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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE COMMISSION,	No. 3:16-cv-00438-PK
Plaintiff,	RECEIVER'S RESPONSE TO WEIDER

RECEIVER'S RESPONSE TO WEIDER AND FORMAN'S MOTION TO STAY THE JUNE 9, 2017 OPINION AND ORDER

v.

AEQUITAS MANAGEMENT, LLC; AEQUITAS HOLDINGS, LLC; AEQUITAS COMMERCIAL FINANCE, LLC; AEQUITAS CAPITAL MANAGEMENT, INC.; AEQUITAS INVESTMENT MANAGEMENT, LLC; ROBERT J. JESENIK; BRIAN A. OLIVER; and N. SCOTT GILLIS,

Defendants.

HEALTH & FITNESS'S AND BRUCE FORMAN'S MOTION TO STAY THE JUNE 9, 2017 OPINION AND ORDER

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It is premature to further crowd the Ninth Circuit's docket with Weider Health & Fitness and Bruce Forman's (collectively, "Weider/Forman") sham claims. Weider/Forman try to elbow their way past other investors by claiming security interests in certain receivables (the "Receivables Assets"). Because Weider/Forman can advance "no serious argument" under the plain language of the parties' contracts supporting their claimed lien over the Receivables Assets, this Court declined to segregate proceeds from the sale of the Receivables Assets for the payment of Weider/Forman's eventual claims. *Opinion & Order* [Dkt. 465], p. 7. *See also Order* [Dkt. 549] (adopting same following *de novo* review).

At root, Weider/Forman's claims against the Receivership Entity are similar to those of hundreds of other investors. These investors claim to be owed money, which debts were purportedly secured by, *inter alia*, ownership interests in subsidiaries. *Reply ISO Mot. re: Hearing* [Dkt. 418], pp. 9-10. In time, all investors will submit claims and, in relation to an eventual plan of distribution, can argue in favor of or in opposition to tracing funds or treating the Receivership Entity as a unitary enterprise. Further, after completing his investigation, the Receiver will litigate whether any transfers, including those to Weider/Forman, are avoidable.

This Court should deny Weider/Forman's motion seeking a piecemeal appeal. [Dkt. 552.] They do not present the unusual case in which a Rule 54(b) partial judgment is proper. An immediate appeal:

- Dedicates limited judicial resources to issues that may later become moot; and
- Cannot fully resolve the parties' intertwined claims.

This Court also should not certify an interlocutory appeal because:

- Rather than present "controlling questions of law," 28 U.S.C. § 1292(b), Weider/Forman raise collateral issues and no exceptional circumstances;

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- There is no "substantial ground for difference of opinion" as to this Court's denial of Weider/Forman's demand for segregation of funds to pay their claims; and
- Review of Weider/Forman's demand for segregation of funds would not "materially advance the ultimate termination of the litigation[.]"

Regardless, Weider/Forman fail to carry their heavy burden of establishing that, on balance, equity is served by the extraordinary relief of a "stay." They, in effect, ask this Court to grant them the same relief this Court just denied—segregation of proceeds from the sale of the Receivables Assets to elevate the satisfaction of their purported claims against the Receivership Entity—as any appeal stretches into months and years.[1] Such a procedural perversion of justice is unwarranted under the auspice of a "stay."

As further established below, this Court should deny each of Weider/Forman's motions.

I. Procedural history

When they first appeared in connection with the Court approving an option to sell the Receivables Assets, Weider/Forman demanded immediate payment of their claims or liens on the proceeds from the sale of the Receivables Assets. Their demand was predicated on their statement that CP Holdings LLC ("CP Holdings") had granted them "perfected first-priority, secured interest[s] in [certain receivables (the "Receivables Assets")]." *Weider/Forman Obj. to CCM Sale* [Dkt. 344], p. 16. About those secured interests, they told the Court, "[t]here can be no question[.]" *Id*. at 24. Weider/Forman initially obtained the Receiver's conditional stipulation and the Court's oral ruling that the sale proceeds would be segregated for a short period of time pending a robust hearing. *Jan. 20, 2017 Hearing Tr.* [Dkt. 364].

[1] In 2016, the median civil appeal lasted more than 43 months. *See* U.S. Courts of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2016, Table B-4a at 2, *available at* http://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2016.pdf.

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Later, upon further review, this Court concluded that Weider/Forman's claimed securities interests were not even colorable.[2] Weider/Forman's security agreements with CP Holdings *do not* identify the Receivables Assets owned by CP Holdings' subsidiaries as collateral. Instead: "Weider/Forman would be secured by [CP Holdings'] equity interests in [subsidiaries]" as well as sundry monetizations of those equity interests set forth in boilerplate. *Opinion & Order* [Dkt. 465], pp. 5-6. Indeed, the parties' written communications in June 2015 establish that CP Holdings expressly rejected Weider/Forman's request to be secured by "the accounts receivable of [CP Holdings' subsidiaries] …." *Id*. at 6. This Court properly found that:

> The proceeds that Weider/Forman seek to segregate for their benefit arise out of the sale of accounts receivable of [CP Holdings' subsidiaries]. The accounts receivable of [the subsidiaries] do not constitute [CP Holdings'] equity interests in [its subsidiaries], and *there can be no serious argument they constitute "products and produce" of such equity interests*, accounts of any kind arising out of the sale of such equity interests, or proceeds from the sale of such equity interests. In consequence, it follows that Weider/Forman have no security interest in the [Receivables Assets].

Id. at 6-7 (emphasis added).

The Court also rejected Weider/Forman's contention that, to avoid "the Fifth Amendment's prohibition against government takings without due process," it was necessary to segregate sale proceeds for payment of Weider/Forman's claims. *Id.* at 7-8. "Because [they] have no interest in the [Receivables Assets], it follows that their due process rights are not

[2] *Cf. Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 33 (1st Cir. 1994) (even under the Bankruptcy Code, a court may address through summary proceedings whether a creditor has a "colorable claim"); *Biggs v. Stovin (In re Luz Int'l)*, 219 B.R. 837, 842 (B.A.P. 9th Cir. 1998) (following *Grella*); *Giovanazzi v. Schuette (In re Lebbos)*, No. EC-11-1735-KiDJu, 2012 Bankr. LEXIS 5962, at *23 n.8 (B.A.P. 9th Cir. Dec. 31, 2012) (Chapter 7 trustee "was not required to pay 'adequate protection' of the interests of alleged 'owners' of [estate property]" because that claimed interest was extinguished by a prior judgment).

