and TRIPS and PCT agreements based on Congress' Intent therein." SER 162, ¶ 255. Plaintiffs contend that those treaties have

mandatory enforcement clauses which remove the Attorney General's prosecutorial discretion and require that the Department of Justice prosecute all patent frauds, such as the patent fraud that is purportedly at issue in the complaint. SER 124, ¶ 102; SER 152, ¶ 256. Plaintiffs explain that Congress' and the President's ratification of these treaties indicate that the Attorney General's prosecutorial discretion has been either limited or removed entirely. SER 124, ¶ 103.

II. Facts Related To Plaintiffs' Claim That Some Government Entity May Have Issued Some Form Of 'National Security' Warrant To Their Counsel.

Distinct from any claims against the technology defendants, plaintiffs allege that some government entity, perhaps the United States, issued a warrant for plaintiffs' counsel, which plaintiffs contend violates their Seventh Amendment right to unimpeded access to the courts. SER 163, ¶ 257; *see also* SER 125, ¶¶ 104-6. Plaintiffs' allegations are based on the fact that their attorneys—none of whom are identified— "will not answer direct questions about whether they have been served or not." SER 125, ¶ 105. Plaintiffs do not identify what form of warrant or subpoena they believe may have been served on their unidentified attorneys. Plaintiffs alternatively refer to National Security Letters, "other action under Executive Order 12333," FISA warrants, and FISA-related foreign warrants. SER 125, ¶ 106; SER 230-46.

Plaintiffs' motion to quash FISA (or related foreign-issued) warrant includes additional details about plaintiffs' allegations. In their motion, plaintiffs allege that either the United States government or a foreign agency or government issued some form of warrant to plaintiffs' counsel. SER 230-31 & 234, ¶¶ 1-3. Plaintiffs do not specify who issued the warrant, the type of warrant, the content of the warrant or even to whom it was issued. Instead, they allege that "based on dramatic changes from specific points in time onward in their Counsel that they believe their counsel were served with a such a warrant as a method of interfering with their property and court access rights." SER 234, ¶ 3. Plaintiffs explain what they mean by the term "such warrants"—the motion seeks to quash "any existing Intelligence or Internationally issued FISA or Intelligence Warrants issued from any of the nations which US6370629 or related patents were filed in, or any others which have effect in the United States." SER 230, ¶ 1. Plaintiffs note that this "would include any US issued or LE Warrant under the FISA (50 USC ch36 § 1800-§ 1885c) or any related surveillance (including but not limited to PD12333) or LE Program and any other Foreign Issued Warrant for any purpose." SER 231, ¶ 2. Plaintiffs contend that if any "such warrant" was issued to an attorney, it would create a conflict of interest for plaintiffs' lawyer(s), and could "conceptually" even drive the law firm out of business. SER 234-5, ¶¶ 6-8. Plaintiffs then suggest that "such warrants" are being used against their counsel and by foreign governments

in order to harass plaintiffs and prevent them from enforcing their patent rights. SER 235-46. The remainder of plaintiffs' motion recites some of their allegations surrounding their alleged ownership of certain intellectual property rights. Plaintiffs sought an order from the district court: (1) verifying the existence of "said warrant"; (2) quashing the warrant as a violation of plaintiffs' property rights and rights under the Fifth, Seventh, and Fourteenth Amendments; (3) disclosing the nation who issued the warrant; and (4) prohibiting the use in a civil case of any FISA warrant or any warrant that impacts a person's property rights or affects the quality of legal representation available to the person subject to the warrant. SER 243-44.

III. Facts Related To Plaintiffs' "Fraud Loss" Claim.

Though not explicitly alleged in Count 9, plaintiffs elsewhere in the SAC allege that various defendants defrauded them of their intellectual property rights, resulting in a massive financial loss that plaintiffs seek to declare on their taxes. SER 100, ¶¶ 6-7. They describe the loss as "the difference between royalties-received (none) minus the value of the opportunity-lost [which PLAINTIFFS would have been able to receive if they filed US6370629 on their own] relative to what they actually recovered through the extorted DDI and TTI settlements and the alleged frauds by MICROSEMI and its partners since." SER 100, ¶ 6. Plaintiffs

seek "formal acknowledgement of that FRAUD LOSS with the US Department of the Treasury." SER 100, ¶ 7. They request an

> Order [from the Court] to the US treasury, IRS Division "under the provisions of IRC 165 and the Madoff extensions created in the 2009/09 updates to IRC165 "recognizing the PLAINTIFFS' total loss of enforcement rights to date against US6370629 in all six jurisdictions" and in doing so authorizing a Full-Loss Write-down of all pre-recovery values for the US6370629 instances filed and then abandoned including but not limited to those in Japan, Canada, the EU, South Africa and Brazil at a fair valuation as determined by this the trial court.

