THE HONORABLE JOHN C. COUGHENOUR

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

MARGRETTY RABANG, *et al.*,

Plaintiffs,

v.

ROBERT KELLY, JR., *et al.*,

Defendants.

Case No. 2:17-cv-00088-JCC

PLAINTIFFS' REPLY TO DEFENDANTS KELLY, GEORGE, SMITH, SOLOMON, JOHNSON, CANETE, GEORGE, ROMERO, EDWARDS, AND ARMSTRONG IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY

A. The Kelly Defendants' Appeal Did Not Divest This Court of All Jurisdiction.

Arguing that their pending Ninth Circuit appeal "divests the district court of jurisdiction to proceed" with pretrial discovery, Dkt. # 102 at 5-6, the Kelly Defendants cite *United States v. Claiborne*, 727 F.2d 842 (9th Cir. 1984); *State v. Powell*, 24 F.3d 28 (9th Cir. 1994); *Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992); *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989); and *United States v. LaMere*, 951 F.2d 1106 (9th Cir. 1991).[1] The Kelly Defendants are mistaken. These authorities stand for the well-established rule that a case may not be tried while portions of it are under interlocutory appeal. They do not in any way hold that the mere notice of

[1] Many of the cases cited by the Kelly Defendants actually support Plaintiffs' position that the Kelly Defendants should have moved the Court to stay proceedings pending their appeal, rather than obstruct. *Chuman*, 960 F.2d at 104-05 (after filing notice of appeal, defendants moved district court to stay proceedings); *Clairborne*, 727 F.2d at 844 (defendant sought to stay the trial court from proceeding until the appeals court resolved the merits of his interlocutory appeal); *see also Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990) (same).

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interlocutory appeal automatically divests trial courts of *all* jurisdiction; here, the jurisdiction to compel discovery of Defendants Kelly, Canete, and Armstrong relating to Defendant Dodge.

The Ninth Circuit has made clear: "Absent a stay, an appeal seeking review of collateral orders does not deprive the trial court of jurisdiction over other proceedings in the case." *Britton*, 916 F.2d at 1412. Where a party appeals an interlocutory order, the trial court only loses jurisdiction as to the precise issue appealed. *Id.* As the U.S. District Court for Arizona explained in *Donahoe v. Arpaio*:

> In the Ninth Circuit, the interlocutory appeal of denial of immunity normally divests the district court of jurisdiction to proceed with trial. However, [t]his divestiture of jurisdiction rule is not based on statutory provisions or the rules of civil or criminal procedure. Instead, it is a judge made rule originally devised in the context of civil appeals to avoid confusion or waste of time resulting from having the same issues before two courts at the same time. Given this purpose, it has been suggested that the rule should not be employed to defeat its purpose or to induce needless paper shuffling. . . . It is concluded, therefore, that when a public official files an interlocutory appeal from the denial of a non-frivolous claim to absolute immunity, **the district court may not alter the decision on appeal**, *i.e.,* the denial of immunity, which is separate from the merits of the underlying ligation. **But the district court may exercise discretion regarding pretrial discovery** . . . .

No. 10-2756, 2012 WL 2063455, at *3 (D. Ariz. June 7, 2012).

Here, since the single issue on the Kelly Defendants' appeal is whether this Court erred in "denying their claim of sovereign immunity and holding that subject matter jurisdiction exists," Dkt. # 69, this Court retains jurisdiction to proceed with the remaining issues in the case, *i.e.*, the claims against Defendant Dodge. *Id.* Absent a stay, which the Kelly Defendants refuse to seek, this Court can and should compel the limited discovery of Defendants Kelly, Canete, and Armstrong—so that Plaintiffs can prosecute their case against Defendant Dodge. *Id.*

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B. This Court Has Discretion To Order The Kelly Defendants To Furnish Discovery.

The Kelly Defendants contend that "Plaintiffs cite no precedent or authority to support their position that this Court has jurisdiction to force the Kelly Defendants to participate in discovery pending appeal" and that "[t]his Court should be persuaded by *Clairborne, Powell* and *Chuman.*" Dkt. # 102 at 7. Plaintiffs have in fact provided examples of how other in-Circuit District Courts address the unique circumstances before this Court. *See* Dkt. # 95 at 8-11. The Kelly Defendants just choose to ignore those authorities, and instead cite cases that either provide little guidance to the Court or are wholly distinguishable.

