

No. 21-2664

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

<p>UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellee,</p> <p>and</p> <p>KEVIN B. DUFF, RECEIVER, Appellee,</p> <p>v.</p> <p>EQUITYBUILD, INC., et. al., Defendants,</p> <p>and</p> <p>VENTUS HOLDINGS, LLC, and VENTUS MERRILL, LLC, Intervenors-Appellants.</p>	<p style="text-align: center;">RESPONSE TO MOTION TO DISMISS APPEAL</p> <p>Appeal from the United States District Court for the Northern District of Illinois, Case No. 18-CV-5587, Honorable Judge John Z. Lee</p>
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Appellants, Ventus Holdings, LLC and Ventus Merrill, LLC (collectively, “Ventus”), by their attorneys, Robert S. Minetz, Saskia Nora Bryan, and Latimer LeVay Fyock LLC, state as follows:

I. Introduction

The United States District Court for the Northern District of Illinois had jurisdiction over this civil action pursuant to 15 U.S.C. Section 77t(b), 15 U.S.C. Section 78u(d), and 15 U.S.C. Section 78u(e).

This appeal is taken from the interlocutory order of the U.S. District Court for the Northern District of Illinois entered on August 13, 2021, by the Honorable John Z. Lee (Docket No. 1025).

The United States Court of Appeals for the Seventh Circuit has jurisdiction to decide this appeal pursuant to 28 U.S.C. Section 1292(a)(2), based on the following history and facts.

On August 18, 2018, the Plaintiff initiated this proceeding by filing a complaint against four defendants, alleging fraud through a Ponzi Scheme involving over 900 investors (Docket No. 1). On August 17, 2018 Kevin B. Duff was appointed as the Receiver in this proceeding (Docket No. 16).

In December 2019, the Receiver accepted Ventus' bids to purchase four parcels of real property (the "Properties") (Docket No. 739). In or about March 2020 the world was shut down due to the Covid-19 pandemic, the credit market seized-up, and Ventus was unable to secure financing to purchase the Properties (Docket No. 746). On April 20, 2020, Ventus notified the Receiver that due to its inability to secure financing, Ventus would be unable to proceed with the transactions (Docket No. 746).

On May 8, 2020, the Receiver accepted alternate bids for three of the four properties at a combined sale price of \$945,200.00 less than Ventus' bids (Docket No. 746). On June 11, 2020, the Receiver filed a motion to confirm the sales to the third-party bidders (Docket No. 712). On June 23, 2020, Ventus filed a motion to Intervene (Docket No. 721), which was granted, and an attached objection to the Receiver's motion to confirm. Following briefing on Ventus' objection, the District Court entered an order granting the Receiver's motion to confirm sale and on October 30, 2020, entered an order authorizing the sales (Docket Nos. 825 & 841).

As a result, on November 9, 2020, Ventus filed a motion for return of its earnest money for the three properties not sold to it (Docket No. 861). On August 13, 2021, the District Court denied the motion (Docket No. 1025). Ventus now appeals this order. No motion to reconsider or reverse this order was filed in the District Court.

Ventus' Notice of Appeal was filed on September 10, 2021 (Docket No. 1043).

This appeal is brought pursuant to 28 U.S.C. Section 1292(a)(2), which provides that the Appellate Court has jurisdiction over “(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property...” This Court has jurisdiction pursuant to 28 U.S.C. Section 1292(a)(2) because it concerns the wind up of the Receivership Estate. The Order appealed from is interlocutory, and in it the District Court declines to direct the Receiver to return the earnest money deposited by Ventus.

This is the second appeal by Ventus.

On November 2, 2020, Ventus filed a Notice of Appeal (Docket No. 847) of the orders granting the Receiver's motion to confirm sale (Docket No. 825) and authorizing the sales of the Properties (Docket No. 841), which was assigned case no. 20-3155. The Receiver filed a Motion to Dismiss that Appeal (App. Docket No. 10), and Ventus did not file any response. On December 11, 2020, the Seventh Circuit noted that Ventus had not filed a timely response and dismissed that appeal for lack of appellate jurisdiction (App. Docket No. 16).

II. Argument

The issue now before this Court is whether the Order dated August 13, 2021 (Docket No. 1025), is appealable because it is an order either (1) refusing to wind up the Receivership, or (2) refusing to take steps to accomplish the purposes thereof. Ventus concedes that the August 13 Order does not refuse to wind up the Receivership. However, the Order is still appealable because the words “or to take steps to accomplish the purposes thereof” encompass the actions refused by the Court in its August 13 Order. That very broad language supports the proposition that this Court

has jurisdiction to adjudicate this appeal. This Receivership will not be wound up until this Court adjudicates Ventus' claim that the August 13, 2021 Order was error.

The Motion to Dismiss contends that the language of 1292(a)(2) does not confer this Court with jurisdiction to adjudicate this case. However, the movant does not explain how the statutory language supports its position.

The Receiver's Motion relies heavily on the decision by this Court in *U.S. v. Antiques Limited Partnership*, 760 F.3d 668 (2014). However, that case is not controlling because it is distinguishable. This Court in *U.S. v. Antiques* held, *inter alia*, that

1. the order directing the government to propose a receiver for the judge to appoint was not a final appealable order;
2. the order approving the property sales by the receiver was not a final appealable order; and
3. the order of interim compensation for the receiver was an unappealable interlocutory order.

