IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Appellant,	)	
	)	
v.	)	
	)	**Case No. 08-4358**
STEVEN J. ROSEN and	)	
KEITH WEISSMAN,	)	
Appellees.	)	

APPELLEES' OPPOSITION TO GOVERNMENT'S MOTION TO DISMISS CROSS-APPEAL

Appellees Steven J. Rosen and Keith Weissman, by counsel, respectfully submit this opposition to the government's motion to dismiss their cross-appeal.

BACKGROUND

On March 27, 2008, the government filed a notice of appeal in which it identified four district court orders and opinions which it seeks to overturn. The four district court decisions noticed in the government's appeal were: (1) an August 9, 2006 Memorandum Opinion and Order denying defendants' motion to dismiss the Indictment; (2) a November 26, 2006 Order denying the government's motion to reconsider the August 9, 2006 decision; (3) a November 1, 2007 Memorandum Opinion setting forth the principles it would apply in its CIPA § 6(c) Order; and (4) the district court's March 19, 2008 CIPA § 6(c) Order.

Appellees recognize that this Court has jurisdiction to hear an interlocutory appeal of the CIPA § 6(c) Order. Appellees also believe, however, that the Court has no jurisdiction to hear an interlocutory appeal of the other three decisions. In response to the government's notice of appeal as to those three decisions, Appellees therefore took two steps. First, they moved to dismiss the government's appeal as to those three decisions, and, second, in case their motion failed, they cross-appealed the same three decisions. In essence, Appellees' view is that the Court lacks jurisdiction over the government's appeal of those three decisions, but if the Court exercises jurisdiction, then it must exercise jurisdiction over the cross-appeal as well.

In response, the government now has moved to dismiss Appellees' cross-appeal but insists that its appeal of the four decisions proceed.

DISCUSSION

The scope of an appeal is determined according to the district court orders identified in the notice of appeal. Fed. R. App. P. 3(c)(1); *United States v. Garcia*, 65 F.3d 17, 19 (4th Cir. 1995).[1] In this case, the notice of appeal did not limit

[1] *See also Gunther v. E. I. Du Pont De Nemours & Co*., 255 F.2d 710, 717-18 (4th Cir. 1958) ("[T]he jurisdiction of the appellate court is determined by the timeliness and *specific terms of the notice*.") (emphasis added); *Constructora Andrade Gutierrez, S.A. v. Am. Int'l Ins. Co.*, 467 F.3d 38, 43 (1st Cir. 2006) ("We must … determine which orders are encompassed within [the] amended notice of appeal before we proceed to the merits of the appeal."); *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 756 (6th Cir. 1999) ("Federal Rule of Appellate

itself to any specific aspect of the four district court decisions -- the government simply listed the four decisions. In so doing, the government has asserted that this Court has jurisdiction over those four decisions in their entirety.[2] And, in filing their cross-appeal, Appellees seek to protect their right to challenge the same decisions in their entirety, if this Court exercises jurisdiction. Appellees believe, however, that the government's approach is far too broad.

In relevant part, CIPA § 7(a) permits the government to appeal only from district court decisions "authorizing the disclosure of classified information." Only the March 2008 CIPA § 6(c) Order does so; the other three district court decisions noticed in the government's appeal do not. Further, in reviewing a government appeal from a CIPA § 6(c) Order, this Court addresses only "a series of very narrow, fact-specific evidentiary determinations," i.e., whether the district court abused its discretion in ruling that classified information was relevant and

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Procedure 3(c)(1)(B) requires the designation of the judgment or order from which an appeal is taken.... [T]his rule is jurisdictional and may not be 'waived' by this court.").

[2] An appellant is restricted to appealing certain aspects or parts of a district court order only where the notice of appeal so limits itself. *See* Fed. R. App. P. 3(c)(1)(B); *see also Finch v. Fort Bend Indep. Sch. Dist.*, 333 F.3d 555, 565 (5th Cir. 2003) ("When an appellant chooses to appeal specific determinations of the district court—rather than simply appealing from an entire judgment—only the specified issues may be raised on appeal."); *Universal Mgmt. Servs., Inc.*, 191 F.3d at 756 ("The general rule is that if an appellant chooses to designate specific determinations in his notice of appeal - rather than simply appealing from the entire judgment - only the specified issues may be raised on appeal.") (citation and quotations omitted).

admissible. *United States v. Fernandez*, 913 F.2d 148, 154-55 (4th Cir. 1990). Therefore, the proper procedure here is for the Court to dismiss the appeal of the other three decisions and the cross-appeal and to limit the government's appeal to the district court order admitting classified evidence at trial.

