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 12 UNITED STATES OF AMERICA

13 UNITED STATES DISTRICT COURT

14 FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,

16 Plaintiff,

17 v.

18 ROBERT HUNTER BIDEN,

19 Defendant.

No. CR 23-cr-00599-MCS

EX PARTE APPLICATION FOR ORDER  
 REQUIRING DEFENDANT TO COMPLY  
 WITH COURT’S STANDING ORDER  
 AND EXCHANGE PROPOSED JURY  
 INSTRUCTIONS WITH GOVERNMENT

20 The United States of America, by and through its counsel of record, hereby  
 21 applies ex parte for an order that requires the defendant to exchange proposed jury  
 22 instructions with the government pursuant to the Court’s Standing Order. While the  
 23 government sent proposed jury instructions prior to the deadline in the Standing Order,  
 24 the defendant simply ignored the deadline and has not submitted any proposed jury  
 25 instructions to the government. Because he did not seek to stay these proceedings and the  
 26 Court has not been divested of jurisdiction through the defendant’s notice of appeal of a  
 27 nonappealable order, the government requests an order from this Court that commands  
 28 the defendant to comply with the Standing Order. On May 1, 2024, counsel for the

1 defendant, Mr. Abbe Lowell, advised that the defendant’s position is that his appeal “has  
2 divested the district court of jurisdiction to move forward and that includes deadlines for  
3 exchanging or filing pretrial documents contemplated in a scheduling order.” But no  
4 court has ever held an interlocutory appeal is permitted for the three rulings that this  
5 defendant now seeks to appeal - an appeal of the Court’s order (1) denying a motion to  
6 dismiss based on immunity purportedly conferred by a diversion agreement, (2) denying  
7 a motion to dismiss based on the alleged unlawfulness of a Special Counsel  
8 Appointment, and (3) denying a motion to dismiss based on a supposed breach of  
9 separation of powers. And no court has ever held that an appeal from an order denying  
10 such rulings automatically divests the court of jurisdiction. The defendant is simply  
11 choosing to ignore the Standing Order, without first seeking relief from this Court, while  
12 hoping that the Ninth Circuit will, contrary to its prior precedent, be the first court to find  
13 it has jurisdiction to consider the issues involved in his interlocutory appeal. An order is  
14 therefore needed from this Court to keep the pretrial schedule and deadlines on track for  
15 the trial scheduled for June 20, 2024.

16 This ex parte application is made based on the attached memorandum of points  
17 and authorities, the files and records in this case, and the attached declaration of counsel.  
18

19 Dated: May 6, 2024

Respectfully submitted,

20 DAVID WEISS  
21 Special Counsel

22 /s/ \_\_\_\_\_  
23 LEO J. WISE  
24 Principal Senior Assistant Special Counsel

25 DEREK E. HINES  
26 Senior Assistant Special Counsel  
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28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Robert Hunter Biden failed to comply with this Court’s Standing Order  
4 when he declined to exchange proposed jury instructions 28 days prior to the final  
5 pretrial conference. The Standing Order sets out a series of deadlines that both parties  
6 must comply with to proceed to trial on June 20, 2024. While the defendant has filed a  
7 notice of appeal, doing so did not automatically divest this Court of jurisdiction and the  
8 Standing Order remains active absent a judicial determination that relieves the defendant  
9 of his obligation to comply with the Standing Order. *See Nascimento v. Dummer*, 508  
10 F.3d 905, 910 (9th Cir. 2007) (“[W]hen an improper appeal is taken, the district court  
11 retains its jurisdiction to act on the case, and its extant orders must be followed by the  
12 litigants, at risk of grave sanction.”) Rather than seeking a judicial determination by  
13 filing a motion to stay, the defendant unilaterally decided to ignore the Standing Order  
14 and is attempting to delay his trial. *See id.* (“No stay of the district court proceedings  
15 pending resolution of the appeal had been sought or granted, and so Nascimento  
16 remained under an obligation to comply with the district court’s orders and pretrial  
17 timetable notwithstanding his appeal.”) Because he has not sought a stay and the law is  
18 clear that this Court was not automatically divested of jurisdiction, the government seeks  
19 an order from the Court requiring that the defendant provide his proposed jury  
20 instructions immediately and meet all other deadlines listed in the Standing Order in  
21 advance of the June 20, 2024, trial.

