CASE NOS. 06-17132, 06-17137

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL, AND ERIK KNUTZEN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS-APPELLEES,

V.

AT&T CORPORATION,

DEFENDANT-APPELLANT, AND

THE UNITED STATES,

INTERVENOR AND APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE VAUGHN R. WALKER, CHIEF DISTRICT JUDGE
CIVIL No. C-06-0672-VRW

OPPOSITION OF PLAINTIFFS-APPELLEES TO THE GOVERNMENT'S MOTION TO HOLD APPEALS IN ABEYANCE

AND

PLAINTIFFS-APPELLEES' CROSS-MOTION TO DISMISS THE APPEALS

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OPPOSITION OF PLAINTIFFS-APPELLEES TO THE GOVERNMENT'S MOTION TO HOLD APPEALS IN ABEYANCE AND CROSS-MOTION TO DISMISS THE APPEALS

This is a consolidated interlocutory appeal under section 1292(b) seeking review of an order of the district court holding that the state secrets privilege does not require the threshold dismissal of this action. The government, appellant here and intervener below, asks that the Court hold in abeyance its review of the district court's order, pending "further proceedings in the District Court" brought by the government under a newly-enacted statute. Government Motion at 1. Defendant-appellant AT&T has joined in the government's motion. The new statute is called the FISA Amendments Act of 2008 (FISAAA), and the relevant section 802 is codified at 50 U.S.C. § 1885a.

Plaintiffs, appellees here, agree that when the government avails itself of the new procedures created by FISAAA, as it has already represented to plaintiffs it will, the posture of this appeal will change dramatically.[1] But the appeal should not merely be held in abeyance. For the reasons described below, the appeal

[1] Attached hereto as Exhibit A is a July 21, 2008 email to plaintiffs' counsel from Anthony Coppolino of the Department of Justice, Civil Division, who is representing the government in the district court. The email proposes a briefing schedule that includes the date for filing of "AG Certifications" under the FISAAA, referred to as the "new immunity law" in the email, as well as for plaintiffs' constitutional and other challenges to the new law.

should be dismissed. Plaintiffs respectfully request that the government's motion for abeyance be denied and cross-move that the appeal be dismissed and the case remanded to the district court upon the filing of the FISAAA certification by the government in the district court.

In sum, when it avails itself of the process created by the FISAAA the government will necessarily reveal to the district court the specific information which it has asserted is a state secret: whether AT&T gave assistance to the government in the alleged surveillance and whether any purported written authorization was given to AT&T. By revealing the very information that has been the basis of its claim of state secrets privilege, the government will have waived the privilege as to that information. With no specific "secrets" still at issue, this interlocutory appeal will be moot. The appeal should therefore be dismissed.

CASE BACKGROUND

As the Court is aware, plaintiffs represent a class consisting of millions of AT&T customers. Plaintiffs allege that defendant AT&T is engaged in a domestic surveillance dragnet, indiscriminately intercepting and disclosing to the government the telephone and Internet communications of millions of customers, along with detailed records about customers' communications.

This appeal arises from the government's intervention in the action below, asserting the state secrets privilege and demanding that the case be dismissed. The

government asserted to the district court that the "secret" at issue was " 'whether AT&T has provided any assistance whatsoever to the NSA regarding foreign intelligence surveillance.' " *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 985 (N.D. Cal. 2006), *quoting from* government's district court reply brief. The government further asserted that this was " 'the key factual premise underlying plaintiffs' entire case . . . . Indeed in the formulation of *Reynolds* and *Kasza*, that allegation is "the very subject of the action." ' " *Ibid*.

In its July 20, 2006 Order that is on appeal here, the district court rejected the government's contention that the state secrets privilege required dismissal of the case at the outset. It ruled that the *Totten/Tenet* bar requiring dismissal of lawsuits premised on the existence of a covert espionage relationship did not apply to this action and also ruled that the "very subject matter" of this action was not a state secret. *Hepting,* 439 F. Supp. 2d at 993-94.

