IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Richard A. Horn,	)	
Plaintiff,	)	No. 1:94-CV-1756 (RCL)
v.	)	
Franklin Huddle, Jr. and Arthur Brown,	)	
Defendants.	)	

UNITED STATES' MOTION TO VACATE THE JULY 16, 2009 AND AUGUST 26, 2009 OPINIONS AND ORDERS AND MEMORANDUM IN SUPPORT THEREOF

The parties and intervenor, United States of America, have reached a settlement in the above-captioned action, which has been pending for fifteen years. As evidenced by the settlement agreement, a core interest of the parties and intervenor United States is a complete and global resolution of this civil action including any consequences that might flow from this Court's outstanding interlocutory orders. To that end, the United States moves the Court to vacate its July 16, 2009, and August 26, 2009 Opinions and Orders (sometimes referred to as "July 16 Order" and "August 26 Order," respectively). As part of the settlement of this lawsuit, Plaintiff does not oppose this motion to vacate.

Vacatur of the opinions and orders is warranted under the circumstances present here. Leaving intact non-precedential rulings that resolve significant constitutional questions involving separation of powers does not serve the public interest, particularly when the parties have agreed to forego further review to achieve a consensual resolution. The Court should therefore enter an order vacating the opinions and orders in question to assist the parties in effectuating the purpose

of the settlement.

BACKGROUND

The Court is familiar with the twists and turns of this fifteen year old action, which has twice been to the Court of Appeals. While an appeal of this Court's August 26, 2009 Order, which ordered the government to provide for counsel access to classified information over the objection of the Executive Branch, was pending the parties engaged in expedited settlement discussions with the assistance of the Court of Appeals mediation program, and reached a mutually agreeable global settlement of this action. As part of that settlement, the United States stated its intention to move to vacate two orders and opinions of this Court involving the disclosure and use of national security information, and the Plaintiff agreed not to oppose this motion. The United States thus seeks this Court's assistance in effectuating the global nature of the contemplated relief that the parties and intervenor United States negotiated by vacating the Court's July 16, 2009 and August 26, 2009 Opinions and Orders.

This Court entered two related interlocutory orders and accompanying opinions that implicate the Government's interest in, and control over, classified information. On July 16, 2009, the district court denied without prejudice the government's narrowed reassertion of the state secrets privilege and expressed reservations about the scope of the privilege and the relationship between the privilege assertion and redactions of classified information made by the government with respect to earlier filings and to two Inspector General reports. While the Court acknowledged that "there are certain categories of information that are properly covered by the state secrets privilege," it also gave the Government, on an *ex parte* basis, "a further opportunity . . . to explain its basis for redacting certain information" because the court was "unable to uphold or deny the assertion of the privilege on the basis of the government's generalized

declarations alone." The Court also resolved to apply "CIPA-type procedures" to determine the scope of the privilege. Because the Court's July 16 Order made no need-to-know determination and did not set out a detailed schedule, the government did not interpret it as requiring counsel access at that time.

On August 26, 2009, after considering further submissions from the United States and the parties, the Court concluded that the individual parties' counsel have a need-to-know the classified information their clients possess and intend to rely upon. The Court therefore ordered the government to grant security clearances to those counsel and to authorize disclosure of classified information to them. The Court acknowledged that no other decision has compelled the disclosure of classified information to counsel over the objection of the Executive. The United States appealed from the August 26 Order, which the D.C. Circuit stayed on September 10, 2009, after ordering expedited briefing.

Simultaneously with the briefing on that appeal, the United States and the parties engaged in expedited settlement discussions and reached a settlement to resolve this matter on a global basis. An important motivation for the government in agreeing to that settlement is the opportunity for this Court to consider whether to vacate these interlocutory orders and accompanying opinions, which implicate the interests of the United States, defendants, and non-parties.

