IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	No. 18-4119
	)	
RAPOWER-3, LLC, ET AL.,	)	
	)	
Defendants-Appellants	)	

RESPONSE IN OPPOSITION TO APPELLANTS' MOTION TO EXPEDITE PROCEEDING

The United States of America hereby opposes the motion to expedite the above-captioned appeal filed by defendants-appellants RaPower-3, LLC; International Automated Systems, Inc.; LTB1, LLC; R. Gregory Shepard; and Neldon Johnson. We agree instead with the stated position of the Clerk that this interlocutory appeal (No. 18-4119) should be consolidated with the appellants' pending appeal from the final judgment in this case (No. 18-4150). Both appeals are now ripe for review, and consolidating them for briefing and argument would conserve both the Court's and the parties' resources without meaningfully delaying the resolution of either appeal. The Court should therefore deny the defendants' motion, consolidate the appeals,

and set a briefing schedule that does not cut short the Government's time for preparing its brief.

BACKGROUND

This case arises from the defendants' promotion of "an abusive tax scheme centered on purported solar energy technology." (Doc. 467 at 1.)[1] The Government brought this action to enjoin that unlawful conduct and to obtain disgorgement of the defendants' ill-gotten gains therefrom. After a 12-day trial, the district court ruled from the bench that the defendants had "engaged in a 'massive fraud' for which they would be enjoined and disgorgement would be ordered." (*Id.* at ECF pp. 1–2.) The court then set to work preparing its written findings, conclusions, and judgment to that effect.

In the meantime, the Government moved the district court to freeze the appellants' assets and appoint a receiver in order to preserve the status quo and prevent the appellants from continuing their efforts to dissipate and conceal assets. (Doc. 414.) On August 22, 2018, the district court entered an order (Doc. 444) granting the Government's

[1] "Doc." references are to the documents filed in the district court proceedings below, as numbered by the clerk of that court.

motion, freezing the defendants' assets, and holding that that the appointment of a receiver was necessary and appropriate. The order did not, however, actually appoint a receiver, but rather ordered the Government to "provide, within 30 days, the names of three possible receivers" and "the powers and responsibilities that the United States proposes the Court vest within the receiver." (*Id.* at 21.)

The defendants appealed the August 22 order five days later (Doc. 445), which commenced this interlocutory appeal (No. 18-4119). Their motion to expedite this appeal refers to it as "the receivership appeal." (Mot. 6–7.) But in fact, their notice of appeal was premature with respect to receivership issues because the August 22 order they appealed from stated only the court's intention to appoint a receiver, whose identity and powers would be determined at a future date. *See* 28 U.S.C. § 1292(a)(2) (authorizing interlocutory appeals from "orders appointing receivers"); *United States v. Antiques Ltd. P'ship*, 760 F.3d 668, 670 (7th Cir. 2014) (appeal from order that "granted the [government's] motion to appoint a receiver and directed the government to file a proposed order appointing one" held "premature" under § 1292(a)(2) because the "order was not the appointment of a

receiver, but rather a direction to the government to *propose* a receiver for the judge to appoint").[2] Consequently, the defendants' notice would not become effective to appeal the appointment of a receiver unless and until the district court actually appointed one. *See* Fed. R. Civ. P. 4(a)(2) ("A notice of appeal filed after the court announces a decision or order—but before the entry of the . . . order—is treated as filed on the date of and after the entry.").[3]

But before the district court returned to the receivership issue, it first entered judgment for the Government (Doc. 468), accompanied by 144 pages of findings and conclusions (Doc. 467), on the merits of the Government's claims. Among other relief, that October 4, 2018 judgment permanently enjoined the defendants from promoting their abusive solar-energy tax scheme and ordered them to disgorge more than $50 million in ill-gotten gains. The defendants filed a notice of

[2] The Government did not move to dismiss the appeal for lack of jurisdiction because the defendants' notice also encompassed the asset freeze, which was an immediately appealable injunction under 28 U.S.C. § 1292(a)(1).

[3] That did not stop the defendants from moving the district court to stay its August 22 order pending the outcome of their appeal (Doc. 448), which the district court denied (Doc. 479).

appeal from the judgment a few days later (Doc. 472), which commenced their other pending appeal in this case (No. 18-4150). But because the defendants then filed in the district court a timely motion to amend the judgment (Doc. 474), this Court entered an order on October 25, 2018, abating that appeal pending the district court's disposition of the motion. *See* Fed. R. App. P. 4(a)(4)(A)(iv), (B)(i).

On October 31, 2018, the district court, after considering the Government's proposals and the defendants' objections thereto, entered a Receivership Order appointing Wayne Klein as receiver for the defendants' estate, defining his powers and responsibilities, and continuing the existing asset freeze with minor modifications. (Doc. 490.) The next day, the court fixed a formatting error by entering a Corrected Receivership Order (Doc. 491), which is the operative order with respect to the receivership in this case.

As a result, the defendants' notice of appeal from the interlocutory order of August 22, 2018—which commenced the instant appeal that they now seek to expedite (No. 18-4119)—became effective to appeal the appointment of a receiver no sooner than October 31, 2018. *See* Fed. R. Civ. P. 4(a)(2). And their notice of appeal from the judgment—which

commenced their other pending appeal (No. 18-4150)—became effective two weeks later, on November 13, 2018, when the district court granted the defendants' post-judgment motion and entered an amended judgment (Doc. 507). *See* Fed. R. Civ. P. 4(a)(4)(B)(i).

