

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-90075

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF LOUISIANA, *et al.*,

Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

UNITED STATES' MOTION TO DISMISS DEFENDANTS'
PETITIONS FOR PERMISSION TO APPEAL

The United States respectfully moves to dismiss defendants' petitions for permission to appeal for lack of jurisdiction. Because defendants have not filed a notice of appeal in the district court, and have not complied with the requirements for seeking permission to appeal, this Court lacks jurisdiction to consider their petitions under either 28 U.S.C. 1291 or 28 U.S.C. 1292(b). In support of this motion, the United States submits the following:

PROCEDURAL BACKGROUND

1. The United States filed a complaint on July 12, 2011, against: the state of Louisiana; J. Thomas Schedler, Louisiana's Secretary of State; the Louisiana Department of Health and Hospitals (L DHH); Bruce D. Greenstein, the Secretary of the Louisiana Department of Health and Hospitals; the Louisiana Department of Children and Family Services; and Ruth Johnson,¹ the Secretary of the Louisiana Department of Children and Family Services, alleging violations of the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. 1973gg *et seq.* R. 1.²

2. On October 20, 2011, the magistrate judge entered a scheduling order directing the parties jointly to develop "a protective order and a specific discovery plan governing electronically stored information ("ESI")." R. 39 at 1-2. In the event the parties were unable to agree upon a proposed protective order, the magistrate judge ordered the United States to file a motion for a protective order, to which the defendants could respond. R. 39 at 2. The United States thereafter moved for a protective order that would allow for disclosure of confidential

¹ Secretary Johnson was succeeded in office by Suzy Sonnier; Ms. Sonnier, the current Secretary of the Louisiana Department of Children and Family Services, was substituted as the defendant. R. 140.

² References to R. ___ at ___ refer, by docket number and page number where appropriate, to pleadings filed in the district court.

information, with disclosure limited to those individuals involved in the district court litigation and restricted to the purposes of litigation. R. 47.

3. On December 20, 2011, the magistrate judge entered a protective order to govern the disclosure of confidential information. R. 61. The order specifically provided for the disclosure of information ordinarily exempted from public disclosure by state or federal confidentiality statutes, and ordered that it may be produced in accordance with the order, “notwithstanding any other provision of law to the contrary.” R. 61 at 4. The order directed that confidential information “shall be used solely for the purposes of” the litigation, and “shall not” be disclosed to anyone unrelated to the litigation. R. 61 at 5. The order provided for the filing of materials under seal (R. 61 at 5-6), and directed the parties to “undertake all steps reasonably necessary to see that no person shall use, disclose or record confidential material for any purposes other than those permitted by” the order (R. 61 at 6). The order also provided for the return and destruction of all confidential information at the end of litigation. R. 61 at 6-7. Finally, the order specifically allowed the parties to seek modification of the order and additional protections for particular materials, to object based on any ground that existed prior to the order, to object to discovery of materials subject to the order, or to seek broader or more restrictive rights of access to the materials subject to the order. R. 61 at 7. The district court affirmed the order. R. 74.

4. The magistrate judge then entered an order on March 7, 2012, governing the protocol for producing documents and exchanging electronically stored information (ESI). R. 73. The United States objected to the order only insofar as it required all information to be destroyed and/or permanently deleted from electronic storage within 90 days after the entry of judgment in the litigation, unless the court orders otherwise. R. 79. The United States explained that complying with that provision of the order ran contrary to the government's obligations under the Federal Records Act, 44 U.S.C. 3301 *et seq.* R. 79 at 3-7. The defendants responded, arguing that the order, as drafted, was necessary for defendants to disclose individually identifiable health information under 45 C.F.R. 164.500 *et seq.*³ R. 83.