22 **II. BACKGROUND**

23 The Court’s Standing Order governs pretrial deadlines in this case. *See* Initial  
24 Standing Order for Criminal Cases Assigned to Judge Mark C. Scarsi (Dec. 2021),  
25 *available at* [https://www.cacd.uscourts.gov/sites/default/files/documents/MCS/AD/](https://www.cacd.uscourts.gov/sites/default/files/documents/MCS/AD/Criminal%20Case%20Standing%20Order%20Dec.%202021.pdf)  
26 [Criminal%20Case%20Standing%20Order%20Dec.%202021.pdf](https://www.cacd.uscourts.gov/sites/default/files/documents/MCS/AD/Criminal%20Case%20Standing%20Order%20Dec.%202021.pdf). At the arraignment on  
27 January 11, 2024, the Court reminded the parties of their obligations to comply with the  
28

1 Standing Order. *See* Doc. No. 16. With respect to potential interlocutory appeals, during  
2 the hearing on January 11, 2024, the Court stated:

3 And then, finally, you know, in the Ninth Circuit there's a high bar for  
4 interlocutory appeals. The leading case there is *U.S. vs. Austin*, 416 F.3d  
5 1016. To the extent anybody -- the defense wants to argue that denial of their  
6 motion should lead to an interlocutory appeal, please include that in your  
7 briefing. Because what I would like to do is, if that's going to be requested, I  
8 would like to deal with it all at once, if we can, just to streamline things a bit.

9 Doc. No. 18. Trans. 30:6-15.

10 In response to the Court's directive, counsel for the defendant, Mr. Lowell, stated,  
11 "Fine. Exactly. We will do that." *Id.* at 30:16. But the defendant did not do that and still  
12 has not briefed the Court on why the Court's order denying his motions is subject to an  
13 interlocutory appeal. It is not.

14 On May 1, 2024, the government sent defense counsel an email which included an  
15 attachment with proposed jury instructions, pursuant to the Standing Order ¶G(4). Decl.  
16 at ¶ 2, Exhibit 1. As of the filing of this motion, defense counsel has not exchanged their  
17 proposed jury instructions with the government. *Id.* In an email response on May 1,  
18 2024, Mr. Lowell stated, ". . . the appeal has divested the district court of jurisdiction to  
19 move forward and that includes deadlines for exchanging or filing pretrial documents  
20 contemplated in a scheduling order." *Id.* In an email reply on May 2, 2024, the  
21 government stated that, "Nothing has been filed, let alone ruled on, in the Central  
22 District of California that relieves you of complying with the Court's deadlines." *Id.*  
23 The defendant still has not filed a request for a stay and the government therefore brings  
24 this motion. Indeed, no court has ever held that a district court is divested of jurisdiction  
25 for an appeal of an order denying the three motions to dismiss that the defendant appeals.

### 26 **III. ARGUMENT**

#### 27 **A. The Defendant's Notice of Appeal Did Not Automatically Divest this** 28 **Court of Jurisdiction**

The filing of an appeal from an appealable order divests the district court of its  
control over those aspects of the case involved in an appeal. *Griggs v. Provident*

1 *Consumer Discount Co.*, 459 U.S. 56 (1982). By contrast, the “transfer of jurisdiction  
2 from the district court to the court of appeals is not effected, however, if a litigant files a  
3 notice of appeal from an unappealable order.” *Estate of Conners by Meredith v.*  
4 *O’Connor*, 6 F.3d 656, 658 (9th Cir. 1993) (holding that the act of filing a notice of  
5 appeal does not automatically divest a district court of jurisdiction). *See also Ruby v.*  
6 *Secretary of the Navy*, 365 F.2d 385, 389 (9th Cir. 1966) (en banc), *cert. denied*, 386  
7 U.S. 1011 (1967) (finding jurisdiction was not ousted merely by noticing an  
8 appeal). Like civil cases, the district court also retains jurisdiction after the filing of a  
9 notice of appeal of a nonappealable order in a criminal case. *See e.g., United States v.*  
10 *Garner*, 663 F.2d 834, 838 (9th Cir.1981) (holding district court’s order denying  
11 defendant’s motion to dismiss indictment due to alleged grand jury irregularities was not  
12 appealable and district court therefore maintained jurisdiction to proceed with the trial  
13 even after the filing of the notice of appeal), *cert. denied*, 456 U.S. 905 (1982); *United*  
14 *States v. Morales-Bravo*, 650 Fed.Appx. 530, 532 (9th Cir. 2016) (unreported) (finding  
15 district court retained jurisdiction in criminal case where defendant sought appeal from a  
16 nonappealable order); *United States v. Amarra-Herrarte*, 153 Fed.Appx. 452 (9th Cir.  
17 2005) (unreported) (in a criminal case, “[a]n appeal from an unappealable order does not  
18 divest a district court of jurisdiction”).