SER 167, ¶ J. Plaintiffs claim that they "will work with the IRS and this the Trial Court to create a tracking and identification model for new and existing infringements as part of this [order]." SER 100, ¶ J. In plaintiffs' "fraud loss" motion, they sought a declaration from the court that they were entitled to report a multi-trillion dollar loss on their 2014 taxes. SER 194-96.

IV. Other Potentially Relevant Facts Involving The United States.

In the SAC, plaintiffs did not bring a cause of action for patent infringement against the United States, limiting their infringement claims to the technology defendants. However, plaintiffs contend that the United States purchased equipment that infringes plaintiffs' patent(s), and that the United States is dependent on computers that run infringing products. SER 105, ¶ 32.

SUMMARY OF ARGUMENT

Plaintiffs claim that their intellectual property rights are used—and infringed—by virtually every computer in the world. In a series of longer and

longer complaints in the district court, plaintiffs alleged increasingly convoluted legal theories that they say entitle them to trillions of dollars in damages. The district court and defendants—through orders, pleadings, and motions—explained to plaintiffs that their theories were supported by neither law nor fact. Nonetheless, plaintiffs insisted on filing mountains of paperwork, seeking declarations from the court that plaintiffs, in effect, own the entire internet. After giving plaintiffs every opportunity to amend their complaint to properly state a claim, the district court finally declared plaintiffs' complaint to be "utterly frivolous," properly exercised its discretion to dismiss it, and entered judgment for defendants. This court should affirm the judgment for the following reasons.

First, the district court properly exercised its broad discretion to dismiss plaintiffs' complaint for failing to comply with Federal Rule of Civil Procedure 8. *E.g.*, *McHenry v. Renne*, 84 F.3d 1172 (9th Cir. 1996). Plaintiff filed three complaints, the last of which was eighty (80) pages long, against myriad defendants, and proceeded to litter the docket with filings. After the court dismissed plaintiffs' complaint, gave plaintiffs a clear explanation of the complaint's defects and warned plaintiffs that they had one last chance, plaintiffs filed a third complaint that failed to address any of the problems. After issuing an Order to Show Cause and allowing plaintiffs to respond, the court finally dismissed plaintiffs' SAC for failing to comply with even the most basic pleading

requirements, and because it suffered from fatal flaws such as failure to establish a waiver of sovereign immunity, standing, and subject matter jurisdiction. On appeal, plaintiffs offer no law that suggests that the district court acted outside of its discretion. On that basis alone, this court should affirm the judgment.

Second, as separate and distinct basis to affirm the judgment, the district court properly dismissed the SAC because plaintiffs failed meet their burden to establish that the United States waived its sovereign immunity. For none of plaintiffs' three identifiable claims—that they should be able to take a multi-trillion dollar loss on their taxes, that the United States failed to prosecute a foreign patent fraud, and that some government entity issued some sort of warrant to their counsel—do plaintiffs cite any statutory provision where the government consented to be sued.

Third, as yet another independent basis to affirm the judgment, the district court also properly dismissed the SAC because plaintiffs did not meet their burden of establishing constitutional standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs waived their "FISA-related" claim that some government entity may have issued some form of national security warrant to their attorneys. But even if they had not, the claim is based on pure speculation, which is insufficient to establish constitutional standing. The same deficiencies exist in plaintiffs' failure to prosecute claim.

Fourth, plaintiffs' "fraud loss" claim is barred because the court does not have subject matter jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201, to order that plaintiffs may take a loss on their taxes.

Fifth, the court did not err in entering judgment against plaintiffs because, even putting aside the issues of standing, lack of subject matter jurisdiction and sovereign immunity, plaintiffs still failed to state a single plausible claim against the United States. Additionally, as described by the technology defendants, judgment was proper as to all defendants as the court properly dismissed the claims against the other defendants and properly denied plaintiffs' various dispositive motions.

Sixth, the court should not consider new issues related to a prior bankruptcy case and new claims for relief that plaintiffs raise for the first time on appeal.

STANDARD OF REVIEW

This court reviews for an abuse of discretion a dismissal for failure to comply with an order to amend the complaint to comply with Federal Rule of Civil Procedure 8. *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996). Dismissal is not an abuse of discretion when the plaintiff is given the opportunity to amend the complaint and "fail[s] either to respond to the district court's order to show cause with a second amended complaint that complie[s] with Rule 8, or to explain why his action should not be dismissed." *Brenden v. Carlson*, 586 F. App'x 354, 355 (9th

Cir. 2014). A district court's ruling on a question of standing is reviewed de novo. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011). Similarly, this court reviews de novo whether the government has waived its sovereign immunity. *Tobar v. U.S.*, 731 F.3d 938, 941 (9th Cir. 2013); *Harger v. Dep't of Labor*, 569 F.3d 898, 903 (9th Cir. 2009). Where a court has dismissed a complaint for lack of subject matter jurisdiction, appellate review is *de novo. California Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 504 (9th Cir. 2015); *Carolina Cas. Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1086 (9th Cir. 2014). Review of a district court's denial of a motion for partial summary judgment is also de novo. *Balvage v. Ryderwood Improvement and Service Ass'n, Inc.*, 642 F.3d 765, 775 (9th Cir. 2011). An appellate court reviews the district court's decision to take judicial notice for an abuse of discretion. *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458 (9th Cir. 1995). To the extent that plaintiffs' motion to quash a FISA-related warrant sought some form of preliminary injunctive or declaratory relief, the court reviews the district court's decision to grant or deny a preliminary injunction for abuse of discretion. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013).