Recognizing that both appeals are now ripe and ready for briefing, the parties' counsel discussed the setting of a briefing schedule with Lara Smith, Counsel to the Clerk, during a November 27, 2018 conference call arranged by Chief Circuit Mediator David W. Aemmer. Ms. Smith advised that the Clerk's position, which the Government shares, is that the appeals should be consolidated and briefed together.[4] But the defendants' counsel asserted that the appeals should proceed not only separately, but serially, with their appeal of the receivership order being briefed and argued before their appeal of the judgment. Ms. Smith gave the defendants until November 30, 2018, to file a motion for that relief, and the pending motion to expedite was the result.

[4] She further advised that it is therefore unnecessary for the Government to file a motion to consolidate.

DISCUSSION

There is no sound reason for the defendants' two appeals to proceed separately, much less serially. The receivership order and the amended judgment are based largely on the same findings and underlying evidence and were entered in this case only two weeks apart. The fact that the defendants prematurely filed separate notices of appeal—the first before the court actually appointed a receiver, and the second before the court disposed of their post-judgment motion—does not entitle them to the inefficient and extraordinary relief of seriatim appeal proceedings. These are ordinary civil appeals that should be heard by this Court in the ordinary course, which includes consolidating them for briefing and argument where feasible, just like any other two appeals from a single case.

The defendants' request to expedite the receivership appeal is premised on their conclusory and unfounded assertion that consolidating their two appeals for briefing and argument "would severely delay resolution of the receivership appeal." (Mot. 6.) It is true, of course, that the issues in the two appeals are not identical, although they are much more closely related than the defendants

suggest. But this Court routinely hears appeals involving multiple issues, and we know of no reason to believe that the Court decides such appeals any less expeditiously than single-issue appeals.

The defendants' proposed approach of seriatim appeals, in contrast, practically guarantees a delayed resolution of their appeal from the amended judgment. And as the defendants themselves admit, the judgment appeal—*i.e.*, the appeal they want to brief and argue after the receivership appeal—is potentially dispositive of both appeals because "the issue of the appointment of a receiver becomes moot if the [judgment] below is reversed." (Mot. 7.) As a result, if the defendants are right on the merits of the judgment, then separate briefing, argument, and decision on the receivership appeal—before any proceedings on the judgment appeal—would be a waste of time and resources. And even if the judgment is ultimately affirmed, arriving at that result via the defendants' proposed approach would still require two separate decisions by two panels of this Court, two oral arguments, and two sets of at least partly duplicative briefs. Consolidating these appeals for briefing and argument will avoid that inefficient duplication of efforts without meaningfully delaying the resolution of either appeal.

Most of the defendants' motion is devoted to attacking the merits of the receivership order and the allegedly irreparable harm it is causing. But the defendants sought a stay pending appeal, which was denied. (Doc. 479.) And they have alleged no harm from the receivership that either cannot be undone or does not require further court approval. For example, their assertion that the receivership order authorizes the receiver to "dissolve and liquidate" a publicly traded company (Mot. 7 n.2) is inaccurate. The order instead merely directs the receiver to make a recommendation to the district court about that issue. (Doc. 491 ¶ 85.)

Finally, the defendants do not propose any specific timeline for briefing, and their request for "expedited" briefing of the receivership appeal appears to refer only to their desire to brief that appeal first. That relief should be denied, and briefing should instead be consolidated, for the reasons stated above. But to the extent the defendants' motion also seeks to truncate the Government's time for preparing and filing its brief, that relief should likewise be denied. This is a complex case with a voluminous record, including more than 500 docket entries and more than 650 trial exhibits. The Government's

counsel in these appeals did not represent it in the district court and will require at least the 30 days provided under the rules to prepare the Government's brief. We request that the Court set a consolidated briefing schedule accordingly.

Respectfully submitted,

s/ Clint A. Carpenter

CLINT A. CARPENTER
Attorney
Tax Division
Department of Justice
Post Office Box 502
Washington, DC 20044
(202) 514-4346
Clint.A.Carpenter@usdoj.gov
Appellate.Taxcivil@usdoj.gov

Dated: December 7, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	No. 18-4119
	)	
RAPOWER-3, LLC, ET AL.,	)	
	)	
Defendants-Appellants	)	

DECLARATION

Clint A. Carpenter of the United States Department of Justice, Washington, D.C., states as follows.

1. I am an attorney employed in the Appellate Section of the Tax Division of the United States Department of Justice, and in that capacity I have been assigned responsibility for the above-captioned appeal.

2. The facts set forth in the accompanying response are true and correct to the best of my knowledge and belief.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct. Executed on December 7, 2018 in Washington, D.C.

s/ Clint A. Carpenter
CLINT A. CARPENTER

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

[X] this document contains 1,762 words, **or**

[ ] this brief uses a monospaced typeface and contains _____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook 14, **or**

[ ] this brief has been prepared in a monospaced typeface using _____ with _____.

s/ Clint A. Carpenter

Attorney for the Appellee

Dated: December 7, 2018

CERTIFICATE OF SERVICE AND DIGITAL SUMBISSION

I hereby certify that on December 7, 2018 I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

Steven Richard Paul (spaul@nsdplaw.com)
Denver C. Snuffer, Jr. (dcsnuff@aol.com)

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, System Center Endpoint Protection 2016 (updated daily), and according to the program are free of viruses.

Date: December 7, 2018

s/ Clint A. Carpenter

CLINT A. CARPENTER
Attorney
Tax Division
Department of Justice
Post Office Box 502
Washington, DC 20044
(202) 514-4346
Clint.A.Carpenter@usdoj.gov
Appellate.Taxcivil@usdoj.gov