ARGUMENT

Considering the totality of the circumstances before the Court, vacatur of the July 16 and August 26 orders and accompanying opinions is appropriate and in the interests of the parties, the Government, the non-parties and the public at large. This case has been pending for fifteen years, and the parties and the United States have now reached a comprehensive, global settlement

of claims after extensive negotiations under the auspices of the Court of Appeals mediation program. In light of the comprehensive settlement reached among the parties, and the interlocutory nature of the July and August Orders and accompanying opinions, the Court should vacate those opinions and orders to further a full and complete resolution of this matter.

Under Federal Rule of Civil Procedure 54(b),[1] an "order . . . which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." District courts have broad discretion to vacate their interlocutory orders under Rule 54(b) and pursuant to their inherent authority. In contrast to final judgments, "interlocutory judgments are not brought within the restrictions of [Rule 60(b)] but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires." Fed. R. Civ. P. 60(b) advisory committee's note; *see also SLA Property Mgmt. v. Angelina Cas. Co.*, 856 F.2d 69, 71-72 (8th Cir. 1998) (affirming district court order vacating default judgment under Rule 54(b) solely on basis that Rule 54(b) gives the district court authority to do so). Courts therefore may vacate their interlocutory decisions upon settlement of

[1] Here, because the orders are interlocutory, the government submits that the Rule 54 standard is appropriate. *See MIT v. United States*, 75 Fed. Cl. 129, 131 (2007) (recognizing district court's "'inherent power' to vacate non-final orders"). Vacatur would also be warranted under the Rule 60(b) standard. Rule 60(b) permits courts to vacate orders and opinions due to considerations of equity, fairness or in the public interest. *See American Games, Inc. v. Trade Products, Inc.*, 142 F.3d 1164, 1167-70 (9th Cir. 1998) (concluding that the district court properly applied equitable considerations when it vacated its decision). *See also* Fed. R. Civ. P. 60(b) (allowing relief from judgment or order for any other reason justifying relief). Vacatur is an equitable remedy that, in circumstances such as this, should be used to further the parties' settlement. *See also Novell, Inc. v. Network Trade Center, Inc.*, 187 F.R.D. 657, 660-61 (D. Utah 1999) (applying Rule 60(b) to vacate orders in furtherance of settlement); *BMC, LLC v. Verlan Fire Ins. Co.*, 2008 WL 2858737 (W.D.N.Y. 2008); *Tommy Hilfiger Licensing Inc. v. Costco Cos.*, 2002 WL 31654958 (S.D.N.Y. 2002). Here, these factors would counsel in favor of vacatur for reasons similar to those set forth below.

a case. *See*, *e.g.*, *1992 Republican Senate-House Dinner Comm. v. Carolina's Pride Seafood, Inc.*, 158 F.R.D. 223, 224 (D.D.C. 1994); *Persistence Software, Inc. v. The Object People, Inc.*, 200 F.R.D. 626, 627 (N.D. Cal. 2001); *IBM Credit Corp. v. United Home for Aged Hebrews*, 848 F. Supp. 495, 495-97 (S.D.N.Y. 1994). Ultimately, a district court considering a party's request to vacate an interlocutory decision should take into account the totality of the circumstances and balance the equities.

Here, the equities weigh in favor of vacating the orders and accompanying opinions in question. First, this case has been pending for fifteen years with no expeditious end in sight. Indeed, this Court recognized at the first post-remand hearing that settlement of the case would be the most expeditious way for this action to be resolved. *See* Feb. 4, 2008 Transcript at 19-20. The parties have worked together to reach a mutually agreeable resolution. Having done so, the United States has foregone its right to appeal the Court's August 26, 2009 Order. The equities weigh in favor of vacating that order and the accompanying opinion, as well as the July 16 Order and the accompanying opinion upon which the August 26 Order is premised. *See*, *e.g.*, *1992 Republican Senate-House Dinner Comm.*, 158 F.R.D. at 224 (granting unopposed motion to vacate where party "may well have received a favorable judgment on the outstanding issue had the case proceeded . . . and to reward the parties for settlement").

