

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee)
)
v.) Nos. 18-4119, 18-4150
)
RAPOWER-3, LLC, ET AL.,)
)
Defendants-Appellants)

**MOTION FOR EXTENSION OF TIME
TO FILE AND SERVE APPELLEE’S BRIEF**

The United States of America respectfully requests a 30-day extension—from February 25, 2019 to March 27, 2019—of the time for filing and serving the appellee’s brief. In support of this motion, the undersigned counsel states as follows:

1. The appellee’s brief is currently due on February 25, 2019.
2. The appellants have advised, through their counsel, that they oppose the 30-day extension requested herein.
3. The United States has not previously requested any extensions of time in this appeal.
4. I am the Department of Justice attorney who has been assigned primary responsibility for preparing the appellee’s brief.

5. I have exercised due diligence and given priority to preparing the appellee's brief, and I will continue doing so.

Nevertheless, it will not be possible to file the brief on time for the following reasons:

a. The appellants filed their opening brief on January 22, 2019, during the recent 35-day lapse in appropriations that funded the Department of Justice and many other federal agencies.

b. Absent an appropriation, Department of Justice attorneys are prohibited from working, even on a voluntary basis, except in very limited circumstances, including "emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342.

c. As a result, I was unable to begin reviewing the appellants' opening brief and formulating a response until January 28, 2019, the first business day after the lapse in appropriations ended. At the same time, however, I was also required to give significant attention to a 35-day backlog of administrative and ministerial tasks pertaining to my other cases and responsibilities.

d. This is an unusually complicated appeal in several respects. First, the record in this case is massive, with more than 500 docket entries, more than 650 trial exhibits, and more than 2,500 pages of trial transcripts. Because I did not participate in the district court proceedings below, I must review the record thoroughly in order to fully understand the facts and issues and to present them clearly and accurately in the appellee's brief.

e. Second, this case arises from a factually complex solar energy scheme and presents complex issues of substantive tax law, the scope and nature of the government's remedies against promoters of abusive tax schemes, and an issue of first impression concerning the right to a jury trial. Effectively briefing these complex issues requires careful thought and copious legal research.

f. Third, the issues raised by the appellants' opening brief are also unusually numerous, as they include not only the complex issues noted above, but also multiple issues regarding the sufficiency and admissibility of evidence. Moreover, the only way that the appellants were able to raise so many issues without exceeding the word limitation was by filing an opening brief that consists almost

entirely of argument.¹ As a result, preparing the Government's response in the appellee's brief requires additional time both to address the sheer volume of issues, and to do so concisely enough that there is room to also provide the Court with an adequate statement of the case.

g. The procedures of the Appellate Section of the Tax Division require me to submit a draft of the brief for review by a senior attorney no later than seven working days before the filing deadline.

6. In light of the foregoing, the requested extension is necessary to provide adequate time for me to complete a draft of the appellee's brief that will be of maximum assistance to the Court and to have the draft brief reviewed by a senior attorney before it is filed.

7. I understand from the appellants' counsel that they oppose this extension because the court-appointed receiver in this case is continuing to carry out his duties to identify and secure property of the appellants from which the \$50 million judgment against them can be satisfied. The receiver's fees and other costs of administering the

¹ Of the 56 pages in their brief, 47 pages are expressly devoted to argument (Br. 9–56), and even the statements of the case and the facts that comprise the remaining 9 pages (Br. xiii–9) are largely argumentative.

receivership estate, if approved by the district court, will ultimately be paid out of the assets collected from the appellants. And so the appellants contend that any delay in the resolution of this appeal will necessarily result in more fees and costs and, hence, greater diminishment of their assets. This is the same argument they advanced before these appeals were consolidated in their unsuccessful motion to expedite their appeal from the order appointing the receiver. *See* Mot. to Expedite Proceeding 3–5 (No. 18-4119, Nov. 30, 2018).

8. The reason the receiver is continuing his work during this appeal is that the appellants failed to persuade the district court that there were grounds to grant their motion for a stay of the receivership order pending appeal. (Doc. 479.) Their inability to obtain a stay to halt the receiver’s work during this appeal is not a reason to deny the Government the extra 30 days that are needed to prepare its brief.

9. Moreover, despite their earlier request to expedite their appeal of the receivership, the appellants have now abandoned that appeal by failing to challenge the receiver’s appointment in their opening brief. Of course, if the appellants succeed in persuading this Court to reverse the \$50 million disgorgement award, then the

receivership would no longer serve any purpose. But apart from a single, passing reference to “the Receiver” (Br. 54), their brief fails even to acknowledge that a receiver was appointed in this case, much less argue that his appointment or the powers he was granted were an abuse of the district court’s discretion.

10. Finally, the appellants’ view that they will be injured if the requested stay is granted rests on multiple assumptions, including that they will prevail in this appeal, that a 30-day extension will necessarily delay this Court’s resolution of the appeal, that the receivership estate will necessarily incur additional costs during that delay, and that those additional costs will not be due to the appellants’ own misconduct (*see, e.g.*, Doc. 559). Even if these assumptions were founded, they would not warrant the refusal of 30 more days for the Government to prepare its defense of a judgment that took three years of litigation to obtain and that put a stop to what the district court found was a “massive fraud” on the public and the Treasury. (Doc. 467 at 1.)

For all these reasons, the Government requests that this motion be granted and that the time for filing and serving the appellee's brief be extended for 30 days, from February 25, 2019 to March 27, 2019.

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: February 15, 2019

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746,
that the foregoing is true and correct. Executed on February 15, 2019
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):

this document contains 1,161 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:

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: February 15, 2019

CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I hereby certify that on February 15, 2019 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: February 15, 2019

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