The district court limited its state secrets dismissal ruling to those issues, expressly stating that it "declines to decide at this time whether the case should be dismissed on the ground that the government's state secrets assertion will preclude evidence necessary for plaintiffs to establish a *prima facie* case or for AT&T to raise a valid defense to the claims. . . . It would be premature to decide these issues at the present time." *Hepting,* 439 F. Supp. 2d at 994; *see also ibid.* ("it would be premature to conclude that the privilege will bar evidence necessary for plaintiffs'

prima facie case or AT&T's affirmative defense"). It further noted that "AT&T could confirm or deny the existence of a certification authorizing monitoring of communication content through a combination of responses to interrogatories and *in camera* review by the court." *Hepting,* 439 F. Supp. 2d at 997.

The district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). *Hepting,* 439 F. Supp. 2d at 1011.

SCOPE OF THE APPEAL

Section 1292(b) strictly limits appellate jurisdiction to the issues actually decided in the certified order on appeal. "An appeal under this statute is from the *certified order*, not from any other orders that may have been entered in the case. Even if the Court of Appeals' jurisdiction is not confined to the precise question certified by the lower court (because the statute brings the 'order,' not the question, before the court), that jurisdiction is confined to the particular order appealed from. Courts have consistently observed that 'the scope of the issues open to the court of appeals is closely limited to the order appealed from . . .' " *United States v. Stanley*, 483 U.S. 669, 676 (1987). "The court of appeals may not reach beyond the certified order" and may address only those "issue[s] fairly included within the certified order." *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996).

In addition, this Court's exercise of jurisdiction under section 1292(b) is committed to its sound discretion throughout the pendency of the appeal.

"Whenever it appears that an order granting interlocutory appeal was improvidently granted, it is the duty of the court to vacate it." *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966); *see also Molybdenum Corp. of America v. Kasey*, 279 F.2d 216, 217 (9th Cir. 1960) ("when it eventually appears that the question presented should await further ripening, we hold our duty is equally clear to vacate the initial order"). A change in the governing statutory law or further proceedings in the district court may be grounds that render the continued exercise of interlocutory jurisdiction under section 1292(b) improvident. *See New York City Health & Hospitals Corp. v. Blum*, 678 F.2d 392, 397 (2d Cir. 1982) (dismissing 1292(b) interlocutory appeal as improvidently granted because "[s]ignificant changes have been made in the relevant federal law" and therefore "the certified question . . . might relate to an issue that is now moot").

THE GOVERNMENT'S ARGUMENTS ON APPEAL

On appeal the government again specified the "secrets" it sought to maintain and on which it based its motion to dismiss: "the state secrets privilege would prevent the existence of any such certification or authorization, or of any secret relationship at all with AT&T, from being confirmed or denied in this litigation." Gov't Opening Appellate Brief at 45. Thus the two crucial pieces of information that the government claimed were covered by the privilege were:

a) whether any secret relationship existed between AT&T and the government, and

b) the existence of any certification from the government to AT&T.

The government was unequivocal that the state secrets privilege prevented the court from receiving this information, not merely the plaintiffs: "Nor does in camera review resolve the problem: Courts must 'not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.' *Reynolds,* 345 U.S. at 10." Gov't Opening Appellate Brief at 46.

Based on these specific secrets, the government made three arguments in support of its argument on appeal that the state secrets privilege required the threshold dismissal of plaintiffs' action:

(1) the suit's "very subject matter" – including the relationship, if any, between AT&T and the government in connection with the surveillance activities alleged by plaintiffs – is a state secret.

(2) plaintiffs' standing cannot be established or refuted absent disclosure of state secrets because that would require confirmation of the secret relationship between the government and AT&T.

(3) the state secrets privilege precludes litigation of the merits of plaintiffs claims, chiefly because AT&T is prevented from defending itself by relying

on the existence of certifications or other documentation given to it by the government.

See, e.g., Gov't Opening Appellate Brief at 2.