ARGUMENT

I. The District Court Did Not Abuse Its Discretion In Dismissing Plaintiffs' Complaint For Failure To Comply With Rule 8 After Issuing An Order To Show Cause.

After giving plaintiffs multiple chances to plead a short, coherent complaint, the district court dismissed plaintiffs' eighty-page SAC for failure to comply with the pleading requirements in Federal Rule of Civil Procedure 8. Plaintiffs now appeal that dismissal.

A. Legal Standard For Dismissal For Rule 8 Violation.

A district court has broad discretion in whether to dismiss a rambling, *pro se* complaint for violating Federal Rule of Civil Procedure Rule 8.[4] It may consider the length of the complaint, and whether the complaint is excessively confusing, verbose or conclusory. *See McHenry v. Renne*, 84 F.3d 1172, 1174-76 (9th Cir. 1996) (not abuse of discretion to dismiss complaint after allowing multiple amended complaints with lengths of 35, 37, 43, and 53 pages); *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1058-9 (collecting cases).; *but see Hearns v. San Bernardino Police Dept.*, 530 F.3d 1124, 1131 (9th Cir. 2008) (dismissal based on length alone may be abuse of discretion where claims are otherwise comprehensible). "Our district courts are busy enough without having to penetrate a tome approaching the magnitude of *War and Peace*

[4] Here, court explicitly based its dismissal on plaintiffs' failure to comply with *Iqbal* and *Twombly*, both of which outline Rule 8's pleading requirements. SER 14.

to discern a plaintiff's claims and allegations." *Cafasso*, 637 F.3d at 1059. The court may also consider how many opportunities plaintiff has had to amend. *See Hearns*, 530 at 1130 ("we concluded that the district court had not abused its discretion because it had already given the plaintiffs multiple opportunities to comply, along with specific instructions on how to correct the complaint") (citing *McHenry*, 84 F.3d at 1187-89). The court may consider the potential cost and time expended by the court and defendants in responding to the complaint (*McHenry*, 84 F.3d at 179-80), "the rights of litigants awaiting their turns to have other matters resolved" (*Nevijel v. North Coast Life Ins. Co*., 651 F.2d 671, 674 (9th Cir. 1981)), whether the conduct at issue is attributable to the attorney or to plaintiff (*Al-Torki v. Kaempen*, 78 F.3d 1381, 1383-85 (9th Cir. 1996) (affirming dismissal with prejudice when plaintiff's own conduct violated court orders)), and any prior litigation history by plaintiffs. *McHenry*, 84 F.3d at 1179; *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d at 674-75. The court may consider whether any of the claims have merit, or whether the complaint is doomed to fail. *McHenry*, 84 F.3d at 1179. The "harshness of dismissal with prejudice is directly proportional to the likelihood that plaintiff would prevail if permitted to go forward to trial." *Id.* The court may elect to take less drastic measures before dismissing the complaint, such as providing leave to amend, or issuing a detailed order explaining the deficiencies in the complaint. *Id.* at 1178-79; *Salazar v. Cty of Orange*, 654 Fed. App'x. 322,

322-23 (9th Cir. 2014). The district court may warn plaintiff that they have one last opportunity to properly plead their claims. *McHenry*, 84 F.3d at 1176. Moreover, the court may dismiss the complaint even if some of the claims may be meritorious. *Id.* at1179. "The propriety of dismissal for failure to comply with Rule 8 does not depend on whether the complaint is wholly without merit." *Id.*; *see also id.* at 1180 (refusing to address plaintiffs' arguments on the merits, stating "[w]e need not reach those issues, because the district court did not abuse its discretion in dismissing the entire complaint for violation of Rule 8 and of the court's orders").

B. Plaintiffs Have Not Shown That The District Court Abused Its Discretion In Dismissing Plaintiffs "Hopeless And Utterly Frivolous" Complaint.

Here, the district court acted well within its discretion as a gatekeeper of the court's docket. As this case proceeded through the district court, plaintiffs' claims grew more rather than less confusing, and the record grew more voluminous. Plaintiffs filed *three* lengthy, rambling complaints in this matter, each of which was longer and often less coherent than the previous complaint. SER 17-48, 49-80, 91-170. Plaintiffs "larded the record" with more than one thousand pages of exhibits. SER 4, 8. After filing the SAC, plaintiffs filed numerous "dispositive" motions, each of which confused the issues even more. SER 294-96, Dkt. Nos. 118, 122, 123, 137, 138.

