Docket #0564 Date Filed: 12/11/2017

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

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.

3:16-CV-438-PK

FINDINGS AND RECOMMENDATION

PAPAK, Magistrate Judge:

Plaintiff the Securities and Exchange Commission (the "SEC" or the "Commission") filed this securities fraud action against defendants Aequitas Management, LLC ("Aequitas Management"), Aequitas Holdings, LLC ("AH" or "Aequitas Holdings"), Aequitas Commercial

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Finance, LLC ("ACF"), Aequitas Capital Management, Inc. ("ACM"), Aequitas Investment Management, LLC ("AIM" and, collectively with Aequitas Management, AH, ACF, and ACM, the "Aequitas companies" or the "entity defendants"), Robert J. Jesenik, Brian A. Oliver, and N. Scott Gillis (collectively with Jesenik and Oliver, the "individual defendants") on March 10, 2016. By and through its complaint, the SEC alleges that the entity defendants, with the knowledge and under the direction of the individual defendants (Aequitas Management CEO Jesenik, Aequitas Management executive vice-president Oliver, and former Aequitas Management CFO and COO Gillis), defrauded over 1,500 individual and entity investors nationwide into investing their assets in Aequitas business ventures with the promise of lucrative returns, when in reality defendants used the great majority of the funds they received from such investors to pay corporate expenses, including executive salaries, bonuses, and perquisites, actually investing only 15-25% of the proceeds received. Arising out of the foregoing, the SEC alleges (i) all defendants' liability under Sections 17(a)(1) and 17(a)(3) of the Securities Act of 1933 (the "Securities Act"), (ii) the liability of the individual defendants for aiding and abetting the entity defendants in their violation of Sections 17(a)(1) and 17(a)(3) of the Securities Act, (iii) all defendants' liability for violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and of Rules 10b-5(a) and 10b-5(c) promulgated under the Exchange Act, (iv) the liability of the individual defendants for aiding and abetting the entity defendants in their violation of Section 10(b) of the Exchange Act and of Rules 10b-5(a) and 10b-5(c) promulgated under the Exchange Act, (v) defendants ACF and Jesenik's liability for violation of Section 17(a)(2) of the Securities Act, (vi) the liability of the individual defendants for aiding and abetting ACF in its violation of Section 17(a)(2) of the Securities Act, (vii) defendants ACF and

Jesenik's liability for violation of Section 10(b) of the Exchange Act and of Rule 10b-5(b) promulgated under the Exchange Act, (viii) the liability of the individual defendants for aiding and abetting ACF in its violation of Section 10(b) of the Exchange Act and of Rule 10b-5(b) promulgated under the Exchange Act, (ix) defendants ACM and AIM's liability for violation of Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 (the "Advisers Act"), (x) the liability of the individual defendants for aiding and abetting defendants ACM and AIM in their violation of Sections 206(1) and 206(2) of the Advisers Act, (xi) defendants ACM and AIM's liability for violation of Section 206(4) of the Advisers Act and of Rule 206(4)-8 promulgated under the Advisers Act, and (xii) the liability of the individual defendants for aiding and abetting defendants ACM and AIM in their violation of Section 206(4) of the Advisers Act and of Rule 206(4)-8 promulgated under the Advisers Act. The SEC seeks disgorgement of the fraudulently solicited investment funds with prejudgment interest, imposition of civil monetary penalties against all defendants, and injunctive relief to prevent the individual defendants from serving as officers or directors of any public company and to prevent any of the defendants from soliciting investments or participating in securities transactions. This court has subject-matter jurisdiction over the SEC's action as expressly provided in the Securities Act, the Exchange Act, and the Advisers Act, and pursuant to 28 U.S.C. § 1331.

Judge Hernández appointed Ronald F. Greenspan to serve without bond as receiver of the Aequitas companies (and their subsidiaries and/or majority-owned affiliates) on an interim basis effective March 16, 2016; by and through that same order, Judge Hernández both froze the assets of the Aequitas entities and of certain of their subsidiaries and affiliates and stayed litigation of any ancillary proceeding involving the Aequitas entities or their past or present officers,

directors, managers, agents, or partners. On April 14, 2016, I confirmed Greenspan's appointment as receiver of the Aequitas companies, the freeze of the Aequitas entities' assets, and the stay of ancillary litigation on a permanent basis.