UNDER THE FISAAA PROCESS, THE GOVERNMENT WILL VOLUNTARILY REVEAL THE CLAIMED "SECRETS" TO THE DISTRICT COURT

Under the relevant section of FISAAA, section 802, the government may seek dismissal of a case against any person for "providing assistance to an element of the intelligence community" if makes a certification to the district court, supported by "substantial evidence," stating:

> (1) any assistance by that person was provided pursuant to an order of the court established under section 103(a) directing such assistance;
> (2) any assistance by that person was provided pursuant to a certification in writing under section 2511(2)(a)(ii)(B) or 2709(b) of title 18, United States Code;
> (3) any assistance by that person was provided pursuant to a directive under section 102(a)(4), 105B(e), as added by section 2 of the Protect America Act of 2007 (Public Law 110-55) or 702(h) directing such assistance;
> (4) in the case of a covered civil action, the assistance alleged to have been provided by the electronic communication service provider was–
>
> (A) in connection with an intelligence activity involving communication that was—
>
> (i) authorized by the President during the period beginning on September 11, 2001 and ending on January 17, 2007; and
>
> (ii) designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and
>
> (B) the subject of a written request or directive, or a series of written requests or directives, from the Attorney

> General . . . to the electronic communication service provider indicating that the activity was—
>
> (i) authorized by the President; and
>
> (ii) determined to be lawful; or
>
> (5) the person did not provide the alleged assistance.

FISAAA, § 802(a).[2]

FISAAA also provides that the district court, in its review of a certification by the Attorney General, "may examine the court order, certification, written request or the directive" that was given to the electronic communications service provider. FISAAA § 802(b)(2). Such review shall be *ex parte* and *in camera* upon a declaration from the Attorney General. FISAAA § 802(c)(1).

THE GOVERNMENT WILL MOOT THE APPEAL WHEN IT AVAILS ITSELF OF FISAAA

Accordingly, when the government provides information to the district court in support of an Attorney General certification made under any of section 802's provisions:

[2] Note that by describing FISAAA plaintiffs do not concede that the statute is valid, either facially or as applied. To the contrary, FISAAA, including the specific dismissal powers provided to the government described above, is plainly unconstitutional, violating the Fourth Amendment, the separation of powers, and due process among other serious problems. Plaintiffs will address those issues in the district court in the first instance.

(1) The government will reveal to the district court whether AT&T assisted in the alleged surveillance, thereby revealing whether there was a "secret espionage relationship" between AT&T and the government.

(2) The government will reveal to the district court whether plaintiffs have standing – that is whether the alleged surveillance assistance was provided by AT&T to the government.

(3) The government will reveal to the district court whether AT&T received from the government documentation purporting to authorize the surveillance, and it may even reveal the documentation itself to the court.

See FISAAA, § 802(b)(2).

These acts by the government moot the issues of this appeal. Once the information sought to be protected by the privilege is disclosed, the privilege is no longer applicable. *See* Wright & Miller, Federal Practice and Procedure, § 2016 ("When a party puts privileged matter in issue as evidence in a case, it thereby waives the privilege…"); *see, e.g., Mitchell v. Bass,* 252 F.2d 513, 516 (8th Cir. 1958) (informer's privilege no longer applies when identities of the informants have been disclosed); *U.S. v. Mendelsohn,* 896 F.2d 1183, 1188 (9th Cir. 1990) (waiver of attorney client privilege found when defendant told detective of attorney advice).

Because under the FISAAA procedure the government will reveal the very alleged "secrets" it sought to protect by asserting the state secrets privilege, the appeal will be moot. *U.S. v. Bergonzi,* 403 F.3d 1048, 1049-1050 (9th Cir. 2005) (appeal was moot where appellant had conceded the only issue on which it sought relief, the assertion of the privilege against production of certain documents).

OTHER FACTORS ALSO DEMONSTRATE THE NEED FOR DISMISSAL AND FURTHER PROCEEDINGS IN THE DISTRICT COURT RATHER THAN ABEYANCE OF THIS APPEAL

The government may argue that its use of FISAAA does not resolve issue of whether the state secrets privilege prevents plaintiffs from making their *prima facie* case or defendants from presenting a key *defense*. Yet those issues were not properly on appeal, since the district court specifically determined that they were premature and did not decide them in the order on appeal, instead reserving them for later decision. *See* pages 5-6, *supra*. As this court recently observed, a court of appeals should not ordinarily consider an issue not ruled on in the district court. *Al Haramain Islamic Foundation v. Bush,* 507 F.3d 1190, 1206 (9th Cir. 2007), *citing Singleton v. Wulff*, 428 U.S. 106 (1976) and *Barsten v Dept. of Interior*, 896 F.2d 422, 424 (9th Cir. 1990).