Plaintiffs did not just litter the docket with incessant, often incomprehensible filings. They also failed to remedy the already-identified flaws in their claims. With each complaint, plaintiff was given more and more guidance by the court and by defendants about the complaints' deficiencies. For example, the court issued a detailed order that explained to plaintiffs many of the defects in the FAC: lack of standing, failure to state a claim as to various defendants, failure to allege sufficient facts to make a plausible claim, and statute of limitations. SER 4. The court also specifically warned plaintiffs that they had one last opportunity to fix their complaint or they would face dismissal. SER 4-5.

The court's guidance and its accompanying warning fell on deaf ears. The SAC failed to cure many of the defects already identified by the court. Nonetheless, the court gave plaintiff yet *another* chance to avoid dismissal of their action, issuing an Order to Show Cause and permitting plaintiffs to submit a response as to why the complaint should not be dismissed. SER 7. Plaintiffs received even more guidance as to the infirmities in their pleadings before they filed their response: they had further opportunity to review the parties' responses to plaintiffs' six dispositive motions, and the motions to dismiss filed by various parties. In fact, the United States' oppositions to plaintiffs' "fraud loss" and FISA-related motions identify exactly the issues with the SAC that ultimately resulted in dismissal of those claims. SER 249-59. Plaintiffs received both oppositions well

before their response to the court's OSC, yet still failed to explain why the SAC was not fatally deficient or why it should not otherwise be dismissed or amended. They were aware of the relevant pleading requirements; they cited them in the SAC. SER 133, ¶ 136. The end result of all of this effort by the court was that "[n]one of plaintiffs' pleadings (Dkt. Nos. 1, 6, 112) satisfied *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)." SER 14.

The court did not just base its dismissal on the fact that plaintiffs failed to remedy the already-known problems with the SAC. The court properly considered plaintiffs' unsuccessful prior litigation over the same subject matter, and the potential costs to defendants and the court imposed by plaintiffs' pleadings in this case. SER 9, 14. Nor did the court limit its analysis just to the complaint's lack of compliance with Rule 8 pleading requirements. It also identified fatal, incurable flaws in many of plaintiffs' potential claims that have compelled a dismissal under Federal Rule 12(b)(6). SER 14 (lack of standing, lack of subject matter jurisdiction, statute of limitations bar, and sovereign immunity). Given the opportunities afforded to plaintiffs to get it right, the court was within its discretion to determine that is "[i]t is now hopeless to continue with this lawsuit." ER 14; *Cafasso*, 637 F.3d at 1058 (9th Cir. 2011) ("[t]he district court's discretion to deny

leave to amend is particularly broad where plaintiff has previously amended the complaint").

Plaintiffs' Opening Brief fails to demonstrate otherwise. It does not explain how the district court abused its discretion in dismissing plaintiffs' SAC after issuing an Order to Show Cause. Plaintiffs cite no case that even suggests that the district court acted outside its discretion. Instead, plaintiffs merely repeat that the district court refused to review certain facts or issues that plaintiffs believe are central to their case. But plaintiffs still fail to explain how—even if the court did not reach those issues—the district court acted outside of its discretion. *McHenry v. Renne*, 84 F.3d at 1179 (court may dismiss complaint even if some claims are not wholly without merit).

Because plaintiffs fail to establish that the district court abused its discretion in dismissing the SAC, this court should affirm the judgment.

II. The District Court Properly Dismissed The SAC After Plaintiffs Failed To Establish That The United States Waived Sovereign Immunity For Any Of Plaintiffs' Claims.

Should the court find it necessary to reach the merits of plaintiffs' claims against the United States, plaintiffs' appeal fares no better. The district court properly dismissed plaintiffs' complaint because plaintiffs failed to establish that the United States had waived its sovereign immunity.

Plaintiffs' Opening Brief barely addresses the issue of plaintiffs' failure to establish a waiver of sovereign immunity. Instead, it offers the conclusory statement that "[t]he District Court also inappropriately relied on Sovereign Immunity here." AOB at 5, ¶ 8. Plaintiffs also offer the confusing argument that "[t]his case breaks Sovereign Immunity because to use it the Government has to sidestep a fraud occurring in several foreign nations." AOB at 5, ¶ 9. Plaintiffs further contend that "[S]overeign Immunity which was claimed by the US Government in this matter was never intended to be used by the Administrative Branch of the US Government to cover up Intellectual Property Frauds in seven foreign nations." AOB at 6, ¶ 13. Whatever is meant by those statements is immaterial because, as demonstrated below, the district court did not err in finding that plaintiff failed to establish a waiver of sovereign immunity.

It is black letter law that the United States is a sovereign and that no one may bring suit against it without its consent. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). If the United States has not waived its immunity, the court lacks subject matter jurisdiction and a claim must be dismissed. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985). When the United States grants its consent to be sued, the terms of its consent define the court's jurisdiction. *Meyer*, 510 U.S. at 475. Waivers of sovereign immunity must be unequivocally expressed, and cannot be implied. *Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981). Courts must strictly

construe such waivers in favor of the United States. *Id*. The party invoking the court's jurisdiction bears the burden of proving its existence. *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983). Such party must point to a statute by which the United States expressly waived its immunity from suit. *Lehman v. Nakshian*, 453 U.S. at162; *E.E.O.C. v. Peabody Western Coal Co.*, 610 F.3d 1070, 1083-1084 (9th Cir. 2010).