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implicated by the free and clear sale of those assets." *Id*.

Accordingly, the Court dissolved its interim oral ruling "directing the receiver to segregate the proceeds from the asset sale pending a future hearing" and relieved the Receiver "of any obligation to reserve on Weider/Forman's behalf any portion of the proceeds of [the Receivables Assets]." *Id.* at 8.

On October 12, 2017, Judge Hernandez issued an Order that, following *de novo* review, adopted this Court's Opinion and Order in full. [Dkt. 549.]

On October 26, 2017, Weider/Forman filed the instant motion. *Mot.* [Dkt. 552].

II. This Court's denial of a dedicated fund for payment of Weider/Forman's purported claims does not present the "unusual case" meriting a Rule 54(b) partial judgment.

It is premature for the Ninth Circuit to take any portion of this case on appeal. The material issues—whether Weider/Forman's claims will be satisfied and from where—are best addressed *after* the Court has decided any defenses the Receiver raises against Weider/Forman (*e.g.*, for voidable transfers and equitable subordination based on their apparent fraud on the Court) and *after* the Court has approved a plan of distribution. *Accord SEC v. Capital Consultants, LLC*, 397 F.3d 733, 737 n.4 (9th Cir. 2005) (noting that the district court entered a Rule 54(b) judgment in relation to the distribution order); *Hayes v. Palm Seedlings Partners-A (In re Agric. Research & Tech. Grp., Inc.)*, 916 F.2d 528, 531-32 (9th Cir. 1990) (noting trial court entered a partial judgment under Rule 54(b) after finding that a transfer to an investor in a Ponzi scheme was voidable). Weider/Forman present no compelling reason for the Ninth Circuit to grapple with issues that may become moot or, alternatively, require review later.

A. Rule 54(b) does not displace the historic antipathy toward piecemeal appeals.

Rule 54(b) should be used "sparingly." *Gausvik v. Perez*, 392 F.3d 1006, 1009 n.2 (9th

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Cir. 2004).[3] Traditionally, the federal courts "prohibited piecemeal disposal of litigation," except in "special instances." Fed. R. Civ. P. 54, Notes of Advisory Committee on 1946 amendments. As adopted, Rule 54(b) retained this "ancient policy" subject only to the trial court discretion "to afford a remedy in the infrequent harsh case …." *Id*. *See also Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 42 (1st Cir. 1988) (given the "long-settled and prudential policy against the scattershot disposition of litigation[,] … entry of judgment under [Rule 54(b)] should not be indulged as a matter of routine or as a magnanimous accommodation to lawyers or litigants").

Such discretion "must … reserve[]" partial judgment under Rule 54(b) "for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants." *Morrison-Knudsen v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). That is, "[t]he process … [is] tilted from the start against fragmentation of appeals[.]" *Spiegel*, 843 F.2d at 43.

While no "narrow guidelines" exist, the Ninth Circuit has identified the following nonexclusive factors that "shed[] light" on the propriety of a Rule 54(b) severance:

- "whether certification would result in unnecessary appellate review;"

[3] Rule 54(b) states:

> When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

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- "whether the claims finally adjudicated were separate, distinct, and independent of any other claims;"
- "whether review of the adjudicated claims would be mooted by any future developments in the case;"
- "whether an appellate court would have to decide the same issues more than once even if there were subsequent appeals;"
- "whether delay in payment of the judgment … would inflict severe financial harm[;]"
- "whether the adjudicated claims were separable from the others;" and
- "whether the nature of the claim was such that no appellate court would have to decide the same issues more than once."

Wood v. GCC Bend, LLC, 422 F.3d 873, 878 n.2 (9th Cir. 2005).

Here, these factors militate against entering a partial judgment.

B. The Ninth Circuit should not be required to dedicate limited judicial resources to issues that may later become moot.

Later developments in this receivership proceeding may obviate the need for an appellate court to *ever consider* the predicate of this Court's order denying a dedicated fund to pay Weider/Forman's claims—namely, whether Weider/Forman supposedly hold security interests in the Receivables Assets. For example:

- The Receiver could establish that the transfer to Weider/Forman of promissory notes and associated conveyance of any putative security interests were, in whole or in part, voidable conveyances under the applicable law;
- Weider/Forman's claims could be equitably subordinated because of their apparent attempt to defraud the Court and, relatedly, other investors;
- The Court-approved distribution plan could (a) isolate an entity and its assets instead of treating the Receivership Entity as a unitary enterprise for purposes of making distributions;[4] or (b) employ fund tracing,[5] whereupon Weider/Forman

[4] While the Receivership Entity is "treated as a consolidated enterprise" for purposes of its present administration, such consolidation is not determinative of whether the plan of

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might contend that the Receivables Assets were purchased with money they paid the Receivership Entity; or

- Weider/Forman could decide to compromise their claims for amounts that the Receiver, in discharging his fiduciary duties to the Receivership Entity, was convinced to accept.

The Ninth Circuit identifies such possibilities as weighing against entry of a Rule 54(b) partial judgment. *See Wood*, 422 F.3d at 878 n.2 (noting factors). Indeed, in *Wood*, 422 F.3d at 882, the Ninth Circuit held that the trial court abused its discretion in entering a Rule 54(b) partial judgment in part because, absent such a judgment, "we may never have to decide" the issue presented by the putative partial judgment. The circuit court singled out the possibility that "the issue could be mooted" by later developments or that "the case might settle." *Id.*[6]

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distribution that the Court eventually approves requires similar consolidation. *Order Appointing Receiver* [Dkt. 156], ¶ 6.D. Rather, the process of approving a plan of distribution will involve a separate determination about whether consolidation for such purposes is equitable. *See, e.g.*, *SEC v. Byers*, 637 F. Supp. 2d 166 (S.D.N.Y. 2009) (overruling objections to consolidation).