More importantly, any consideration of claims of state secrets privilege in this case must now take into account the district court's recent ruling that the state secrets privilege is preempted in surveillance cases by section 1806(f) of the

Foreign Intelligence Surveillance Act, 18 U.S.C. §1806(f). *In re National Security Agency Telecommunications Records Litigation*, --- F. Supp. 2d ----, 2008 WL 2673772 *9 (N.D. Cal. 2008). As the Court is well aware, the district court's determination of the impact of §1806(f) was requested by this Court in its ruling in the companion case of *Al Haramain* in November 2007. *Al Haramain*, 507 F.3d at 1206. Since plaintiffs' action arises under many of the same statutory and constitutional provisions as does the *Al Haramain* action and since both actions are pending before the same district judge as part of Multi-District Litigation No. 06-1791, the district court's finding of preemption bears directly on any assertion of the state secrets privilege in this action. As such, the district court's section 1806(f) ruling is another event that has dramatically changed, if not mooted, this appeal.

Moreover, even if the government were now to assert that there exist additional state secrets justifying dismissal other than the two specific alleged secrets that the district court ruled on and that were central to this appeal, further proceedings in the district court would be necessary in order to evaluate any such assertion. This is because any additional or new secrets must to be reevaluated in light of the specific evidence that the government will have already revealed under FISAAA, since this will provide a significant amount of information about the means, scope, and rationale for the surveillance. Such further evaluation must also

consider the specific additional evidence claimed to be secret and the remaining need for such evidence in the litigation. As this Court observed in *Kasza v. Browner,* the court must review the specific evidence excluded due to the state secrets privilege and then determine whether "sensitive information can be disentangled from non-sensitive information" and whether any "protective procedure can salvage" the litigation despite the privilege. *Kasza v. Browner,* 133 F.3d 159, 1166, 1170 (9thCir. 1998), *quoting Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). Such determinations are properly made by the district court in the first instance; moreover, they are outside the scope of the order that is on appeal and, thus, beyond the appellate jurisdiction of the Court.

Finally, as demonstrated by the Request for Judicial Notice filed herewith, the government has already waived its claim of state secrets privilege through its continuing stream of admissions about the surveillance and the telecommunications companies role in public statements and in Congressional testimony. Even apart from any disclosures it may make in the course of requesting dismissal under section 802 of FISAAA, therefore, the government has admitted that it had a surveillance relationship with the telecommunications that are being sued in this case (i.e., AT&T), and that the telecommunications companies received written documentation from the government to facilitate that surveillance. The President, the Director of National Intelligence, and senior

administration officials have each already admitted these facts, including in public statements and in formal testimony to Congress, mostly in support of the administration's very public lobbying campaign for the FISAAA.

For instance, DNI McConnell testified before Congress that "certifications were issued" to companies who are now "being sued." Hearing on the House Permanent Select committee on Intelligence at 21 (February 7, 2008). RJN at 14. Similarly, on February 22, 2008, the Senior Administrative officials stated that "companies who were assured of legality by the Attorney General of the United States [are being] sued for billions of dollars." RJN at 15. Likewise on February 25, 2008, President Bush referred to the "Companies who are believed to have helped us," and confirmed that "[O]ur government told them that their participation was necessary, and … that what we had asked them to do was legal." The President confirmed that he was speaking of the defendants in *In re National Security Agency Telecommunications Records Litigation*, by noting that "they're getting sued for billions of dollars." RJN at 7-8.

Obviously AT&T is a telecommunications carriers being sued for their involvement in the surveillance; this case was the first one filed and remains the lead case in the multi-district litigation. While the government has attempted to dance around the issue by referring the "companies being sued" instead of using

the defendant companies' names, there is no doubt to whom the government is referring.

These and many other admissions confirm that:

1) assistance was given to the government by telecommunications carriers,

2) those carriers received written authorizations from the government,

3) those same carriers are now being sued.

Thus, even without the disclosures it will be making under FISAAA, the government's own admissions in the year since this case was argued waive its assertions both that its relationship with AT&T is a secret and that it can neither confirm nor deny that certifications or other written authorizations were given to AT&T.

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CONCLUSION

For the reasons stated above, plaintiffs-appellees respectfully request that the Court deny the government's motion to hold this case in abeyance and instead dismiss the appeal and remand the case to the district court.

Respectfully submitted,

DATED: August 14, 2008

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