A. Plaintiffs Failed To Establish That The United States Waived Its Sovereign Immunity For Plaintiffs' Failure to Prosecute Patent Fraud Claim.

In this case, the district court properly ruled that plaintiffs have not met their burden to identify a statute in which the United States waived its immunity. Plaintiffs' first claim—that the United State refused to criminally prosecute a "patent based EEA and Sherman Act complaint"—fails to identify any statutory authority whereby the United States consents to be sued for a failure to prosecute. The SAC correctly concedes that "generally speaking the Attorney General may refuse any prosecution demand as a discretionary control of the office of the Attorney General." SER 124 ¶ 102. However, plaintiffs then allege that the legislative ratification of three "International Treaties with mandatory enforcement clauses" are a "Congressional override" of the Attorney General's discretion as to whether to prosecute certain criminal cases. SER 124 ¶ 102. Specifically, plaintiffs contend that 19 U.S.C. § 2904 requires the United States under the "NAFTA,

TRIPS and PCT agreements" to prosecute "a patent fraud based EEA and Sherman Act Complaint." SER 162 ¶¶ 254-56. Plaintiffs do not explain which sections of those three treaties require the United States to prosecute such complaints. Plaintiffs do not even provide legal citations for the treaties; plaintiffs just use acronyms. No matter. Properly identifying the treaties would not help plaintiffs. Section 2904 says nothing about waiving sovereign immunity. Even if the government was required to prosecute certain cases, it still cannot be sued for failing to do so.

B. Plaintiffs Failed To Establish That The United States Waived Its Sovereign Immunity For Plaintiffs' Fraud Loss Claim.

Plaintiffs' claim for "fraud losses" similarly fails to establish a waiver of sovereign immunity.[5] The stated legal basis for plaintiffs' claim is 26 U.S.C. § 165 (entitled "Losses"), which plaintiffs cite as IRC 165. But Section 165 does not

[5] Plaintiffs also contend that the district court failed to "review" certain foreign patents related to their fraud loss claim. Plaintiffs appear to be referencing the district court's denial of their requests for judicial notice. SER 10-11. Such a denial is reviewed for abuse of discretion. *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458 (9th Cir. 1995). Plaintiffs have not established that the court abused its discretion in refusing to judicially notice documents that had not been authenticated. SER 10-11. Plaintiffs did not even include those documents or their request for judicial notice in their excerpts of record. ECF No. 26. Plaintiffs cannot simply ask the appellate court to speculate that the district court abused its discretion. Moreover, even had the district court judicially noticed the various documents, plaintiffs did not provide sufficient evidence for the court to grant partial summary judgment on their "fraud loss" motions. SER 184-196. Certainly, the record on appeal contains no such evidence.

waive the United States' sovereign immunity. Instead, as its title suggests, the statute addresses when a taxpayer may deduct a loss on their taxes. *Id.* There is no explicit waiver of sovereign immunity in Section 165 that subjects the United States to an order declaring that plaintiffs may take a "fraud loss" on their 2014 taxes. Because plaintiffs do not identify a jurisdictional basis for a waiver of sovereign immunity as to their fraud loss claim, the court properly dismissed that cause of action.

C. Plaintiffs Abandoned Their Claim Regarding Issuance Of A FISA Warrant And Also Failed To Establish That The United States Waived Its Sovereign Immunity.

As to plaintiffs' third claim—that some sort form of intelligence warrant was issued to their counsel—plaintiffs abandon this claim on appeal. Their Opening Brief does not mention FISA or surveillance or any sort of warrant at all. *See Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1079-80 (9th Cir. 2013) (a petitioner waives a contention by failing to raise it in the opening brief). Plaintiffs waive the argument entirely, and on that basis alone, the court should affirm the dismissal of that claim.

On the merits of this claim, plaintiffs fare no better. Plaintiffs fail to identify any statute that explicitly waives sovereign immunity. In the SAC, plaintiffs repeatedly use the acronym "FISA" (the Foreign Intelligence Surveillance Act) without referencing any applicable code sections where a sovereign immunity

