Sac/Dlg

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

STEVEN J. ROSEN,

KEITH WEISSMAN,

Defendants-Appellees.

No. 08-4358

GOVERNMENT'S REPLY TO DEFENDANTS' OPPOSITION TO GOVERNMENT'S MOTION TO DISMISS CROSS-APPEAL

The defendants' opposition does not refute the central issue in the government's motion to dismiss: the defendants have no right to an interlocutory appeal in this case. As explained in the government's motion, the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3, does not provide the defendants with an interlocutory appeal. Nor do they have a right to appeal under the collateral order doctrine. The defendants barely try to refute these points in their opposition. They do not cite a single case that supports the notion that this Court has jurisdiction over a cross-appeal when none is afforded by statute or common law. Instead, their opposition tries to change the subject by launching

into an extended discussion about the jurisdiction of the government's appeal – a subject that is not at issue in this motion. The issue here is whether jurisdiction is proper over the defendants' cross-appeal, regardless of what happens with respect to the government's appeal.

When boiled down to its essence, the defendants' argument is that they "merely seek the same opportunity to appeal" as the government. Def. Opp. at 7. They complain that they "should not be in a situation where the government is permitted to appeal . . . but the defendants are not." *Id.* But that is precisely what Congress intended when it enacted CIPA Section 7 – which provides the government, and the government alone, with an interlocutory appeal. *Graymail Legislation: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong. at 21 (1979) ("there is no dispute about the fact that the interlocutory appeal is only a Government appeal").

The defendants' remedy is not to ask this Court to manufacture its own jurisdiction over the defendants' cross-appeal when none exists. The defendants' remedy is to convince Congress to give them an interlocutory appeal. *Carroll v. United States*, 354 U.S. 394, 407 (1957) ("it is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases"). Alternatively, they must wait to raise

their complaints in an appeal after they are convicted and sentenced. *United States v. Lawrence*, 201 F.3d 536, 537 (4th Cir. 2000) ("finality of a judgment is a predicate for federal appellate jurisdiction").

The defendants concede that dismissing their cross-appeal may be the correct course of action, but only if their motion to dismiss the government's appeal is granted too. Def. Opp. at 6. The defendants argue that this is appropriate because of "the government's expansive view that it may appeal from everything in those prior district court decisions . . . ." *Id.* at 7 (emphasis in original). This is not the government's view. As was explained in a prior pleading, the government is not seeking to appeal "everything" in the orders and opinions identified in the government's notice of appeal. Gov't Opp. to Appellees' Motion to Dismiss at 4-5. It is seeking to appeal certain rulings contained in the district court's CIPA Section 6(a) order. The government included the previous orders and opinions in its notice of appeal because, as the district court itself stated, those orders and opinions served "to identify and elucidate the legal principles that govern disposition of the government's [CIPA Section 6(c)] motion." *United States v. Rosen*, 520 F.Supp.2d 786, 789 (E.D.Va. 2007).

If this Court were to have any doubt about the nature of the government's

appeal, the proper approach is not to grant the defendants' motion to dismiss, but to deny it as not yet ripe. This Court has not yet seen the government's appeal and therefore cannot make a determination about whether the government's appeal is proper in scope.

Yet one thing is quite clear right now: this Court has no jurisdiction over the defendants' cross-appeal. CIPA does not give the defendants a right to an interlocutory appeal. The collateral order doctrine does not give the defendants a right to an interlocutory appeal. Certainly the government's appeal does not give the defendants a right to an interlocutory appeal. Without jurisdiction, "the only

function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

Respectfully submitted,

Chuck Rosenberg
United States Attorney

By: Richard Cooke for
James L. Trump
Assistant United States Attorney

Richard Cooke for
W. Neil Hammerstrom, Jr.
Assistant United States Attorney

Richard Cooke for
Thomas Reilly
Trial Attorney
U.S. Department of Justice

Richard Cooke for
Michael C. Martin
Trial Attorney
U.S. Department of Justice

Date: May 29, 2008

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing "Government's Reply to Defendants' Opposition to Government's Motion to Dismiss Cross-Appeal" was sent by first-class mail this 29th day of May 2008 to:

Abbe David Lowell, Esq.
McDermott Will & Emery LLP
600 Thirteenth St., N.W.
Washington, D.C. 20005

John N. Nassikas III, Esq.
Arent Fox PLLC
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

Richard Cooke for
W. Neil Hammerstrom, Jr.
Assistant United States Attorney