[5] Whether a distribution plan should utilize "tracing" of funds to a particular investor is a case specific inquiry. *Compare United States v. Wilson*, 659 F.3d 947, 956 (9th Cir. 2011) (courts generally "will not indulge in tracing when doing so would allow one fraud victim to recover all of his losses at the expense of other victims") and *United States v. 13328 & 13324 State Highway 75 N.*, 89 F.3d 551, 553 (9th Cir. 1996) (rejecting investor's appeal where "[r]ather than participate in the SEC's plan to distribution this inadequate fund pro rata, [the investor] seeks to better its position by using tracing fictions to make a claim to all proceeds from the sale of the Idaho property.") *with Capital Consultants*, 397 F.3d at 736 (noting distribution plan called for tracing of some types of assets but not others). Here, the Receiver has not proposed and this Court has not yet approved a plan of distribution.

[6] While *Wood* was not a "complex" case, 422 F.3d at 882, Weider/Forman's factual arguments preclude Weider/Forman distinguishing the case on that basis. According to Weider/Forman's myopic view, the Court should treat them as special or unique investors whose investment and alleged security interests are siloed within a discrete part of what is now the Receivership Entity. Their factual argument, if accepted *arguendo*, strips out the complexities of their claims. To rephrase *Wood* to reflect a commercial transaction, Weider/Forman would have this Court view their claims as those of "a single plaintiff, single defendant … involving a discrete [commercial transaction] that played out in a relatively short time among relatively few actors." *Id*. That is, to Weider/Forman, this is not a "complex" case.

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Here, the possibility of these developments—each of which could prevent the Ninth Circuit from *ever* needing to determine the existence of Weider/Forman's alleged security interests in the Receivables Assets—militate against entering a Rule 54(b) partial judgment. See *Wood*, 422 F.3d at 878 n.2 & 882 (identifying and applying factors).

C. An immediate appeal will consume the Ninth Circuit's limited resources but cannot avoid serial decisions on the same issues and intertwined claims.

Weider/Forman pursue meritless arguments. They ignore the plain language of the contracts. They turn hornbook law on its head when they contend that, by taking security interests in CP Holdings' ownership interests in its subsidiaries, they somehow obtained a property interest in the assets of those subsidiaries.[7] Likewise, they have failed to offer any cogent support for their argument that they are entitled to a segregated fund because the value of the collateral proffered by CP Holdings, its equity interest in its subsidiaries, may be negatively impacted by the Receiver's duly-authorized actions in relation to the Receivership Entity.[8] And

[7] *See Brock v. Poor*, 216 N.Y. 387, 401, 111 N.E. 229, 234 (1915) ("even complete ownership of capital stock … is by no means identical with or equivalent to ownership of corporate property"); *5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 323, 486 N.Y.S.2d 877, 884, 476 N.E.2d 276, 283 (1984) ("[S]hareholders do not hold legal title to any of the corporation's assets. Instead, the corporation—the entity itself—is vested with the title."); *In re Beck Indus., Inc.*, 479 F.2d 410, 415 (2d Cir. 1973) ("Ownership of all of the outstanding stock of a corporation … is not the equivalent of ownership of the subsidiary's property or assets."); *Klein v. Bd. of Tax Supervisors*, 282 U.S. 19, 24 (1930) ("The corporation is a person and its ownership … makes it impossible to attribute an interest in its property to its members.").

[8] The argument is a *non sequitur* and the principle case they have identified in the past, *In re Pacific/West Communications Group, Inc.*, 301 F.3d 1150, 1153 (9th Cir. 2002), is inapposite. There, the court quoted a prior opinion construing the California Commercial Code, in which it had held that "sale …or other disposition of collateral," includes proceeds from tort claims for diminution in value of the collateral because, pursuant to the California Commercial Code, "'the [security holder] must be protected against diminutions in the value of the security that arise not only from sale, but also from other events or transactions that damage the security.'" *Id*. at 1152 (quoting *McGonigle v. Combs*, 968 F.2d 810, 828 (9th Cir. 1992)). Here, in contrast, there has

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Weider/Forman's resort to conclusory constitutional arguments has always smacked of desperation both in relation to putative property rights[9] and supposed due process violations.[10]

Inefficiencies would be thrust upon the Ninth Circuit if this Court were to grant Weider/Forman an immediate appeal. Even assuming *arguendo* that Weider/Forman have colorable claims to the sale proceeds from the Receivables Assets in the abstract, other intertwined issues exist which are not yet ripe—namely, whether the transfers of any security interests to Weider/Forman are voidable, whether distributions to Weider/Forman will be affected by tracing of funds, and whether the Receivership Entity, including CP Holdings, will be treated as a unitary enterprise under this Court's approved distribution plan. There is no justification for the Ninth Circuit to ponder Weider/Forman's theoretical interests now, only to address their actual interests later once all of the issues ripen.

Given the intertwined issues, the Ninth Circuit could not dispose of Weider/Forman's claims against the Receivership Entity on appeal. Where severance cannot dispose of a wholly discrete claim, entry of a Rule 54(b) partial judgment is generally improper. As the Ninth Circuit explained in *Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 747 (9th Cir. 2008), "[p]iecemeal appellate review is not only inimical to the will of Congress but also

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been no monetization (whether by tort claim or otherwise) of the collateral in which Weider/Forman were granted security interests.

[9] *See Reply re: Reserve Hearing* [Dkt. 418], pp. 24-29 (rebutting Weider/Forman's contention that a security interest in equity in a company or other entity (a) creates a property interest in that entity's assets; and (b) forces the Receiver to prevent the value of that ownership interest from fluctuating during the Receivership proceeding).

[10] Indeed, Weider/Forman *opposed* further process and invited the Court to decide based solely on the transaction documents "whether [Weider/Forman] have an interest in proceeds from the sale of [the Receivables Assets] …." *Weider/Forman Resp. to Mot. re: Reserve Hearing* [Dkt. 391], p. 34. That, of course, is exactly what the Court ultimately did.