The Order dated August 13, 2021, in this case is very different.

The other cases cited by the movant are also distinguishable.

The movant (p. 8 of Motion) correctly states that *SEC v. Am. Principals Holdings, Inc.*, 817 F.2d 1349, 1350 (9th Cir. 1987), held that "orders requiring that funds be turned over to a receiver are nonappealable." That order is not similar to the Order at issue.

SEC v. Am. Principals Holdings, Inc. recognized that 1292(a)(2) "is not a model of clear expository writing." 817 F.3d at 1350. It then resolved the ambiguity in the statute by holding that "orders to take steps" are not appealable while "orders refusing to take steps" are appealable. *Id.* The court invoked the frequent observation that, in the absence of a narrow interpretation, "virtually any order of the receiver within the scope of its jurisdiction would be potentially appealable." *Id.* In this case, the district court order was an order "refusing to certain take steps"

to wind up the Receivership – namely, to return the earnest money deposits that are due to Ventus. Therefore, it is appealable. To the extent that the Receiver characterizes the August 13 Order as one that “takes” a step rather than refuses one, the inverse of the *Am. Principals Holdings* court becomes apparent: when any Order can be characterized as one taking a step instead of refusing to do so, then “virtually every” order would *not* be appealable. In this matter, the simplest characterization is the correct one, and the August 13 Order is appealable as one that refuses to take certain steps to wind up the Receivership at issue.

State Street Bank & Trust Co. v. Brockrim, Inc., 87 F.3d 1487, 1490-91 (1st Cir. 1996) (Motion at p. 8), involved an order approving the sale of certain Receivership assets. Again, that order is not similar to the order at issue because the order by the district court in this case was not an order approving the sale of certain assets. In its opinion in *State Street Bank & Trust Co.*, the First Circuit rejected the appellant’s alternative § 1292(a)(2) argument and held that “Because the Ohio Order in no way represents a refusal to wind up the receivership or to take steps to accomplish the purposes thereof, § 1292(a)(2) does not apply.” 87 F.3d at 1491.

The issue in *Commodity Futures Trading Comm’n v. Walsh*, 618 F.3d 218, 225 n.3 (2d Cir. 2010) (Motion at p. 8), was whether the district court properly granted a preliminary injunction. In fn 3, the Court of Appeals stated:

Likewise, the district court’s order referring Schaberg’s request for the release of some of her funds to the court-appointed receiver is also not injunctive—either explicitly or practically—and is therefore not appealable under § 1292(a)(1); nor is it appealable under § 1292(a)(2), which pertains to receivers, but provides for appellate review only of orders “appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof.”

618 F.3d at 225. This summary discussion of a very different kind of order is not a persuasive precedent for the Motion to Dismiss.

In *SEC v. Black*, 163 F.3d 188, 194-95 (3d Cir. 1998), and *Netsphere, Inc. v. Baron*, 799 F.3d 327 (5th Cir. 2015) (Motion at p. 8), the Courts of Appeals held that the fee award orders were not appealable under 1292(a)(2). Ventus does not contest those rulings or analyses. Instead, Ventus contends that those decisions are inapplicable to this situation because it is not now appealing from a fee award order.

The Ninth Circuit in *Plata v. Schwarzenegger*, 603 F.3d 1088 (9th Cir. 2010) (Motion at p. 8), held that the district court's refusal to block the Receiver's construction plan was not appealable under 1292(a)(2). *Id.* at 1099. That decision involves a very different issue than the issue now before this Court.

The Receiver's Motion and *U.S. v. Antiques* reflect the concern that interlocutory orders in receiverships "could flood the courts of appeals with interlocutory appeals." 760 F3d at *672. Obviously, this is a valid public policy concern that deserves analysis.

This public policy argument is an important part of the statutory construction of 28 U.S.C. 1292(a)(2). Ventus submits that public policy supports its request that this Court rule that it has jurisdiction for the following reasons:

1. By enacting 1292(a)(2), Congress recognized that interlocutory orders in Receiverships are proper.
2. Waiting for the conclusion of the Receivership to decide all the interim orders before allowing an appeal will present problems for the district court. If this appeal is decided now, the district court can adjudicate any remaining issues in a timely manner during the pendency of the Receivership in the event of a reversal. If the issue is not decided until after the Receivership is completed, the district court will be required to adjudicate all the interlocutory orders that are reversed after the Receivership is closed.
3. Waiting for the conclusion of the Receivership to decide all the interim orders before allowing an appeal may present this Court with an unwieldy appeal compared to the clear, district appeal presented by this case.
4. It would be unfair to Ventus to require that it wait years until the

Receivership is over for an adjudication of its rights. Justice delayed is justice denied.

III. Conclusion

WHEREFORE, the Receiver's Motion to Dismiss should be denied.

Dated: October 28, 2021

Respectfully submitted,

/s/Robert S. Minetz

By: Counsel for Appellants

Robert S. Minetz - #1925563
Saskia Nora Bryan - #6255682
Latimer LeVay Fyock LLC
55 West Monroe St., Suite 1100
Chicago, Illinois 60603
Telephone: 312-422-8000
rminetz@llflegal.com; sbryan@llflegal.com

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Robert S. Minetz