waiver might exist. *E.g.*, SER 287 Plaintiffs' Motion to Quash FISA Or Related (Foreign Issued) Order In This Matter is hardly any better. SER 230-31, ¶¶ 1-2. There, plaintiffs cite the FISA legislation generally without identifying any specific section that explicitly waives sovereign immunity. Plaintiffs' response to the court's Order To Show Cause shares the same infirmity. SER 264, ¶ 8. Though their response cites a specific statute that grants certain emergency powers, 50 U.S.C. § 1701, plaintiffs still do not identify any section of that statute that permits plaintiffs to sue the United States. SER 264. Having failed to identify a statutory waiver of sovereign immunity, plaintiffs are also barred from proceeding with a direct, *i.e.*, non-statutory, claim against the United States. Despite plaintiffs' contention that the United States is directly liable for violations of the Fourth, Fifth, Seventh and Fourteenth Amendments (SER 163, ¶ 257; SER 265, ¶ 11), the United States has not waived its sovereign immunity for constitutional violations. *FDIC v. Meyer*, 510 U.S. 471 (1994). It is plaintiffs' burden to establish a waiver of sovereign immunity, and they have not done so. *See also Al-Haramain Islamic Foundation, Inc. v. Obama*, 705 F.3d 845, 854 -855 (9th Cir. 2012) (no sovereign immunity waiver for FISA warrant issued under § 810).

Because the district court properly ruled that plaintiffs had not met their burden of establishing a waiver of qualified immunity, the court should affirm the judgment.

III. The District Court Properly Dismissed The SAC After Plaintiffs Failed To Establish That They Had Standing To Sue The United States.

The district court also properly dismissed plaintiffs' SAC for lack of standing. ER 14. On appeal, plaintiffs do not challenge the court's ruling that plaintiffs have not established that they have standing to sue the United States. In fact, plaintiffs' only mention of standing relates to various intellectual property rights, which are not claims against the United States. AOB at ¶¶ 5, 42-44, 60. Because plaintiffs have waived this argument on appeal (*Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1079-80 (9th Cir. 2013)), this court should affirm the district court's dismissal for lack of standing.

Should the court reach the merits of this issue, the result is no different. Plaintiffs have made no showing that the district court erred in ruling that plaintiffs failed to satisfy their burden of establishing that they have standing to sue the United States. To bring suit in federal court, a plaintiff must establish three constitutional elements of standing. First, the plaintiff must have suffered an "injury in fact," the violation of a protected interest that is (a) "concrete and particularized," and (b) "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (quoting

Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41–42 (1976)). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560 (quoting *Simon, supra*, 426 U.S. at 43). "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." *Lujan*, 504 U.S. at 465, n.2 (internal quotation marks omitted). "Thus, we have repeatedly reiterated that "threatened injury must be certainly impending to constitute injury in fact," and that "[a]llegations of possible future injury" are not sufficient." *Clapper v. Amnesty Int'l USA*, __ U.S. __, 133 S. Ct. 1138, 1147 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (internal quotations marks omitted)). Moreover, when an asserted injury arises from government action against a third party, "much more is needed" to show standing. *Lujan*, 504 U.S. at 562. "In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *Id.* "It becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* Thus, when plaintiff is not the object of the

government action he challenges, standing is "substantially more difficult" to establish. *Id.*

In the district court, the issue of standing was raised primarily in response to plaintiffs' claim that the United States or a foreign government may have issued a "FISA-related" warrant to their client. In its order dismissing the SAC, the district court held that the SAC failed to establish that plaintiffs had standing, but did not specifically identify the claims for which plaintiffs lacked standing. SER 14. However, the order also denied plaintiffs' motion to quash on the grounds that plaintiffs lacked Article III standing. SER 10. The United States addresses both the court's dismissal of the SAC, and plaintiffs' motion to quash below.

A. Even If They Had Not Waived Their FISA Claim, Plaintiffs Failed To Meet Their Burden To Establish That They Had Article III Standing.

As explained above, plaintiffs have waived their claim that the United States improperly issued a FISA-related warrant. But should the court consider the claim, the district court properly ruled that plaintiff had not established constitutional standing. "The party invoking federal jurisdiction bears the burden of establishing these [three] elements" of standing. *Lujan*,, 504 U.S. at 561. Here, plaintiffs fail to establish any of these elements.

1. Plaintiffs Did Not Meet Their Burden To Show Injury.

Plaintiffs' alleged injury is purely speculative. Plaintiffs appear to allege that *if* a warrant was issued to their counsel, the warrant interfered with their attorney/client relationship, and as a result somehow affected their property rights under the United States Constitution and/or denied plaintiffs access to the courts. SER 234-35, ¶¶ 3-8. *Clapper v. Amnesty Int'l USA*, ___ U.S. __, 133 S. Ct. 1138 (2013) forecloses this sort of argument for standing. The *Clapper* plaintiffs sought to establish standing based on the fact that people with whom they were communicating would likely be targeted for surveillance under the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1881a. Plaintiffs could not identify who the government might use its authority to target, the exact statutory authority the government might use to authorize surveillance, whether the court would authorize such surveillance, whether plaintiffs' contacts might be surveiled, and whether plaintiffs would be parties to the surveillance at all. The Supreme Court held that such a "speculative chain of possibilities" fails to satisfy the requirement that the injury be certainly impending. *Id.* at 1150; *see also Summers v. Earth Island Institute*, 555 U.S 488, 496 (2009) (rejecting a standing theory premised on a speculative chain of possibilities); *Whitmore*, 495 U.S. at 157-160 (same).

