

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

-v-

TRAFFIC MONSOON and  
CHARLES DAVID SCOVILLE,

Defendants-Appellants.

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No. 18-4038

**SECURITIES AND EXCHANGE COMMISSION'S  
RESPONSE TO THE DEFENDANTS' MOTION TO CONSOLIDATE  
APPEAL WITH CASE NO. 17-4059, OR ALTERNATIVELY, MOTION  
FOR STAY OF APPEAL PENDING RESOLUTION OF  
APPEAL NO. 17-4059**

The Securities and Exchange Commission submits this response to the motion of Charles Scoville and Traffic Monsoon (collectively “Defendants”) to “Consolidate [this] Appeal with Case No. 17-4059, or Alternatively, Motion for Stay of Appeal Pending Resolution of Case No. 17-4059[.]” (For ease of reference to distinguish the two appeals, this appeal (No. 18-4038) is referred to herein as the “New Appeal” and appeal No. 17-4059 is referred to as the “Original Appeal”). As a result of difficult and novel jurisdictional issues raised by the New Appeal, the Commission believes that the appropriate course of action would be for this Court to stay any proceedings in connection with the New Appeal pending

resolution of the Original Appeal (which has already been submitted to the Court for a decision following oral argument), rather than to consolidate the two appeals.

According to the Defendants, this Court’s jurisdictional authority to consider the New Appeal is “28 U.S.C. § 1292(a)(2): ‘[T]he courts of appeal shall have jurisdiction of appeals from: ... Interlocutory orders appointing receivers....’”

Defendants’ Motion to Consolidate or Stay, at 2. Yet, the district court’s interlocutory order (“Order”) from which the New Appeal is taken merely makes “two clarifications” concerning the scope of an *existing* receivership. *Id.* at Ex. 1, p. 4. As the Defendants themselves explain, the Order seeks only to “confirm[] that both Scoville and Traffic Monsoon have standing to present the substantive issues in the [Original Appeal]” and “clarif[y] that the receiver cannot take a position on the merits of the dispute between the SEC and Traffic Monsoon/Scoville[.]” *Id.* at Ex. 1, p. 4.

The Order does not have the functional or practical effect of actually appointing a receiver and therefore does not appear to fall within the limited scope of appellate jurisdiction afforded by Section 1292(a)(2). *See generally* *FTC v. Overseas Unlimited Agency, Inc.*, 873 F.2d 1233, 1235 (9th Cir. 1989) (explaining that courts apply “a policy of strict construction” to Section 1292(a)(2)). Rather, the Order is simply one “entered in the course of a receivership” and such interlocutory orders are “generally not appealable[.]” CHARLES WRIGHT, ARTHUR

MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 3925 (3d ed.) (discussing receivership appeals). Moreover, the fact that the district court captioned the Order “Second Amended Order Appointing Receiver” is not relevant to the jurisdictional analysis. “Interlocutory appeal is not permitted simply because an order is characterized as one appointing a ‘receiver.’” *Id.*

In their motion, the Defendants have not identified any authority from any court holding that an interlocutory order clarifying the scope of an existing receivership may be treated as an order appointing a receivership under Section 1292(a)(2). But even assuming that an order clarifying the scope of an existing receivership might be appealable under Section 1292(a)(2) under certain circumstances, it is far from clear that the Defendants should be able to pursue the New Appeal as a mechanism to raise “the same legal issues” that the parties litigated in the district court in connection with an earlier order that indisputably appointed the current receiver (and which is before this Court in the Original Appeal). Defendants’ Motion to Consolidate or Stay, at 2.

In light of the foregoing jurisdictional issues (which have not been briefed), the Commission believes that it would not be advisable to consolidate the two appeals. Instead, this Court should stay any proceedings in connection with the New Appeal pending resolution of the Original Appeal; this would allow the Court to issue its opinion in the Original Appeal without having to address the

jurisdictional issues (and might result in this Court avoiding those issues even in the context of the New Appeal, *see, e.g.*, FED. R. APP. P. 42(b) (voluntary dismissal)).<sup>1</sup> And once this Court issues its decision in the Original Appeal, the parties would be in a position to make any appropriate filings concerning the New Appeal.

### CONCLUSION

Accordingly, the Commission requests that this Court stay any proceedings in connection with the New Appeal pending the resolution of the Original Appeal rather than consolidate the two appeals.

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<sup>1</sup> Any legal or factual questions associated with Scoville's authority to represent Traffic Monsoon in the Original Appeal should, in the Commission's view, have no bearing on this Court's ability to reach the underlying issues presented in that appeal. It is undisputed that Scoville can pursue the underlying issues on his own behalf in the Original Appeal. *Cf. Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009) (“[I]f one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case.” (internal quotation marks omitted)). Further, any determination on those issues with respect to Scoville would necessarily be binding on the district court with respect to Traffic Monsoon in connection with the ongoing litigation.

Respectfully submitted,

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April 5, 2018

### CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2018, I electronically filed the foregoing Securities and Exchange Commission's Response using the Court's CM/ECF system. All counsel involved with this appeal will also be served through the CM/ECF system.

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## CERTIFICATE OF COMPLIANCE

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/s/ William K. Shirey  
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April 5, 2018