On December 16, 2016, the receiver filed a motion (#323) by and through which he sought (*inter alia*) approval of the sale of certain receivership assets. Specially appearing third parties Weider Health & Fitness ("Weider") and Bruce Forman (collectively, "Weider/Forman") filed limited objections (#344) to the proposed asset sale. At a hearing held in connection with the receiver's motion on January 20, 2017, I overruled Weider/Forman's objections and permitted the proposed asset sale to go forward, but directed the receiver to place the proceeds from the sale into escrow pending a future hearing to determine whether Weider/Forman had (as they claimed) any special entitlement to those proceeds, and if so, in what amount. In addition, I directed the receiver and Weider/Forman to confer regarding the type of evidence that would be presented at the contemplated reserve hearing and the scope of discovery that would be required prior to the hearing. Effective June 9, 2017, on the basis of evidence tending to establish that in fact Weider/Forman had no security interest in the sold assets, I dissolved my previous order that proceeds from the asset sale be held in escrow, and expressly relieved the receiver of any obligation to reserve on Weider/Forman's behalf any portion of the proceeds of the asset sale approved January 20, 2017. Weider/Forman appealed my order of June 9, 2017, to Judge Hernández, who overruled Weider/Forman's objections and adopted my order as his own effective October 12, 2017.

Now before the court is Weider/Forman's motion (#552) for entry of partial final judgment in connection with Judge Hernández' order (#549) of October 12, 2017, or in the

alternative for certification of that order as appropriate for interlocutory appeal, and in either event to stay enforcement of the order pending resolution of Weider/Forman's contemplated appeal therefrom. I have considered the motion, oral argument on behalf of the receiver and Weider/Forman, and all of the pleadings and papers on file. For the reasons set forth below, Weider/Forman's motion (#552) should be denied.

LEGAL STANDARDS

I. Entry of Partial Final Judgment

Pursuant to Federal Civil Procedure Rule 54(b), the district courts may enter final judgment as to fewer than all claims for relief at issue in a legal proceeding, where no just cause exists for delay in entry of such judgment. Rule 54(b) provides in relevant part as follows:

> 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.

Fed. R. Civ. P. 54(b). To certify an otherwise interlocutory order as a partial final judgment and therefore as immediately appealable under Rule 54(b), the court must make an "express determination that there is no just reason for delay" in rendering judgment on the matter decided by the order and must further make an "express direction for the entry of judgment" as to that order. *SEC v. Capital Consultants LLC*, 453 F.3d 1166, 1174 (9th Cir. 2006) (citations omitted).

The decision whether to make the Rule 54 express determination and express direction are "exclusively within the discretion of the district court." *Dannenberg v. Software Toolworks*, 16 F.3d 1073, 1078 (9th Cir. 1994), *quoting Illinois Tool Works, Inc. v. Brunsing*, 378 F.2d 234, 236 (9th Cir. 1967); *see also, e.g., Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991)

("[t]he present trend is toward greater deference to a district court's decision to certify under Rule 54(b)."). In general, "Rule 54(b) certification is proper if it will aid 'expeditious decision' of the case" in which it is requested. *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991), *quoting Sheehan v. Atlanta Int'l Ins. Co.*, 812 F.2d 465, 468 (9th Cir. 1987).

II. Certification for Interlocutory Appeal

28 U.S.C. § 1292(b) governs the circumstances under which a district court may certify an interlocutory order for appeal, where no appeal would otherwise be available:

> 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.

28 U.S.C. § 1292(b). Thus, the district courts have discretion so to certify an order for interlocutory appeal only where the order was premised on (i) a "controlling question of law," as to which (ii) "there is substantial ground for difference of opinion," and (iii) immediate appeal might "materially advance the ultimate termination of the litigation." *Id.* "Section 1292(b) is a departure from the normal rule that only final judgments are appealable, and therefore must be construed narrowly." *James v. Price Stern Sloan*, 283 F.3d 1064, 1068 (9th Cir. 2002).

"The legislative history of subsection (b) of section 1292, which was added to the Judiciary and Judicial Procedure Title in 1958, indicates that it was to be used only in extraordinary cases where decision of an interlocutory appeal might avoid protracted and

expensive litigation. It was not intended merely to provide review of difficult rulings in hard cases." *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (footnotes omitted). That legislative history includes the statement that Section 1292(b) is intended to be invoked only "where a question which would be dispositive of the litigation is raised and there is serious doubt as to how it should be decided." *Id.*, n. 2.

The discretion vested in the district courts whether or not to certify an order for interlocutory appeal is absolute. *See Exec. Software N. Am. v. United States Dist. Court*, 24 F.3d 1545, 1550 (9th Cir. 1994) (a district court's decision whether or not to certify an order for purposes of Section 1292(b) is "unreviewable").