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undermines the efficient use of judicial resources by exposing appellate panels to the costs of repeated familiarization with the [same] case."

In *Morrison-Knudsen*, 655 F.2d 962, the Ninth Circuit considered "a routine dispute over whether a summary judgment was correct," which came to the appellate court on a Rule 54(b) partial judgment. There, the owner of a coal mine sued an investor for contributions owed by the investor. *Id*. at 963. The investor counterclaimed for injuries stemming from the sale of the mining interests to a third party. The prior owner of the mining interests obtained summary judgment on some (but not all) of the investor's counterclaims and, relatedly, a Rule 54(b) judgment. *Id*. at 963-64. The Ninth Circuit stressed that—absent "unusual and compelling circumstances"—it is improper to enter a Rule 54(b) judgment when "[t]he claims disposed of by the Rule 54(b) judgment [are] inseverable, both legally and factually, from claims that remain[] unadjudicated in the district court[.]" *Id*. at 966. When such legally or factually similar issues continue to be presented to the district court, "a Rule 54(b) order will be proper *only* where necessary to avoid a harsh and unjust result[.]" *Id*. at 965 (emphasis added).

Here, there are no unusual and compelling circumstances. Weider/Forman's claimed security interests and claimed basis for obtaining a segregated fund are factually and legally intertwined with the Receiver's unadjudicated defense that the security interests transferred and payments made are avoidable and, regardless, subject to equitable subordination. If a Rule 54(b) judgment is to eventually enter, it should not enter until *after* this Court is certain that an appeal to the Ninth Circuit resolves all issues material to Weider/Forman's claims against the Receivership Entity. *Accord In re Agric. Research & Tech. Grp., Inc.*, 916 F.2d at 531-32 (noting trial court entered partial judgment under Rule 54(b) after finding transfer to investor in a Ponzi scheme was voidable).

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For each of these reasons, the Court should exercise its discretion to deny Weider/Forman's motion seeking a Rule 54(b) partial judgment. At this juncture, an appellate ruling for or against Weider/Forman is unnecessary. Further developments may moot any error they would presently assign and, alternatively, such a judgment invites serial appeals because Weider/Forman's claims are intertwined factually and legally with issues that are not ripe for review. No doubt, Weider/Forman see strategic benefits to being before an appellate court in advance of similarly situated investors. But "the purpose of [Rule 54(b)] is not to encourage broadly piecemeal appeals just because an appellant may be in a hurry." *In re Bromley-Heath Modernization Committee*, 448 F.2d 1271, 1271 (1st Cir. 1971).

III. Weider/Forman do not have an "extraordinary case" meriting certification under 28 U.S.C. § 1292(b).

A. Certification under 28 U.S.C. § 1292(b) is to be "applied sparingly and in exceptional circumstances."

Like Rule 54(b), 28 U.S.C. § 1292(b) does not displace the court system's aversion toward fragmented appeals.[11] As the Ninth Circuit has long recognized, a district court should

[11] 28 U.S.C. § 1292(b) states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

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certify an interlocutory appeal "only in extraordinary cases," and not "merely to provide review of difficult rulings in hard cases." *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). District courts should afford relief under 28 U.S.C. § 1292(b) "sparingly and only in exceptional cases[.]" *In re Cement Antitrust Litig.*, 673 F.2d 1020 (9th Cir. 1982).

Section 1292(b) establishes three elements for certification.

- Is a party seeking certification of an "order involv[ing] a controlling question of law"? 28 U.S.C. § 1292(b).
- Is there "substantial ground for difference of opinion" as to that controlling question of law? *Id*.
- Would determination of that question of law "materially advance the ultimate termination of the litigation[?]" *Id*.

Even if each element is present, a district court still enjoys "'unfettered discretion to deny certification.'" *Mowat Constr. Co. v. Dorena Hydro, Ltd. Liab. Co.*, No. 6:14-cv-00094-AA, 2015 U.S. Dist. LEXIS 128058, at *14 (D. Or. Sep. 23, 2015) (Aiken, C.J.) (quoting with approval *Brizzee v. Fred Meyer Stores, Inc.*, No. CV-04-1566-ST, 2007 U.S. Dist. LEXIS 99155, at *8 (D. Or. Dec. 10, 2007) (Stewart, M.J.)). *See also Exec. Software N. Am., Inc. v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 24 F.3d 1545, 1550 (9th Cir 1994) (noting that a district court's certification decision is "unreviewable").

Here, Weider/Forman's motion fails to establish any of the three elements.

B. Rather than present "controlling questions of law," Weider/Forman present issues "collateral to the merits" devoid of any "exceptional circumstances."

This Court's denial of Weider/Forman's demand for a segregated fund to pay their purported claims does not present a "controlling question of law" for at least two reasons.

(Emphasis in original.)

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First, Weider/Forman present no question that "materially affect[s] the outcome of the litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). When a question is "collateral to the merits," such a question is not "controlling" absent "exceptional circumstances." *Id*. at 1027 n.5. Here, each question Weider/Forman list is collateral to the merits of their claims for $10.5 million plus interest and fees and, indeed, even the rationale for this Court's order. Weider/Forman want this Court to invite the Ninth Circuit to issue advisory opinions about, for example, whether a receivership proceeding is beholden to the Bankruptcy Code, how and when the Bankruptcy Code would confront a "bona fide dispute," what procedure is dictated by the Fifth and Fourteenth Amendments in relation to voiding a fraudulent transfer and equitably subordinating a claim. *Mot.*, pp. 6-7. No question suggests a credible basis for undercutting this Court's well-reasoned basis for declining to provide Weider/Forman a segregated fund—let alone, the merits of Weider/Forman's claims. While Weider/Forman are dissatisfied investors, they identify no "exceptional circumstances" relative to other similarly situated investors or particular to themselves that warrant the Ninth Circuit weighing in on collateral issues.