Second, constitutional avoidance counsels strongly in favor of vacatur. The significant legal issues resolved in the Court's July and August orders, which the Court itself recognized were unprecedented, involve core constitutional disputes between coordinate branches of Government that should not be resolved absent a clear necessity to do so. Indeed, as the Court of Appeals has noted in the context of whether to vacate appellate decisions "[v]acatur appears particularly appropriate where retention of the precedent creates a gratuitous conflict with a

co-equal branch of government." *See Clarke v. United States*, 915 F.2d 699, 708 (D.C. Cir. 1990) (citing *Matter of City of El Paso, Texas*, 887 F.2d 1103, 1106 (D.C. Cir. 1989) for the proposition that "avoidance of constitutional questions [is] one of the bases for vacatur"); *cf. National Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 353-54 (D.C. Cir. 1997) (recognizing "separation of powers" and "unnecessarily deciding constitutional questions" as relevant considerations). There are thus strong equities in favor of vacating the July and August Orders and accompanying opinions.

On the other side of the equitable equation, the public interest in letting stand these two interlocutory orders—which now are no longer subject to further review, have since been stayed, and will not be implemented—is minimal. The public interest and social value of the final resolution of particular issues principally derives from the fact that the judicial decision "'produces a precedent'" to be followed in other cases. *See In re United States*, 927 F.2d 626, 628 (D.C. Cir. 1991) (citing *In re Memorial Hospital of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir. 1988)). That consideration is absent here because the interlocutory orders in question are non-precedential. There is no public interest in leaving them extant. The equitable balance therefore strongly favors vacatur.

Moreover, this Court need not apply the "exceptional circumstances" test enunciated in *U.S. Bancorp v. Bonner Mall* merely because this case involves a settlement agreement that arguably moots the case. *See* 513 U.S. 18, 29 (1994). *Bonner Mall* fashioned a rule to guide the Supreme Court's (and the courts of appeals') decisions about whether to vacate circuit and district court judgments where cases have been settled. *Id.* at 28. But the Supreme Court also noted that this standard does not limit the district court's traditional discretion over its own orders:

> Of course *even in the absence of, or before considering the existence of*, extraordinary circumstances, a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request, which it may do *pursuant to Federal Rule of Civil Procedure 60(b)*.

Id. at 29 (emphases added). This is not an instance of an appellate court considering whether to vacate a lower court's judgment and therefore this motion is not governed by *Bonner Mall*. District courts consider requests to vacate under the usual standards that apply to review of final or interlocutory orders. *See American Games, Inc. v. Trade Products, Inc.*, 142 F.3d 1164, 1167-70 (9th Cir. 1998) (concluding that the district court properly applied equitable considerations under Rule 60 rather than the "exceptional circumstances" test when it vacated its decision).

Finally, even if the exceptional circumstances standard applied here, vacatur would still be appropriate for many of the reasons identified above.[2] The Court's July and August orders themselves recognize the unprecedented nature of the relief granted. In addition, the constitutional dispute between the Executive and Judicial Branches regarding who may access classified information should not be resolved unless absolutely necessary for the resolution of a case. The settlement precludes the need to resolve this dispute now and principles of constitutional avoidance counsel against leaving the Orders in question on the books. Moreover, the settlement agreement itself recognizes the importance to the Government of seeking vacatur of the Court orders. In light of these factors, including Plaintiff's agreement not to oppose this motion, vacatur of the Court's July and August orders and accompanying opinions would be

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[2] There would be a serious question over whether *Bonner Mall*'s limitations would apply to a district court's consideration of its own opinions in any event given that a chief concern of the *Bonner Mall* Court was the precedential nature of the decisions that the parties sought to vacate. *See* 513 U.S. at 28-29. District court opinions are non-precedential and thus vacating a district court's opinion should not implicate that concern.

most consistent with the public interest and the interest of justice.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court vacate the July 16 and August 26 Opinions and Orders.

Dated: November 3, 2009

Respectfully submitted,

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