19 Accordingly, “[w]hen a Notice of Appeal is defective in that it refers to a non-  
20 appealable interlocutory order, it does not transfer jurisdiction to the appellate court, and  
21 so the ordinary rule that the district court cannot act until the mandate has issued on the  
22 appeal does not apply.” *Nascimento v. Dummer*, 508 F.3d at 908. In *Nascimento*, the  
23 Ninth Circuit explained, “when a litigant makes an improper interlocutory appeal, such  
24 action will not throw a monkey wrench into the machinery of our justice system.” *Id.* at  
25 910. The law in the Ninth Circuit is clear that “when an improper appeal is taken, the  
26 district court retains its jurisdiction to act on the case, and its extant orders must be  
27 followed by the litigants, at risk of grave sanction.” *Id.* at 910. In *Nascimento*, the Court  
28 further held that:

1 No stay of the district court proceedings pending resolution of the appeal had  
2 been sought or granted, and so Nascimento remained under an obligation to  
3 comply with the district court's orders and pretrial timetable notwithstanding  
his appeal.

4 *Id.* Like *Nascimento*, here the same reasoning applies—the defendant remains under an  
5 obligation to comply with this Court's Standing Order and pretrial timetable  
6 notwithstanding his appeal because he has not sought and been granted a stay.

7 Indeed, the defendant has not filed anything in this Court requesting relief from  
8 the Standing Order or scheduling order while he pursues an appeal. Consequently, the  
9 Standing Order and scheduling order remain live orders of the Court that the government  
10 has complied with while the defendant has not. And by not seeking a stay of the Court's  
11 deadlines, the defendant is attempting to delay trial, or otherwise obtain an unfair  
12 advantage in these proceedings by receiving the government's positions, exhibits,  
13 witness list, and motions in limine, without providing his own simultaneous disclosures  
14 pursuant to the Standing Order.

15 **B. The Ninth Circuit Does Not Have Jurisdiction Because the Defendant**  
16 **Sought to Appeal a Nonappealable Order**

17 Because the defendant filed an improper notice of appeal of a nonappealable  
18 order, the government filed a motion to dismiss the appeal on April 22, 2024. Exhibit 2.  
19 The defendant filed a response on April 30, 2024. Exhibit 3. The government filed a  
20 reply on May 6, 2024. Exhibit 4. The matter is fully briefed and the government has  
21 requested relief by May 14, 2024, pursuant to Ninth Circuit Rule 27-1(3). Exhibit 2.

22 Although his notice of appeal did not specify which issues he was appealing (he  
23 simply attached to his notice the entire order of the court denying all of his motions), the  
24 defendant later stated in response to the motion to dismiss that he sought to appeal the  
25 court's denial of three of his motions: (1) motion to dismiss based on an alleged  
26 improper appointment and funding of the Special Counsel, (2) motion to dismiss based  
27 on immunity purportedly conferred by the diversion agreement, and (3) motion to  
28 dismiss based on a supposed breach of the separation of powers. Exhibit 3 at p. 1.