Here, plaintiffs' "speculative chain of possibilities" is even more attenuated. Plaintiffs believe that their counsel are subject to "such a warrant" because of what plaintiffs describe as "dramatic changes from specific points in time onward in their Counsel." SER 234, ¶ 3. Plaintiffs then allege that *if* a warrant issued to their counsel (who remain unidentified) from some unidentified source (either the United States or another law enforcement agency or a foreign government) with authority from some unidentified statute (be it FISA or pursuant to some other authority), it *might* cause a conflict of interest for plaintiffs' attorney and *might* somehow interfere with plaintiffs' right to access the courts and plaintiffs' property rights in some unidentified way. SER 234-35, ¶¶ 3-8. These allegations are insufficient to establish an injury-in-fact for Article III standing.

2. Plaintiffs Did Not Meet Their Burden To Show Causation.

Even if some sort of warrant issued, plaintiffs cannot show a sufficient causal connection between the "dramatic changes" in their undisclosed counsel (SER 234, ¶ 3) and defendant's alleged improper conduct. To establish that any particular statue or warrant is the cause of plaintiffs' alleged injury, plaintiffs must first show that their injury is "fairly traceable" to that that statute. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. at 1150. Here, plaintiffs do not even identify a specific statute. Instead, they merely speculate that there is some form of warrant, either a FISA warrant or an "Intelligence Warrant" or some other warrant from a

foreign government. SER 230, ¶ 1; *see also* SER 231, ¶ 2; SER 270, ¶¶ 30-31 (speculating why a government might issue such a warrant and explaining that they would have standing *if* a "FISA, IEEAP or other Presidential Directive was used"). Even if they could identify a single particular statute under which a warrant issued, such as FISA, they fail to allege that their injury is fairly traceable to such a warrant. These allegations are not sufficient to meet the causation element of Article III standing. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. at 1150.

3. Plaintiffs Did Not Meet Their Burden To Show Redressability.

Plaintiffs cannot show that their injury will be redressed by a favorable decision. Plaintiffs believe that as a result of the warrant affecting their counsel, they now cannot access the courts and that their property rights have been affected. They have not established how these rights have been affected by this alleged warrant, nor how quashing the warrant will provide any redress. As for plaintiffs' right to access the court, the volume of filings by plaintiffs in this case alone ably demonstrate that their rights have not been encumbered.

B. Plaintiffs Failed To Meet Their Burden To Establish That They Have Article III Standing For The Failure To Prosecute Patent Fraud Claim.

In addition to plaintiffs' "FISA-related" claim, plaintiffs also lack standing for their allegation that they suffered injury from the Attorney General's alleged failure to criminally prosecute patent fraud. As previously explained, this claim

fails because the United States is protected by sovereign immunity. *See* Section II.B, *supra*. But it also fails because this claim provides no facts establishing either a "concrete and particularized" nor an "actual and imminent" injury. Causation and redressability are similarly lacking. Plaintiffs' Opening Brief suggests that they might have standing because "[u]nder Title 18, the Courts cannot knowingly allow the Will of Congress to be impugned by the US DoJ and so the US Department of Justice[']s refusal to enforce a fraud claim against a unlawful patent filing for a US Citizen in another country constitutes a formal taking and a willing reassignment of that Intellectual Property under the Fifth Amendment to those parties." Opening Br., ¶ 59. This argument is premised on their purported ownership of the patents at issue. As explained in the technology defendants' brief (pp. 10-16, 21-26) and in the district court's order (SER 14), plaintiffs do not own the patents or have standing to assert any patent rights. And even if plaintiffs owned any such rights, their argument still fails to meet their burden of showing each element of standing.

The district court was correct to dismiss this claim for lack of standing as well as based on sovereign immunity.

IV. THE COURT DOES NOT HAVE JURISDICTION OVER THE FRAUD LOSS CLAIM.

In its order dismissing the SAC, the district held that plaintiffs' claims were barred by sovereign immunity and lack of standing. In the same order, it also denied plaintiffs' motion for partial summary judgment on its fraud loss claim on

the grounds that the court lacked jurisdiction over the claim. Though not explicitly included in Count 9 of the SAC as a claim against the United States, plaintiffs' "fraud loss" claim is mentioned in various places in their Opening Brief. AOB at 5-7, 10, 12-13, 16-18 (¶ ¶ 10, 13, 17, 26, 33, 38, 51, 57-61). But mere mentions are not enough to raise an issue on appeal. At no point in the Opening Brief do plaintiffs explain why the dismissal was improper, or otherwise offer any legal citation—other than a reference to "IRC 165"—as to why the district court has subject matter jurisdiction over their fraud loss claim. On the basis of that omission alone, the court should affirm the dismissal of this claim.