Second, Weider/Forman plainly intend the Ninth Circuit to reach fact issues or those that are not yet ripe. Their intent is evidenced by their contention that immediate review would

> resolv[e] entitlement to the receivership assets, eliminate[e] or confirm[] Weider and Forman as claimants to the proceeds of the free-and-clear sale, provid[e] clarity on whether a so-called reserve hearing is either necessary or appropriate to determine the amount of adequate protection, and whether it is logistically or procedurally proper for the Receiver to attempt to litigate fraudulent transfer allegations through a so-called reserve hearing.

Mot., p. 8. Those supposed benefits each arise from a fact issue or an issue that is not yet ripe. Certification under 28 U.S.C. § 1292(b) is not the proper vehicle for resolving any of these fact

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issues or those that the Court has yet to confront. *See Natkin v. Am. Osteopathic Ass'n*, No. 3:16-cv-01494-SB, 2017 U.S. Dist. LEXIS 149339, *5 (D. Or. July 27, 2017) (Beckerman, M.J.), *adopted by* 2017 U.S. Dist. LEXIS 147110 (Sept. 12, 2017) (Simon, J.) ("It is well settled that a 'question of law' means a 'pure question of law,' not a mixed question of law and fact or an application of law to a particular set of facts." (Internal quotation marks and authority omitted; alterations accepted)); *Molybdenum Corp. of Am. v. Kasey*, 279 F.2d 216, 217 (9th Cir. 1960) (vacating order granting appeal under section 1292(b) because "it eventually appear[ed] that the question presented should await further ripening").

For both of these reasons, this Court should find that Weider/Forman fail to present "controlling questions of law" for purposes of 28 U.S.C. § 1292(b).

C. There is no "substantial ground for difference of opinion" as to this Court's denial of Weider/Forman's demand for the segregation of funds.

"In assessing whether there is a substantial ground for difference of opinion, the primary inquiry is the strength of the arguments in opposition to the challenged ruling." *Natkin*, 2017 U.S. Dist. LEXIS 149339, at *8 (internal quotation marks and citation omitted). As the Ninth Circuit has cautioned, "just because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal." *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (quotation marks and citation omitted).

Weider/Forman inaccurately contend that their appeal would present "novel issues." *Mot.*, p. 7. This Court rejected Weider/Forman's claimed security interests in the Receivables Assets based on the plain language of the parties' contracts. *Opinion & Order* [Dkt. 465], p. 7. The analysis is not "novel." Similarly, Weider/Forman's contention that their security interests

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in the equity of entities also grants them security interests in the assets of those entities is also not novel. It is simply wrong. *See supra*, Section II.C.

Weider/Forman's "strong disagreement with the Court's ruling is not sufficient for there to be a substantial ground for difference." *Couch*, 611 F.3d at 633 (quotation marks omitted). Weider/Forman's arguments purporting to establish a right to segregation of proceeds have been rejected by all who have confronted them—from the Receiver [Dkt. 353, 383, 418] and other investors [Dkt. 389, 390, 439] to two Judges of this Court [Dkt. 465, 549]. Weider/Forman have failed to raise any "substantial ground for difference of opinion." 28 U.S.C. § 1292(b).

D. An interlocutory appeal of Weider/Forman's demand for segregation of funds would not "materially advance the ultimate termination of the litigation[.]"

Weider/Forman fail to establish that an interlocutory appeal would "materially advance the ultimate termination of the litigation[.]" 28 U.S.C. § 1292(b). They contend that this element can be satisfied when an appeal "may remove claims or parties from the case," "may affect recovery," or may "sav[e] both the court and parties 'unnecessary trouble and expense.'" Mot., pp. 7-8. Weider/Forman, however, cannot place themselves within any of those categories. Even the questions Weider/Forman pose relate to procedural issues and their demand for a segregated fund rather than to the amount and viability of their claims against the Receivership Entity. An interlocutory appeal to the Ninth Circuit would not materially advance the litigation or otherwise circumvent the issues and expense destined to arise from the Court-approved distribution plan.

As with Weider/Forman's motion for a Rule 54(b) partial judgment, their motion for certification of questions for an interlocutory appeal under 28 U.S.C. § 1292(b) should be denied. Weider/Forman pose questions that are, relative to this Court's disposition of their demand for

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segregation of funds, immaterial rather than "controlling questions of law." 28 U.S.C. § 1292(b). Further, this Court's denial of Weider/Forman's request for segregation of funds poses no "substantial ground for difference of opinion." *Id*. Finally, an appeal now of Weider/Forman's demand for segregation of funds would not "materially advance the ultimate termination of the litigation[.]" *Id*. On these bases, this Court should decline to certify any question for Weider/Forman under 28 U.S.C. § 1292(b).

IV. Even if this Court were to provide Weider/Forman an immediate appeal, this Court should decline to segregate funds for their benefit.

Even though Weider/Forman obtained interim relief (based on the Receiver's conditional stipulation to segregate sale proceeds), Weider/Forman ask this Court to "preserve the status quo during the pendency of this motion and the appeal[.]" *Mot.*, p. 9. This Court should deny Weider/Forman's motion because, on balance, a "stay" would be inequitable.

A. A stay is "extraordinary relief."

A stay pending review is "extraordinary relief" for which the moving party bears a "heavy burden." *Winston-Salem/Forsyth County Bd. of Edu. v. Scott*, 404 U.S. 1221, 1231 (1971). In relation to that "heavy burden," the court considers four factors:

> "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). These factors "substantial[ly] overlap" with those "governing preliminary injunctions." *Id*. However, the two tests are not "one and the same." *Id*.

The four factors do not share uniform weight. Instead, "[t]he first two factors of the

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traditional standard are the most critical." *Id*. On the likelihood of success factor, the moving party's requisite showing is inverse to the strength of the other factors, and is either "a probability of success on the merits" or that "serious legal questions are raised." *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011). Under all circumstances, however, the moving party must at a minimum establish that, if the stay is not granted, irreparable harm is probable. *Id*. at 968.

Ultimately, a "stay" is "an exercise of judicial discretion and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken*, 556 U.S. at 433 (internal quotation marks and citations omitted).

