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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT HUNTER BIDEN,

Defendant.

Case No. 2:23-cr-00599-MCS-1

**ORDER RE: EX PARTE
APPLICATION FOR ORDER
REQUIRING DEFENDANT TO
COMPLY WITH COURT'S
STANDING ORDER AND
EXCHANGE PROPOSED JURY
INSTRUCTIONS WITH
GOVERNMENT (ECF NO. 76)**

1 The Government applies *ex parte* for an order requiring Defendant Robert Hunter
2 Biden to comply with the Court’s standing order regarding the exchange of proposed
3 jury instructions and other pretrial documents in anticipation of trial. (Appl., ECF No.
4 76.) Mr. Biden filed a brief opposing the application, (Opp’n, ECF No. 77), and the
5 Government filed a reply, (Reply, ECF No. 78). The Court assumes without deciding
6 that relief on an *ex parte* basis is warranted and does not reach the parties’ arguments
7 on the propriety of emergency relief.

8 The Government argues that the Court retains the authority to proceed to trial in
9 this matter because the Ninth Circuit Court of Appeals lacks jurisdiction to consider
10 Mr. Biden’s interlocutory appeal of the Court’s order denying Mr. Biden’s motions to
11 dismiss. The Government contends that under the appropriate standards for
12 interlocutory review, the Court’s nonfinal order is not appealable on an interlocutory
13 basis. According to the Government, because Mr. Biden has not sought a stay of
14 proceedings while the interlocutory appeal is pending, he must comply with the trial
15 schedule. Mr. Biden asserts that his notice of interlocutory appeal divested the Court of
16 jurisdiction, so the Court may not proceed to trial absent an order certifying Mr. Biden’s
17 interlocutory appeal as frivolous. The Government responds that the authorities Mr.
18 Biden invokes concern situations in which an interlocutory appeal is substantively
19 frivolous, not situations where, as here, the notice of appeal is procedurally defective,
20 as the Government alleges that Mr. Biden seeks interlocutory review of a nonfinal order
21 not subject to interlocutory review.

22 Although the parties and many courts employ the term *jurisdiction*, a statutory
23 concept, in connection with a discussion of whether a district court’s authority to
24 proceed is divested upon the filing of a notice of appeal, the divestiture rule is a
25 nonjurisdictional doctrine of judicial creation. *See Rodriguez v. County of Los Angeles*,
26 891 F.3d 776, 790 (9th Cir. 2018). Thus, a court *is not* without jurisdiction when a notice
27 of appeal is filed, including when the appellate court *is* without jurisdiction over the
28 appeal. *See id.* at 791 (“[A]n error in following our circuit’s divestiture procedure does

1 not entirely eliminate the authority of the district court to hear a case.”); *Nascimento v.*
2 *Dummer*, 508 F.3d 905, 908 (9th Cir. 2007) (“When a Notice of Appeal is defective in
3 that it refers to a non-appealable interlocutory order, it does not transfer jurisdiction to
4 the appellate court, and so the ordinary rule that the district court cannot act until the
5 mandate has issued on the appeal does not apply.”); *Ruby v. Sec’y of U.S. Navy*, 365
6 F.2d 385, 389 (9th Cir. 1966) (“Where the deficiency in a notice of appeal, by reason
7 of untimeliness, lack of essential recitals, or reference to a non-appealable order, is clear
8 to the district court, it may disregard the purported notice of appeal and proceed with
9 the case, knowing that it has not been deprived of jurisdiction.”).

10 Mr. Biden, resting on his conviction that no stay is necessary given his
11 understanding of the divestiture rule, has not sought a stay of this Court’s orders
12 regarding trial preparation. To be clear, the Court has not vacated the pretrial schedule,
13 and absent a request for relief, Mr. Biden ignores the Court’s orders at his own peril. If
14 the Ninth Circuit dismisses the interlocutory appeal for lack of jurisdiction, the Court
15 intends to proceed to trial without significant delay.

16 The Government asks the Court to expressly recognize the Ninth Circuit’s lack
17 of jurisdiction over Mr. Biden’s appeal.¹ As discussed, divestiture is a prudential rule.

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19 ¹ The parties dispute whether the determination must be accompanied by a certification
20 that the appeal is frivolous. (Opp’n 6–8; Reply 3–5.) The case law the parties cite does
21 not provide clear guidance on whether the frivolity standard governs when a district
22 court facing divestiture considers appellate jurisdiction over an interlocutory appeal.
23 *Compare Rodriguez*, 891 F.3d at 791 (observing divestiture is automatic in the absence
24 of a certification that an appeal is frivolous or waived), *with Nascimento*, 508 F.3d at
25 908, 910 (upholding district court’s orders entered while appeals over which the
26 appellate court lacked jurisdiction were pending without discussing certification). In
27 such situations, this Court has both expressly issued a frivolity certification, *compare*
28 *Curtis v. Transamerica Premier Life Ins. Co.*, No. 2:23-cv-01413-MCS-AGR, 2023
U.S. Dist. LEXIS 178315, at *3 (C.D. Cal. Aug. 21, 2023) (Scarsi, J.) (certifying appeal
as frivolous on same grounds for which the court denied leave to appeal in forma
pauperis), *with Order Re: Mot. & Aff. for Leave to Appeal In Forma Pauperis 2*, *Curtis*
v. Transamerica Premier Life Ins. Co., No. 2:23-cv-01413-MCS-AGR (C.D. Cal. Aug.

1 Prudential concerns of judicial economy and comity among the federal courts counsel
2 against this Court rendering an opinion on the Ninth Circuit’s jurisdiction in response
3 to this emergency application. The Ninth Circuit’s jurisdiction over Mr. Biden’s
4 interlocutory appeal is already the subject of a fully briefed motion to dismiss pending
5 in that court. (Mot. Exs. 2–4, ECF Nos. 76-2 to -4.) The Government asked the Ninth
6 Circuit to resolve this motion on an expedited basis. (Mot. Ex. 2, at 23–24.) Given the
7 swiftness with which the Third Circuit resolved a motion to dismiss the interlocutory
8 appeal of similar nonfinal orders in Mr. Biden’s other criminal case, the Court
9 anticipates that the Ninth Circuit may resolve the motion before it in a similarly
10 expeditious manner. *See Order, United States v. Biden*, No. 24-1703 (3d Cir. May 9,
11 2024), ECF No. 17 (resolving motion to dismiss within three days of conclusion of
12 briefing). The Court, therefore, declines at this time to substitute its judgment for the
13 judgment of the Ninth Circuit on its own jurisdiction.

14 The application is denied.

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16 **IT IS SO ORDERED.**

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18 Dated: May 9, 2024



19 MARK C. SCARSI
20 UNITED STATES DISTRICT JUDGE

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24 7, 2023), ECF No. 39 (finding appeal of unappealable interlocutory order frivolous),
25 and recognized its power to proceed without making an express finding of frivolity, *see*
26 *Pham v. Talkdesk, Inc.*, No. 2:22-cv-05325-MCS-JPR, 2023 U.S. Dist. LEXIS 212810,
27 at *3–7 (C.D. Cal. Sept. 13, 2023) (Scarsi, J.) (recognizing authority to consider motion
28 for sanctions both under inherent power to police bad faith conduct in litigation and
because a pending appeal concerned a nonfinal order). For reasons discussed below, the
Court does not resolve the parties’ dispute at this time.