Should the court reach the merits, the dismissal of the SAC and the denial of plaintiffs' motion on jurisdictional grounds were nonetheless both proper. Even if the United States had waived its sovereign immunity with regard to plaintiffs' fraud loss claim, the district court does not have jurisdiction over the claim because the Declaratory Judgment Act ("the Act"), 28 U.S.C. § 2201, bars the relief sought by plaintiffs. While courts generally have jurisdiction to grant declaratory relief under the Act, the statute specifically prohibits the court from granting declaratory relief in controversies with respect to federal taxes. *See Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7 (1974); *Hutchinson v. United States*, 677 F. 2d 1322, 1326-27 (9th Cir. 1982). Here, plaintiffs sought a declaration from the court that they are entitled to take fraud losses on their tax returns. SER 196 ¶ 29. That is *exactly* the

sort of declaration of rights specifically barred by the Act.[6] Moreover, plaintiffs' claim for fraud losses depends on a finding that they own certain intellectual property rights. As the other non-government defendants separately demonstrate, plaintiffs' ownership claims fail. *See* Tech Defs' Br. at 10-16, 21-26.

V. Judgment Was Properly Entered And Plaintiffs' Motions Were Properly Denied.

Sovereign immunity, standing and lack of subject matter jurisdiction are not the only bases upon which plaintiffs' claims fail, and the district court's order addressed more than just the claims against the United States. Entry of judgment as to all defendants was proper for the following reasons.

First, as the district court ruled, none of plaintiffs' claims satisfied the pleading requirements in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). SER 14. At no point have plaintiffs established that there are cognizable claims for issuing a FISA warrant, for "fraud loss", or for failure to prosecute patent fraud. And even if such causes of action existed, plaintiffs have not pled facts sufficient to establish that they have plausible claims for relief. For those reasons as well, the district court properly dismissed the SAC.

[6] If plaintiff attempts to characterize their complaint as seeking injunctive relief, the Anti-Injunction Act bars suits to restrain the assessment or collection of federal taxes. 26 U.S.C. § 7421(a).

Second, the district court entered judgment after it dismissed the SAC as to all parties, not just the United States. In this appeal, plaintiffs challenge the dismissals of the technology defendants as well as the United States. The United States incorporates by reference the technology defendants' arguments as to why the district court's dismissals were proper. *See* Tech. Defs' Br. at 20-26. Moreover, though plaintiffs have not made a patent infringement claim (or any other sort of infringement claim) against the United States, such a claim would nevertheless fail for the same reasons as described by the technology defendants. Tech. Defs. Br. at 10-15, 21-26.

Third, the district court properly denied plaintiffs' various motions. As to the motions specifically addressed to the United States, the district court properly denied plaintiffs' FISA-related motion and "fraud loss" motion for the reasons identified above.[7] As to the other motions, the United States incorporates by reference the technology defendants' arguments as to the dismissal of plaintiffs' other motions, including plaintiffs' motion for a three-judge panel. Tech. Defs. Br. at 21-26.

[7] Despite its name, plaintiffs' motion to quash a FISA-related warrant is more in the nature of a request for a preliminary injunction. Review of the district court's denial of a motion for a preliminary injunction motion is for abuse of discretion, which plaintiffs have certainly not shown occurred here. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013).

In short, plaintiff has not established that the district court abused its discretion or otherwise erred in its order, or in entering judgment on behalf of all defendants and against plaintiffs.

VI. The Court Should Not Consider New Issues Raised By Plaintiffs For The First Time On Appeal.

Plaintiffs raise several new issues for the first on appeal, including a request that the court quash the "Enforcement Blockage from US DoJ" of an alleged "Sale Order from US BK 01-54207-MM" and qualify the "Enforcement Blockage" as a taking. AOB at 12. Plaintiffs also seek several new remedies. AOB at 18-19. None of these issues or remedies were raised before the district court and thus are not properly before this court. *See* 28 U.S.C. § 1291; *see also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below").

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

CONCLUSION

For the foregoing reasons, this court should affirm the judgment of the district court, entered after dismissal with prejudice of plaintiffs' Second Amended Complaint.

Dated: July 13, 2015

Respectfully submitted,

MELINDA HAAG
United States Attorney

/s/ Warren Metlitzky
WARREN METLITZKY
Assistant United States Attorney

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6(a) of the United States Court of Appeals for the Ninth Circuit, Defendant-Appellee United States Of America hereby states that it is not aware of any cases related to this appeal.

Dated: July 13, 2015

Respectfully submitted,

MELINDA HAAG
United States Attorney

/s/ Warren Metlitzky
WARREN METLITZKY
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, I certify that, the preceding Answering Brief is proportionately spaced, has a typeface of 14 points or more, and contains no more than 10,239 words.

Dated: July 13, 2015

Respectfully submitted,

MELINDA HAAG
United States Attorney

/s/ Warren Metlitzky
WARREN METLITZKY
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2015, I electronically filed the Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 13, 2015

Respectfully submitted,

MELINDA HAAG
United States Attorney

/s/ Warren Metlitzky
WARREN METLITZKY
Assistant United States Attorney