The district court recognized that modifying the order was the only course of action that would permit the United States to comply with the Federal Records Act while allowing the defendants to comply lawfully with privacy regulations. R. 102 at 4. In an order entered on July 13, 2012, the district court thus ordered the

³ Title 45, Code of Federal Regulations, Section 164.512(e)(1), permits covered entities to disclose individually identifiable health information in a judicial proceeding: (1) where a court orders the disclosure; or (2) pursuant to a discovery request unaccompanied by a court order if the receiving party either gives assurance that the individual(s) whose information is disclosed receives notice, or if the parties make reasonable efforts to secure a qualified protective order. A qualified protective order requires "the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding." 45 C.F.R. 164.512(e)(1)(v)(B).

magistrate judge to modify the protective order and the document and ESI protocol so that they would direct the parties to destroy and/or delete non-public documents or ESI within 30 days after the end of litigation, “[e]xcept as otherwise required by federal law under the Records Disposal Act.” R. 102 at 4. The district court, after “recognize[ing] the difficult situation this puts both parties in,” indicated that it would “entertain motions to seal the records” at issue. R. 102 at 5. The magistrate judge thereafter amended the protective order and document and ESI protocol as directed by the district court. See R. 125; R. 126.

5. Following the entry of the amended protective orders and another order concerning discovery (R. 124), the magistrate judge, citing those previous orders, denied as moot several of defendants’ pending motions for protective orders and/or evidentiary hearings (R. 96; R. 98; R. 99). R. 127. Defendants objected to the order. R. 128; R. 130; R. 131.

6. The district court entered a ruling on October 26, 2012, upholding the magistrate judge’s order dismissing defendants’ discovery motions as moot. Defendants have not filed a notice of appeal from that ruling in the district court.

7. On December 13, 2012, defendants filed a joint Motion for Reconsideration of Court’s Ruling, or in the Alternative, Motion for Stay Pending Appeal. R. 147. The United States filed its response in opposition on January 3,

2013. R. 150. Defendants' reply brief is due in the district court on January 18,

2013. R. 149. As of today's date, the district court has not ruled upon the motion.

ARGUMENT

1. Defendants assert this Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291. See Motion of Secretary of State 12; Petition of L DHH 8-10. Section 1291 of Title 28 confers on courts of appeals jurisdiction over appeals from all final decisions of the district courts. 28 U.S.C. 1291. Parties seeking to appeal from a final order must file a notice of appeal in the district court within 60 days after entry of the judgment or order appealed from when, as here, one of the parties is the United States. Fed. R. App. P. 4(a)(1)(B)(i). Defendants have not filed a notice of appeal in the district court. Defendants have instead filed a motion for reconsideration of the district court's October 26, 2012, ruling, which remains pending in the district court. R. 147.

2. Although defendants assert that this Court has jurisdiction under 28 U.S.C. 1291, defendants seek permission to appeal the district court's October 26, 2012, ruling pursuant to Federal Rule of Appellate Procedure 5, which sets forth the procedure for seeking permissive appeals over interlocutory orders, decrees and judgments. This Court has jurisdiction over permissive appeals pursuant to 28 U.S.C. 1292(b). Such appeals require the district court to "state in writing" that an order "involves a controlling question of law as to which there is substantial

ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. 1292(b). A party appealing such an order must apply to this Court for permission to appeal within 10 days of the district court’s order. 28 U.S.C. 1292(b).

Here, the district court did not and has not stated in writing that its ruling was of the kind that would trigger this Court’s jurisdiction under 28 U.S.C. 1292(b). See R. 145. Nor have defendants moved the district court to amend its order to indicate that the conditions of Section 1292(b) are met in this case. See Fed. R. App. P. 5(a)(3).

3. For the reasons stated herein, this Court lacks jurisdiction, under either 28 U.S.C. 1291 or 28 U.S.C. 1292(b), to consider defendants’ appeal. The United States thus respectfully moves this Court to dismiss the appeal for lack of jurisdiction.

4. Counsel for the United States contacted Ms. Celia Cangelosi, counsel for J. Thomas Schedler, Louisiana Secretary of State. Ms. Cangelosi indicated that her client opposes the government’s motion.

5. Counsel for the United States attempted to contact Mr. Harry J. “Skip” Philips, Jr., counsel for the Louisiana Department of Health and Hospitals. Counsel for the United States was unable to speak with Mr. Philips, but did provide Mr. Philips with a voice message indicating the government’s intent to file

a motion to dismiss. Given the nature of the government's motion, counsel for the United States assumes Mr. Philips's client will oppose the motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2013, I electronically filed the foregoing UNITED STATES' MOTION TO DISMISS DEFENDANTS' PETITIONS FOR PERMISSION TO APPEAL with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that participants in this case who are registered CM/ECF users will receive service by the appellate CM/ECF system.

I further certify that counsel listed below will be served by first class U.S. mail, postage prepaid:

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