

DOUGLAS J. ROSINSKI,
Appellants,
v.
ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

Pursuant to U.S. Vet. App. Rule 27(b), Appellee, Robert L. Wilkie, Secretary of Veterans Affairs (Secretary), respectfully submits this response in opposition to Appellant's August 19, 2020, Opposed Motion to Recall This Court's Transmission of the Secretary's Untimely Notice of Appeal (Motion). The Secretary respectfully asserts that the Court should deny Appellant's Motion for several reasons, not least of which is because this Court does not control whether the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has jurisdiction over an appeal.

On May 29, 2020, this Court issued an order *en banc* that denied the Secretary's motion for full-court review. On July 27, 2020, the U.S. Department of Justice (DOJ) filed a Notice of Appeal indicating that the

Secretary was appealing this case to the Federal Circuit. This Court entered judgment on its docket sheet on July 29, 2020, and stated, “Under Rule 36, judgment is entered and effective this date.” That same day, July 29, 2020, DOJ filed an amended Notice of Appeal to the Federal Circuit, this time including a certificate of service, because Appellant, an attorney who practices before this Court and has access to the Court’s electronic filing system, was acting *pro se* at that time. On August 3, 2020, Kenneth M. Carpenter filed a Notice of Appearance to represent Appellant, and filed an Opposed Motion to Dismiss. Appellant filed a corrected copy of his Opposed Motion to Dismiss on August 4, 2020. The Secretary filed a Response in Opposition to Appellant’s Opposed Motion to Dismiss on August 18, 2020 (Secretary’s Response). On August 19, 2020, the Clerk of this Court transmitted the Secretary’s Notice of Appeal to the U.S. Court of Appeals for the Federal Circuit. In his latest Motion, Appellant alleges that the Court should recall its transmittal of the Secretary’s Notice of Appeal to the Federal Circuit because he disagrees with the date the Court entered judgment on the docket sheet, and therefore believes the Notice of Appeal was Untimely.

THE COURT SHOULD DENY APPELLANT’S MOTION

The Court should deny Appellant’s Motion because this Court does not control whether the Federal Circuit takes an appeal, the Secretary’s

notice of appeal satisfied the criteria necessary at the Federal Circuit, and, finally, it also complied with this Court's rules.

A. This Court does not control whether the Federal Circuit takes an appeal

As previously demonstrated in the Secretary's Response, this Court does not control whether the Federal Circuit takes an appeal, and Appellant's arguments to the contrary are inapposite. "It is the duty of [the Federal Circuit], not the district court, to determine whether [an appellant's] appeal belonged in this court." *In re Lockhart*, No. 504, 1997 WL 264846, at *2 (Fed. Cir. 1997) (citing *Dickerson v. McClellan*, 37 F.3d 251, 252 (6th Cir. 1994); *Graves v. General Ins. Corp.*, 381 F.2d 517, 518 (10th Cir. 1967); 20 *Moore's Federal Practice* § 303.32[2][a][i] (3d ed. 1997)). Furthermore, nothing in this Court's rules, or the Federal Rules of Appellate Procedure, provides a mechanism to recall the transmittal of the Secretary's Notice of Appeal to the Federal Circuit. Because the relief sought by Appellant's motion is both inappropriate and unavailable, the Motion should be denied.

B. Appellant's Motion is essentially a repetition of his previous Corrected Opposed Motion to Dismiss, and his reliance upon *Gilda* is misplaced

Appellant's Motion is premised on an assertion that the Secretary's Notice of Appeal to the Federal Circuit was untimely. See Motion at 1-5. However, Appellant already made this argument in his previous Opposed

Motion to Dismiss, see Appellant's corrected Opposed Motion to Dismiss (Aug. 4, 2020), and the Secretary responded to it in his Response. See Secretary's Response. The Secretary's Notice of Appeal was not untimely, and the Secretary incorporates the arguments from the Secretary's Response by reference here, and will not repeat them.

Insofar as Appellant now cites to *Gilda Indus. v. United States*, 511 F.3d 1348, 1350 (Fed. Cir. 2008), see Motion at 3-5, that case is inapposite. In *Gilda*, the appellant's counsel asserted that on the last day of the 60-day appeal period, December 11, 2006, "he logged on to the electronic filing website maintained by the Court of International Trade. He entered the information that Gilda was taking an appeal from the trial court's judgment . . . [and] apparently logged off the website before reaching the final confirmation page." *Gilda*, 511 F.3d at 1350. "As a result, Gilda's notice of appeal was not recorded as having been filed on that day." *Id.* The next day, December 12, 2006, Gilda's counsel again completed the electronic form and the filing was made. *Id.* One week later, Gilda's counsel filed in the Court of International Trade a motion to extend the filing deadline for the notice of appeal to December 12, 2006. *Id.* The Federal Circuit ultimately found it did not have jurisdiction over Gilda's "untimely effort to appeal the trial court's October 10, 2006, judgment[.]" and remanded to the trial court to determine whether the late filing was due to excusable neglect. *Id.* at 1352.

No such missed deadlines exist in this case. In *Gilda*, to the contrary, the clerk of the Court of International Trade did not receive the notice of appeal on time because Gilda's counsel never completed the electronic filing. See *Gilda*, 511 F.3d at 1350. As previously noted in the Secretary's Response, the facts of this case clearly demonstrate that VA's July 27 and July 29, 2020, notices of appeal were sufficient under Fed. R. App. Proc. 3. The notices of appeal were received by the clerk and filed on July 27 and July 29, 2020, which was within 60 days of this Court's entry of judgment on July 29, 2020. See Fed. R. App. Proc. 3(a)(1), 4(a)(i)(B)(2). *Gilda* would be inapposite even if July 28, 2020, had been the deadline in this case, which it was not. Appellant's arguments are without merit, and the Court should deny his Motion.

WHEREFORE, Appellee respectfully asserts that the Court should deny Appellants' Motion to Recall this Court's Transmission of the Secretary's Notice of Appeal.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Principal Deputy General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Carolyn F. Washington
CAROLYN F. WASHINGTON
Deputy Chief Counsel

/s/ Nathan Paul Kirschner

NATHAN PAUL KIRSCHNER

Senior Appellate Attorney

Office of General Counsel (027D/E)

U.S. Dept. of Veterans Affairs

810 Vermont Avenue, N.W.

Washington, D.C. 20420

202.632.6959

Telecommuting: 414.256.1891

Attorneys for Appellee

Secretary of Veterans Affairs