

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING, ET AL.,)
)
Plaintiffs/Appellees,)
)
v.) Nos. 06-17132, 06-17137
)
AT&T CORP., ET AL.,)
)
Defendants/Appellants,)
)
and)
)
UNITED STATES OF AMERICA,)
)
Intervenor/Appellant.)
_____)

**GOVERNMENT’S MOTION TO HOLD APPEALS IN ABEYANCE
PENDING ITS SUBMISSION IN THE DISTRICT COURT
PURSUANT TO THE NEW FISA AMENDMENTS**

Pursuant to FRAP 27 and this Court’s Circuit Rule 27-1, the United States respectfully moves to hold the captioned, consolidated interlocutory appeals in abeyance, pending further proceedings in district court. As we informed the Court by letter dated July 10, 2008, Congress has recently enacted the FISA Amendments Act of 2008 (FISAAA), Pub. L. No. 110-261, which provides for dismissal of civil actions such as the present case in certain circumstances. The Court should thus await potentially dispositive proceedings in district court before resolving these

appeals. This case is not currently submitted for decision, and granting the motion will require no substantive change in the status of the appeals in this Court.

1. These are interlocutory appeals under 28 U.S.C. § 1292(b). On review is the district court's order denying the Government's and AT&T's motions to dismiss (or, in the alternative, for summary judgment) on the ground that the state secrets privilege precludes litigation of the case in district court. While the interlocutory appeals have proceeded, the case remains pending below.

The appeals have been fully briefed and argued. On March 14, 2008, the panel that heard oral argument in this case ordered that submission of the matter be withdrawn. There are no other pending motions before this Court.

2. Resolution of these appeals may ultimately be unnecessary, if the case is dismissed on other grounds. The FISAAA precludes the litigation of certain claims alleging that an electronic communication service provider provided assistance to the intelligence community. See Pub. L. No. 110-261, § 201 (adding new § 801(5) to FISA). Such "a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General certifies to the district court" that certain conditions have been satisfied. Pub. L. No. 110-261, § 201 (FISA § 802(a)). Such a certification could address whether "the assistance alleged

to have been provided” was “in connection with an intelligence activity authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and [was] the subject of [one or more] written requests or directives,” from an appropriate official “indicating that the activity was authorized by the President” and was “determined to be lawful.” Ibid. Alternatively, the Attorney General may certify that “any assistance * * * was provided pursuant to an order of the [Foreign Intelligence Surveillance Court],” or that any assistance was provided pursuant to other specified legal authority. Ibid. Finally, the Attorney General may certify that the defendant “did not provide the alleged assistance.” Ibid.

The FISAAA takes into account the vital national security interests in preventing the unnecessary disclosure of the sources and methods of foreign-intelligence gathering by providing that, if disclosure would harm the national security, the certification and any supplemental materials may be provided to the district court ex parte and in camera, and any public disclosure by the district court concerning those filings shall be limited “to a statement as to whether the case is dismissed and a description of the legal standards that govern the order, without disclosing * * * the basis for the certification.” Pub. L. No. 110-261, § 201 (FISA

§ 802(b)). Submission of the requisite certification under the new statute could lead to dismissal of the case in district court.

In the interest of judicial economy, this Court should hold the captioned appeals in abeyance, pending further proceedings in district court. FISAAA creates a new statutory basis for potential dismissal, which could pretermitt the state secrets inquiry because dismissal would be required on separate statutory grounds. If the Attorney General tenders a certification and the district court dismisses the case under the new FISAAA provisions, there will be no need for this Court to resolve the pending appeals, which would thus become moot.

3. To manage their dockets and conserve judicial resources, courts routinely stay or hold in abeyance cases, particularly where a stay pending resolution of related proceedings might eliminate the need to litigate the case. See, *e.g.*, *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (a court “has broad discretion to stay proceedings as an incident to its power to control its own docket”); *Landis v. North Am. Co.*, 299 U.S. 248, 256 (1936) (when a case presents “great issues” and “novel problems of far-reaching importance to the parties and the public,” and a decision in a related case “will settle many and simplify them all,” a stay is unquestionably proper, so long as it is “kept within the bounds of moderation”). Such a step is particularly appropriate when a court is faced with an interlocutory appeal that may become moot. See, *e.g.*,

United States v. Radosh, 490 F.3d 682, 686 (8th Cir. 2007) (resolving subsequent appeal, and dismissing earlier appeal, held in abeyance, as moot).

Here, the current status of the interlocutory appeals, as well as the issues presented, further counsel in favor of holding the case in abeyance pending further proceedings in district court. Submission of these appeals has been withdrawn, and there is no need for immediate disposition of the case by this Court. The Government's principal concern underlying its interlocutory appeal – the need to protect state secrets from disclosure – can be avoided if the case is dismissed under FISAAA and the district court does not otherwise schedule proceedings that would threaten such disclosure. And dismissal under FISAAA would preclude further proceedings that could result in such disclosure.

4. Despite the pendency of these interlocutory appeals concerning the state secrets privilege, the district court has jurisdiction to consider other grounds for dismissal. Although it is generally true that the “filing of a notice of appeal transfers jurisdiction from the district court to the court of appeals with respect to all matters involved in the appeal,” *Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 956 (9th Cir. 1983) (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982)), it is a well-recognized exception to the general rule that “an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other

phases of the case.” *Phelan v. Taitano*, 233 F.2d 117, 119 (9th Cir. 1956); see also, e.g., *Plotkin v. Pacific Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir.1982).

Thus, the relevant rule in this Court and other circuits is that “an appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal.” *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990). Consistent with that rule, the district court here has kept this case open during the pendency of the appeals, and parties have presented motions during that period as well.

Here, proceedings under the newly enacted FISAAA provision are not matters involved in the interlocutory appeals, which concern whether the action can proceed in light of the unavailability of information encompassed by the state secret privilege. Dismissal under FISAAA thus provides an alternative basis for dismissal that may moot the state secrets privilege issue. The district court therefore may proceed to consider the effect of FISAAA on this case.

CONCLUSION

For the foregoing reasons, this Court should hold the captioned appeals in abeyance pending further proceedings in district court. The United States will inform the Court promptly of any relevant order by the district court that would affect disposition of the appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 30th day of July, 2008, I caused to be served via Federal Express one true and correct copy of the foregoing motion properly addressed to the following:

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