B. Weider/Forman fail to make a "strong showing that [they] [are] likely to succeed on the merits."

In their motion to obtain an immediate appeal and "stay," Weider/Forman offer nothing new to upend this Court's sound analysis. *See supra*, Section II.C (citing authority). As noted, the moving party's requisite showing on the legal merits is inverse to the strength of the other factors, requiring either "a probability of success on the merits" or that "serious legal questions are raised." *Leiva-Perez*, 640 F.3d at 967. Here, Weider/Forman fall well short of either showing and, consequently, the Court should deny the stay.

C. Weider/Forman fail to establish that, absent a stay, irreparable injury to them is probable.

Weider/Forman's discussion of the irreparable harm standard is incomplete. They failed to note their minimum required showing that the claimed irreparable injury is probable to occur. *Leiva-Perez v. Holder*, 640 F.3d at 968.[12] Moreover, they failed to note that "[a] proper showing

[12] Weider/Forman directed this Court to several cases that were decided in relation to the
(*continued on next page*)

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regarding irreparable harm [is] … a necessary but not sufficient condition for the exercise of judicial discretion to issue a stay[,]" *Leiva-Perez*, 640 F.3d at 965, or that "[s]peculative injury does not constitute irreparable injury." *Goldie's Bookstore, Inc. v. Super. Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984). Likewise, their claimed financial injuries are presumed to be incompatible with a finding of "irreparable harm":

> Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of the litigation, *weighs heavily against a claim of irreparable harm*.

Sampson v. Murray, 415 U.S. 61, 90 (1974).

Here, Weider/Forman advance three purportedly separate arguments that they face irreparably injury—specifically, that: (1) the Court denied them their requested "adequate protection," *Mot*., p. 10; (2) the Court has extinguished Weider/Forman's liens on *both* the receivables and on CP Holdings' equity interests in its subsidiaries, *id.* at 9-10; and (3) the Court is "allow[ing] the subsidiaries' assets to dissipate," *id*. at 11. In essence, Weider/Forman's purportedly separate arguments collapse into a single inquiry: whether Weider/Forman have shown even a bare probability that the Court's order will cause them irreparable harm. They have not.

Weider/Forman cannot reconcile their claimed financial injuries with their simultaneous

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previous threshold for irreparable injury, which was the mere possibility of such injury. *See FDIC v. Garner*, 125 F.3d 1272, 1279-80 (9th Cir. 1997) (relying on prior standard); *In re Focus Media Inc.*, 387 F.3d 1077, 1086 (9th Cir. 2004) (relying on "specter of irreparable harm"). As explained in another case Weider/Forman cite (on the same page, even), the Ninth Circuit's previous "possibility of irreparable harm" formulation has been overturned. *Johnson v. Couturier*, 572 F.3d 1067, 1081 (9th Cir. 2009).

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argument that segregation of funds does not negatively impact the Receivership Entity (and, by extension, other innocent investors and creditors) because, *inter alia*, they concede the Receiver will receive "approximately $122 million sale price for one of the many Aequitas entities." *Mot*., p. 13 (arguing that same defeats potential harms). By Weider/Forman's own estimation, adequate funds would exist within the Receivership Entity as a whole to compensate them if Weider/Forman's efforts to overturn this Court were successful before a distribution plan is approved. And it is presently only a matter of speculation how an eventual distribution plan will apportion assets in relation to the various types of claimants (investors versus creditors), creditors (secured versus unsecured), equity as collateral, and the underlying tangle of entities that now comprise the Receivership Entity.

This Court has returned the assets held by CP Holdings' subsidiaries to the status quo—namely, that assets held by all entities within the Receivership Entity are available for use as specifically approved by the Court or already authorized for use by the Order Appointing Receiver. The Receiver's control of the Receivership Entity is entirely dissimilar from those factual circumstances in which courts have segregated funds, pending further adjudication. Weider/Forman rely on cases in which there was substantial evidence that the party to be enjoined would intentionally and wrongfully dissipate funds:

- In *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009), defendant's "own prior conduct [of wrongfully paying himself millions of dollars] establishes a likelihood that in the absence of an asset freeze …, Plaintiffs will not be able to recover the improperly diverted funds and will thus be irreparably harmed."
- In *In re Focus Media Inc.*, 387 F.3d 1077, 1086 (9th Cir. 2004), the court noted that a stockholder had previously absconded "with [debtors] funds, suggesting that he may do the same with respect to the funds that [creditor] seeks to recover."
- In *FDIC v. Garner*, 125 F.3d 1272, 1275 (9th Cir. 1997), the FDIC's "fear of dissipation of assets by [defendants]" was substantiated with a declaration and

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> more than 100 exhibits identifying "numerous instances where the Garners failed to comply with subpoenas … and over fifty examples of asset transfers among the Garners and their family members, trusts, and related business entities."

Weider/Forman's case examples do not assist them. Weider/Forman identify no past misconduct by the Receiver and the Receiver will not (and could not) hide assets including the proceeds from the sale of the Receivables Assets. Weider/Forman fail to establish any likely dissipation of assets resulting in irreparable injury.[13]

Weider/Forman have failed to make even the minimal showing that an irreparable injury is probable to occur. As such, this Court should deny Weider/Forman's request for a stay.

D. A "stay" is likely to cause injury to the Receivership Entity and, ultimately, innocent investors and creditors.

Weider/Forman's argument that they are likely to prevail on the merits leads inescapably in this case to the conclusion that, on balance, their harms can never be greater than the harms to other interested parties. By Weider/Forman's reckoning, their security interests in equity cascade through the entity structure and warrant segregated funds whenever assets owned by such an entity are sold. If that dubious contention is accepted, hundreds of investors can parrot Weider/Forman's claims because hundreds of investors were granted security interests in the equity of an Aequitas entity. *See Reply re: Reserve Hearing* [Dkt. 418], pp. 9-10.