The majority of the cases cited by the Kelly Defendants are not instructive because they bear no resemblance to the unique posture of this matter. For instance, in *Powell*, the defendant appealed a conviction for being a felon in possession of a firearm; the Ninth Circuit determined that an appeal from criminal convictions on severed counts did not deprive the District Court of jurisdiction over the remaining counts. 24 F.3d at 29-30. In *Griggs*, the U.S. Supreme Court held that notice of appeal filed while a motion to alter or amend judgment was pending in District Court was null; because the notice was untimely, it could not confer jurisdiction on the appeals court. 103 S.Ct. at 400. In *Clairborne*, the defendant filed an interlocutory appeal after the District Court denied his motion to quash a criminal indictment. 727 F.2d at 843-44, 850.

None of the cases address the issue at hand: whether discovery as to claims against one defendant may be directed to co-defendants, who may be entitled to tribal sovereign immunity as to claims against them. Plaintiffs are not: asking the Court to suddenly try this case while portions of it are under appeal; requesting that the Court alter or amend its decision on appeal; or asking for discovery related to the claims against the Kelly Defendants now on appeal.

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The Kelly Defendants rely heavily on *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to argue that the norm is to disallow discovery pending resolution of immunity issues. Dkt. # 102 at 7. In *Iqbal*, the Supreme Court held that a District Court's order denying a dismissal motion on qualified immunity grounds was reviewable under the collateral order doctrine. 129 S. Ct. at 1947. The Court also held that plaintiff's complaint did not comply with Rule 8 under *Bell Atlantic Corp. v. Twombly,* 550 U.S. 554 (2007). *Id.* at 1952. The Court did not hold, however, that District Courts are divested of jurisdiction to determine whether it is proper to stay all discovery as to all claims, pending the resolution of a qualified immunity defense on appeal. Rather, the Court observed in *dicta* that it was unpersuaded by plaintiff's request to relax the pleading requirements under Rule 8 simply because the appeals court had instructed the District Court to confine discovery to preserve defendants' qualified immunity defense in anticipation of a summary judgment motion. *Id.* at 684-86.

In other words, *Iqbal* does *not* require this Court to stay all discovery, here as to Defendant Dodge, pending appeal. Numerous District Courts have so held. *See, e.g., Saenz v. City of El Paso, Tex.*, 2015 WL 4590309, at *2 (W.D. Tex. Jan. 26, 2015); *M.G. v. Metro. Interpreters & Translators*, 2013 WL 690833, at *2 (S.D. Cal. Feb. 26, 2013); *Seeds of Peace Collective v. City of Pittsburgh*, 2010 WL 2990734, *2 (W.D. Pen. Jul. 28, 2010); *see also, e.g.,* Dkt. # 95 at 8-11; *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) ("Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.").

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C. Plaintiffs' Discovery Bears On Defendant Dodge's Role, And Knowledge.

The Kelly Defendants also challenge Plaintiffs' discovery requests to Defendant Kelly, Canete, and Armstrong by claiming the requests do not "have any bearing on Plaintiffs' claims against Defendant Dodge." Dkt. # 102 at 10-11. The Kelly Defendants are mistaken again.

Put simply, Defendant Dodge is not being forthright about his knowledge or role in Defendants' RICO scheme. *See* Dkt. # 96-3, RFA No. 7 ("Dodge does not recall whether he drafted Nooksack Tribal Council Resolution No. 16-27"); Dkt. # 96- 11, at 3 ("It is specious for Defendant Dodge to put on his lawyer hat . . . in order to claim 'Attorney Work Product' as a basis for withholding the documents."); Dkt. # 95 at 2-3, 6-8 (detailing Defendant Dodge's discovery obstruction). Defendant Dodge is also deflecting blame to others, like Schwabe Williamson, and Wyatt, P.C. *See* Dkt. # 68 at 2. Plaintiffs require the narrow discovery they seek from three of his RICO co-Defendants (as well as the Non-Party Witnesses and Schwabe) in order to get to the bottom of Defendant Dodge's role in Defendants' scheme to defraud Plaintiffs and thus to establish his knowledge of the three Roberts Determinations.

Plaintiffs should be allowed to undertake the "fact-intensive inquiry" regarding Defendant Dodge that this Court directed them to undertake on June 29, 2017. Dkt. # 85.

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DATED this 8th day of September, 2017.

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