In so doing, the Court would not prevent the parties from arguing about the underlying rationale articulated in those prior decisions in instances where the rationale determined the outcome of a ruling in the CIPA § 6(c) Order. Indeed, in reviewing the district court's evidentiary determinations under CIPA, this Court, of course, will examine the bases on which the district court ruled that classified evidence is relevant and admissible. It does not matter if those bases are in the CIPA § 6(c) Order or incorporated by reference from an earlier decision or order. But in noticing an appeal of the three earlier rulings and in its pleadings before this Court, the government has not recognized that its appeal may address those earlier rulings only to the extent they provide the basis for admission of a specific piece of classified information at trial. The government likewise has not recognized that, in those limited situations, it would not be appealing the earlier opinions directly but simply may reference the relevant portions of those decisions in arguing that the district court erred in its CIPA § 6(c) rulings.

Further, it is important to recognize that the district court's evidentiary determinations often were based on multiple grounds. Thus, in order to

demonstrate that the district court abused its discretion, the government must show that none of these grounds provides a proper basis for admitting the evidence. If the government fails to meet this burden, then this Court should affirm these rulings regardless of whether one of the district court's alternate bases of admissibility might have been improper. Indeed, it is fundamental that this Court does not analyze every possible ground of affirmance, where one ground suffices. *See, e.g., Hanson v. U.S. Agency for Int'l Dev.*, 372 F.3d 286, 293 n.* (4th Cir. 2004) ("We need not address this alternative ground in order to affirm the district court's decision.").[3]

As a result, this Court will have occasion to address the district court's underlying rationale for admitting a specific piece of evidence only where that rationale provides the sole basis for admitting the evidence. In those limited situations, this Court may analyze the district court's reasoning as stated in earlier decisions or court hearings but such analysis would *not* involve an appeal of those earlier decisions in their entirety. Appellees therefore dispute the government's

[3] *See also, e.g., R.R. ex rel. R. v. Fairfax County Sch. Bd.*, 338 F.3d 325, 332 (4th Cir. 2003) ("[W]e may affirm the district court's judgment on any ground properly raised below …"); *Hall v. Clinton*, 235 F.3d 202, 205 n.1 (4th Cir. 2000) ("Because we affirm the dismissal of this claim on this ground, we do not address Hall's arguments concerning the alternative basis given by the district court for the dismissal of the claim."); *Columbus-America Discovery Group v. Atl. Mut. Ins. Co.*, 56 F.3d 556, 567 n.14 (4th Cir. 1995) ("Because we affirm the court's denial of the intervenors' claim on sufficient alternative grounds, we need not review this particular finding.").

contention that this Court has jurisdiction to hear an appeal of the three prior district court decisions merely because they may bear in some respect on the March 19, 2008 CIPA § 6(c) Order. (*See* Gov't Opp'n to Appellees' Mot. to Dismiss.) Indeed, there are numerous rulings in those earlier opinions which do not form the basis for *any* of the district court's decisions to admit classified evidence. Those earlier rulings should not be subject to this appeal, regardless of whether they bear on the district court's CIPA § 6(c) Order in some respect.

Otherwise stated, this Court does not gain jurisdiction over the earlier decisions simply because the district court first articulated elements of the charged crimes or other potential bases for admitting classified evidence in those decisions. *See Hyatt v. Sullivan*, 899 F.2d 329, 337 n.10 (4th Cir. 1990) ("We emphasize … that we review judgments, not opinions."). Instead, the only arguments available to the government on this appeal concern the district court's CIPA § 6(c) rulings admitting specific pieces of classified evidence at trial and the specific bases the district court invoked in making those rulings.

If the Court accepts Appellees' argument that the earlier decisions are relevant to this appeal only to the extent that they provide background and context for the district court's CIPA § 6(c) rulings, then Appellees respectfully submit that the Court should dismiss both the cross-appeal and the government's appeal of the three earlier district court decisions. On the other hand, if the Court accepts the

government's expansive view that it may appeal from everything in those prior district court decisions, then the government would open the door beyond the limited appeal authorized by CIPA § 7, and, once open for the government, that door should be open for Appellees as well. Indeed, by invoking the collateral order doctrine as grounds for its appeal, the government obviously seeks to expand the scope of its appeal beyond that which is authorized by CIPA. To the extent this Court accepts the government's expansive view of appellate jurisdiction, whether under the collateral order doctrine or on any other basis, Appellees merely seek the same opportunity to appeal. We should not be in a situation where the government is permitted to appeal all aspects of the four decisions at issue but the defendants are not.

CONCLUSION

For the reasons discussed, this Court either should dismiss the government's appeal of the district court's three prior decisions from 2006 and 2007 and dismiss Appellees' cross-appeal, or the Court should exercise jurisdiction over the government's appeal of the earlier decisions and allow Appellees the similar right to challenge the four decisions insofar as the decisions are adverse to them.

Respectfully submitted,

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May 23, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants, addressed as follows:

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