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[13] *See Moreno-Padilla v. United States*, NO. CIV. S-93-758-WBS PAN, 1994 U.S. Dist. LEXIS 19002, at *5 (E.D. Cal. Dec. 21, 1994) (declining to stay judgment discharging government tax lien on property because, even if property was sold without lien on proceeds, government made no showing that property owner had "pattern or practice of secreting assets," or that alternative funds would be unavailable, even if owner expatriated with all assets to Mexico); *GE Commer. Distribution Fin. Corp. v. Eng. Endeavors, Inc.*, No. CIV S-12-0715 KJM-EFB, 2012 U.S. Dist. LEXIS 39513, at *5 (E.D. Cal. Mar. 22, 2012) (denying unopposed application for temporary restraining order and preliminary injunction because plaintiff made no showing of irreparable injury even though plaintiffs had a security interest in the property because any claimed economic damage could be remedied by a damage award).

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It follows that Weider/Forman are not entitled to a segregated fund, pending any appeal. Weider/Forman's contention that they risk "irreparable injury" is, fundamentally, that these other investors are so similarly situated to Weider/Forman that the Receivership Entity has insufficient assets to satisfy all investors with security interests in equity when a distribution occurs. If so, the balance of injury tips heavily in favor of denying a stay because these other innocent investors are both greater in number and collectively hold higher dollar value claims than Weider/Forman's claims.[14]

Conversely, Weider/Forman assert that these other innocent investors are not injured by Weider/Forman's demand for segregated funds during the pendency of appeal because, according to Weider/Forman, the Receivership Entity has adequate money to segregate the funds without consequence to the Receivership or the other investors. *Mot*., pp. 12-13.[15] They ignore the likelihood that the grant of a segregated fund pending appeal would prompt copycat claims, which—given the minimal showing Weider/Forman envision for obtaining such relief—could wholly encumber the Receivership Entity with demands for segregation. Weider/Forman cannot

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[14] The SEC alleges that Aequitas Commercial Finance, LLC ("ACF") raised "approximately $312 million in ACF notes … [from] more than 1,500 investors" between December 31, 2015 and March 10, 2016, when the SEC filed its complaint, *SEC Compl.* [Dkt. 1], ¶ 23. Not only did the Receiver provide this Court an exemplar promissory note and security agreement reflecting ACF investors' security interests in equity, *Foster Decl. ISO Reply re: Reserve Hearing* [Dkt. 419], Ex. D, but the Receiver has identified several hundred million dollars of additional investments purportedly secured by pledges of equity interests in various companies within the Receivership Entity.

[15] To be sure, the Receiver did so on an interim basis for the sake of this Court's judicial economy pending the Article III judge's consideration and ultimate rejection of Weider/Forman's objections. *Stip. re: Stay* [Dkt. 473]. *See also Second Stip. re: Stay* [Dkt. 537]. Weider/Forman cannot credibly characterize the Receiver's short-term courtesies as an admission that continuing such segregation indefinitely is harmless. As previously noted, the median length of a civil appeal to the Ninth Circuit in 2016 was *more than three-and-a-half years*. *See supra* Note 1.

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avoid their conundrum by arguing that they hold priority over all other investors.[16] Ultimately, any argument that disclaims injuries to other investors can only invite the conclusion that Weider/Forman do not face irreparable injury.

In reality, Weider/Forman fall short of the requisite showing on both the merits and the irreparable injury prongs. No doubt, the obvious shortcomings of Weider/Forman's position prompted many innocent investors to oppose Weider/Forman's demand for a reserve [Dkt. 389, 390, 439]. And yet, freezing the proceeds from the sale of the Receivables Assets through a lengthy appeal pushes the innocent investors into the prisoner's dilemma. The innocent investors' collective best interests would be served by *not* attempting to encumber the

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[16] Weider/Forman previously argued that the exemplar security agreement, *see Foster Decl. ISO Reply re: Reserve Hearing* [Dkt. 419], Ex. C) creates an interest that is junior to "Senior Indebtedness," which includes "credit facilities," which, in turn, they contend they provided. *Weider/Forman Sur-reply re: Reserve Hearing* [Dkt. 451], pp. 19-20 & n. 11. Weider/Forman's argument turns on (a) the undefined term "credit facility," including simple "term loans," and (b) Weider/Forman having provided "term loans." *Id.* Weider/Forman are wrong on both counts.

- Not a loan. At least $6 million of CP Holdings' debt to Weider/Forman did not arise from Weider/Forman loaning money to CP Holdings. As such, any current debt is not, in its entirety, a "term loan." So Weider/Forman did not provide a "credit facility" to CP Holdings and their promissory notes are not "Senior Indebtedness."
- Weider/Forman's priority argument is circular. A "Senior Creditor" includes a person who "provides a credit facility to Maker or any subsidiary of Maker" and that person holds "Senior Indebtedness." But the note holders are then themselves "Senior Creditors" if the term "credit facility" is defined broadly, as proposed by Weider/Forman, to include simple "term loans." *See Foster Decl. ISO Reply re: Reserve Hearing* [Dkt. 419], Ex. C., p. 1 (exemplar note has a "Scheduled Maturity Date"). And here the circularity sets in: the note holders agreed that their interests are "expressly subordinate to any security interest granted by Maker to secure Senior Indebtedness." That is, by Weider/Forman's definition, the note holder's lien is subordinated to itself. That cannot be. So Weider/Forman's definition of "credit facility" is wrong. *Cf. Silver Point Fin., LLC v. Deutsche Bank Tr. Co. Ams. (In re K-V Discovery Sols., Inc.)*, 496 B.R. 330, 342 (Bankr. S.D.N.Y. 2013) (rejecting construction of term "credit facility" that equates it with "senior debt" because it "deprives the limitation in the definition of Senior Indebtedness of any meaning").

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Receivership Entity's assets, but game theory dictates that a reserve for Weider/Forman will push individual investors to embroil the Receivership Entity in copycat litigation and, if "successful," would require the termination of the Receivership and the Receiver's investigation due to the absence of operating funds.

Further, if this Court were to adopt a siloing of assets on an entity-by-entity basis as demanded by Weider/Forman (and any copycat claims), the Court would, in effect, prevent the Receiver from using funds needed to fully investigate the possibility of fraudulent conveyances by entities such as CP Holdings to investors such as Weider/Forman. In other words, Weider/Forman ask this Court to use their apparently fraudulent contention about the extent of their security as a springboard to hinder and delay the Receiver from investigating possible prior fraudulent conveyances to Weider/Forman.