1 In his response to the motion to dismiss, defendant made a series of claims before  
2 the appellate court that underscore how deficient his arguments really are:

3 (1) the defendant dishonestly stated that he requested an injunction by moving this  
4 Court to “enjoin” Special Counsel David Weiss, even though he never asked for  
5 injunctive relief or even mentioned the word “enjoin” in any of his briefing, because the  
6 law is clear that only denials of requests for an injunction (and not a denial of a motion  
7 to dismiss) may be subject to an interlocutory appeal;

8 (2) the defendant erroneously asserted that his immunity claim was derived from  
9 the Fifth Amendment, like a Double Jeopardy claim, as opposed to a contractual  
10 agreement with the government, and he argued that the diversion agreement is  
11 ambiguous, even though he argued it was unambiguous before this Court;

12 (3) the defendant falsely claimed that he filed a petition for writ of mandamus  
13 even though he has not and could never satisfy the relevant factors for mandamus even if  
14 he had chosen to do so;

15 (4) the defendant argued the Ninth Circuit should be the first court to find that a  
16 denial of a motion to dismiss for a breach of separation of powers claim is immediately  
17 appealable as a collateral order, even though the collateral order doctrine is limited by  
18 precedent to Double Jeopardy claims, Speech and Debate claims, and bail orders; and

19 (5) the defendant invented the legal proposition that his claims are independently  
20 reviewable under the “pendent jurisdiction” doctrine, even though the actual law of  
21 “pendent jurisdiction” requires the issues he raises to be pendent to a matter over which  
22 the appellate court already has jurisdiction.

23 For the reasons discussed in the government’s appellate briefs, Exhibits 2 and 4,  
24 the Court’s order is nonappealable and there is no appellate jurisdiction over an  
25 interlocutory appeal. Since there has been no finding that this Court has lost jurisdiction,  
26 this Court has inherent authority to enforce its Standing Order. Because the defendant  
27 has not sought a stay, the Standing Order and scheduling order remain live orders that  
28 the Court should enforce.



1           **C.     This Court Should Issue an Order Requiring the Defendant to Follow**  
2           **its Standing Order and Exchange Proposed Jury Instructions**

3           In order to keep the trial on schedule for June 20, 2024, the government requests  
4 that this Court issue an order requiring the defendant to comply with pretrial deadlines in  
5 the Standing Order. Even if the Ninth Circuit dismisses the appeal soon, it will be  
6 difficult to maintain the trial date of June 20, 2024, if the defendant continues to refuse  
7 to comply with the Standing Order. For example, on or before May 8, 2024, the parties  
8 must exchange objections to proposed jury instructions, meet and confer regarding a  
9 statement of the case, exchange exhibit lists, and meet and confer regarding admissibility  
10 of exhibits. Standing Order ¶¶G(4), G(1), 6(a). Motions in limine, the statement of the  
11 case, voir dire, witness lists, jury instructions, a verdict form, and exhibits lists are due  
12 on or before May 15, 2024. Standing Order ¶¶ F, G(1), G(2), G(3), G(4), G(5), 6(a).  
13 Because of these imminent deadlines, the government respectfully requests this ex parte  
14 relief to confirm that the defendant has not been relieved from the pretrial deadlines  
15 listed in the Standing Order. Additionally, by issuing the requested order, the defendant  
16 will be unable to rely on his noncompliance with the Court’s deadlines as a basis for a  
17 continuance of the trial date.

18           **IV.    CONCLUSION**

19           For the foregoing reasons, the government respectfully requests that this Court  
20 issue an order requiring the defendant to comply with the pretrial deadlines in the  
21 Court’s Standing Order and exchange proposed jury instructions immediately.  
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**DECLARATION OF DEREK E. HINES**

I, Derek E. Hines, declare as follows:

1. I am the Senior Assistant Special Counsel and represent the government in the prosecution of United States of America v. Robert Hunter Biden, No. CR 23-cr-00599-MCS.

2. On May 1, 2024, the government sent defense counsel an email which included an attachment with proposed jury instructions, pursuant to the Court’s Standing Order ¶G(4). Exhibit 1. As of the filing of this motion, defense counsel has not exchanged their proposed jury instructions with the government. In an email response on May 1, 2024, Mr. Lowell stated, “. . . the appeal has divested the district court of jurisdiction to move forward and that includes deadlines for exchanging or filing pretrial documents contemplated in a scheduling order.” *Id.* In an email reply on May 2, 2024, the government stated that, “Nothing has been filed, let alone ruled on, in the Central District of California that relieves you of complying with the Court’s deadlines.” *Id.*

3. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed in the Commonwealth of Pennsylvania on May 6, 2024.



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DEREK E. HINES  
Senior Assistant Special Counsel