For these reasons, even if Weider/Forman could meet their burden on the merits and establish irreparable injury, this Court should find that any such injury is outweighed by the injuries to innocent investors.

E. The public interest is best served by ensuring that parties such as Weider/Forman are not rewarded for their apparent fraud.

Weider/Forman's first representations in this action appear to have been fraudulent. Weider/Forman represented to this Court that "[t]here can be no question that … [Weider/Forman's] loans are secured by [the Receivables Assets]."[17] Following that representation (and the Receiver's stipulation), the Court temporarily froze any proceeds from

[17] *Weider/Forman Obj. to CCM Sale* [Dkt. 344], p. 24. *See also id.* at 1 ("The Receiver has proposed a sale of assets that … ignores secured interests in [the Receivables Assets]."); *id.* at 6 ("Weider's loan is secured not only by equity interests in certain CarePayment Companies, but also rights and interests … includ[ing] [the Receivables Assets]."); *id.* at 16 (asserting a "perfected first-priority, secured interest in the receivables").

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the eventual sale of the Receivables Assets.

This Court should reject Weider/Forman's attempt to re-impose that freeze by casting the Court's preliminary ruling as the "status quo." *Mot*., p. 9. The *actual* status quo is set forth in the Order Appointing Receiver, which requires the Receiver:

> [t]o use Receivership Property for the benefit of the Receivership Entity, which … shall be treated as a consolidated enterprise for the purpose of making payments and disbursements, including payments to professionals, and incurring expenses as may be necessary or advisable in the ordinary course of business in discharging his duties as Receiver[.]

Order Appointing Receiver [Dkt. 156], ¶ 6.D. The initial consolidation, however, is without prejudice to any investor or creditor's eventual claim for payment under a Court-approved distribution plan. *Id*. By denying the request for segregated funds, this Court re-imposed the "status quo" that existed before Weider/Forman advanced their apparently fraudulent claims to security interests in the Receivables Assets.

The public interests do not tip in favor of allowing Weider/Forman to keep the fruits of their apparent fraud. As the Supreme Court has stressed:

> [T]ampering with the administration of justice … involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. … The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944). *See also Fox ex rel. Fox v. Elk Run Coal Co.*, 739 F.3d 131, 135 (4th Cir. 2014) (fraud on the court "involve[s] an intentional plot to deceive the judiciary" and "touch[es] on the public interest in a way that fraud between individual parties generally does not"); *Chevron Corp. v. Donziger*, 37 F. Supp.

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3d 653, 671 (S.D.N.Y. Apr. 25, 2014) ("The concept that [appellants] should be permitted to profit pending appeal from the fraud for which they are responsible … is not in the interests of anyone but the wrongdoers.").

Even if Weider/Forman's apparent fraud on this Court were to be disregarded—and it should not—this Court should reject Weider/Forman's attempt to frame their personal benefit as "public interest." Weider/Forman selectively quote several cases, but fail to mention that:

- In *Tocco v. Tocco*, 409 F. Supp. 2d 816, 832 (E.D. Mich. 2005), which Weider/Forman quote in relation to the "bedrock" freedom to contract, the court *declined* to enforce the contract terms because the public interest was better served by protecting the grandfather from his grandson's apparent fraud;

- In *Williamston Invs., Inc. v. Best Express Foods, Inc.*, No. 1:12-cv-1129, 2012 WL 12941125, at *1 (W.D. Mich. Oct. 25, 2012), the court entered a temporary restraining order without appearance from the defendants and, in its cursory treatment of the public interest, notes only that the order will preserve collateral for "*all* secured parties" (emphasis added)—*i.e.*, *possible third parties*;

- In *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 661 F. Supp. 2d 548, 562 (E.D. Va. 2009), the court considered whether to maintain the status quo, an injunction regarding a bell that categorically cannot be unrung, the misappropriation of allegedly trade-secret information; and

- In *In re Union Trust Philadelphia, LLC*, 465 B.R. 765, 774 (Bankr. E.D. Pa. 2011), *aff'd*, 460 B.R. 644 (E.D. Pa. 2011), the court addressed whether to stay litigation against the debtor's principals and—recognizing that the parallel litigation would detract from those principals' efforts to reorganize and rehabilitate debtor through the bankruptcy proceeding and thereby harm debtor's estate—the court found that the stay would "foster the debtor's reorganization and protect the integrity of the claims resolution process."

As with Weider/Forman's apparently fraudulent claims of security interests in the Receivables Assets, Weider/Forman snip phrases from these cases, without providing the full story. The contractual agreements and the opinions Weider/Forman cite do not resemble their use of them. To the extent that these cases inform this Court's public interest inquiry, they should prompt this Court to maintain the status quo established by the Order Appointing

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Receiver and vigorously protect the Receivership Entity from the sorts of fraud that Weider/Forman appear to have pursued from their first appearance.

For each of the reasons set forth above, this Court should deny Weider/Forman's motion to segregate funds from the sale of the Receivables Assets. While Weider/Forman cast their motion as seeking a "stay," the interim order was obtained only after Weider/Forman falsely (and apparently knowingly) represented to this Court that they held perfected security interests in the Receivables Assets.

V. Conclusion

This Court should deny Weider/Forman's motion in its entirety. A Rule 54(b) partial judgment is inappropriate because the issues they presently raise may become moot in the future and, alternatively, such a judgment invites serial appeals because Weider/Forman's claims are intertwined factually and legally with issues that are not ripe for review. Likewise, Weider/Forman fail to meet any of the elements for certification of an interlocutory appeal under 28 U.S.C. § 1292(b). It is simply premature for this Court to send Weider/Forman's claims to the Ninth Circuit when material developments—including adjudication of avoidable transfers, equitable subordination and plan distribution issues—will materially affect the issues, if any, that require the Ninth Circuit's scrutiny.

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Regardless, Weider/Forman failed to establish that the equities tip in favor of continuing an interim segregation of funds for the duration of any appeal when such interim relief was obtained through their apparent fraud.

Dated this 9th day of November, 2017.

Respectfully submitted,

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