III. Stay of Order Pending Appeal

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 determining whether it could be appropriate to stay enforcement of an order pending review, the district courts consider 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). Of these factors, the first two "are the most critical." *Id.*

As to the first enumerated factor – likelihood of success on the merits – the courts of the Ninth Circuit require that a stay movant establish "a substantial case for relief on the merits," a standard that has variously and interchangeably been articulated as requiring a "reasonable

probability" of success, a "fair prospect" of success,"a substantial case on the merits,"or a showing that "serious legal questions are raised." *Leiva-Perez v. Holder*, 640 F.3d 962, 967-968 (9th Cir. 2011). The standard does not require that the movant establish that success on the merits is more likely than not, but the movant must establish more than that success on the merits is possible, and more than that the probability of success is greater than negligeable. *See id.* at 967. As to the second enumerated factor – the possibility of irreparable harm to the movant absent the requested stay – the standard requires that the movant establish that irreparable harm is not merely possible but probable in the event the stay is denied. *See id.* at 968.

Ultimately, whether or not to issue a stay pending review 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).

MATERIAL FACTS

It is undisputed that at all material times, Aequitas entity ACF was the corporate parent of Campus Student Funding, LLC ("CSF"), and that CSF was, in turn, the corporate parent of an entity named, at various times, either ASFG Leverage 1, LLC, or CSF Leverage I, LLC ("CSFLI"). It is additionally undisputed that CarePayment Holdings ("CPH"), a part of the "Receivership Entity" subject to the terms and conditions of Greenspan's receivership, *see* Final Receivership Order (#156) dated April 14, 2016 ("Final Receivership Order"), Exh. A, *see also id.*, § I(1), is the sole owner of both CarePayment, LLC ("CP"), and CP Funding I Holdings, LLC ("CPFIH"), and that CPFIH is the sole owner of CP Funding I Trust ("CP Trust"), *see* Declaration of Bruce Forman (#345) dated January 17, 2017 ("Forman Decl. I"), ¶ 3, Exhs. A-M. It is further undisputed that the CCM Capital Opportunities Fund, LP ("CCMCOF"), another part

of the Receivership Entity subject to the terms and conditions of Greenspan's receivership, *see* Final Receivership Order, Exh. A, *see also id.*, § I(1), which is 69.04% owned by Aequitas entities ACF, AH, Aequitas Private Client, LLC ("APC"), and Aequitas Capital Opportunities GP, LLC ("ACOGP"), *see* Declaration of Robert Greenspan (#324) dated December 16, 2016 ("Greenspan Decl. I"), ¶ 3, is the 92.1% owner of CarePayment Technologies, Inc. ("CP Technologies"), *see* Report of Ronald F. Greenspan (#444) dated April 30, 2017 ("Receiver's April 2017 Report"), Exh. A.

In May 2011, Weider/Forman loaned $2 million to ACF. Declaration of Bruce Forman (#368) dated January 20, 2017 ("Forman Decl. II"), Exh. A. In May 2012, Weider/Forman invested $2 million in Aequitas CarePayment Fund, LLC, *see id.*, whose place in the Aequitas companies' corporate hierarchy I cannot determine from the evidence of record, but which is apparently a subsidiary of CPH. In January 2013, Weider/Forman loaned $5 million to CSFLI. *See id.* In May 2013, Weider/Forman loaned $3 million to CSFLI. *See id.*

In or around early November 2013, Weider/Forman renegotiated the terms of their aggregate total of $12 million in loans and investments to ACF, CSFLI, and Aequitas CarePayment Fund, LLC. *See* Declaration of Bruce Forman (#392) dated March 31, 2017 ("Forman Decl. III"), Exh. A ("Restated Loan Agreement"). Pursuant to Weider/Forman's Restated Loan Agreement of November 1, 2013, CSFLI became responsible for repayment of the full $12 million. *See id.* at 1. CSFLI's repayment obligation was secured by all of CSFLI's assets and by all "Eligible Receivables" of ACF and CSF, collectively. *See id.*, ¶ 14(f). "Eligible Receivables," in turn, refer to educational student loan receivables that originated pursuant to a Tuition Loan Program Agreement dated June 29, 2011, between Corinthian Colleges and ACF

and CSF, as to which CSFLI had purchased the right to all cash flows therefrom. *See id.*, ¶14(i) and (j). CSFLI's repayment obligation was not secured by any equity interest in CSFLI or any other entity, except to the extent that such interests were assets of CSFLI. *See id.*, *passim*.

In June 2014, the Corinthian Colleges began defaulting on their payments due to ACF and CSF. *See* Complaint, ¶ 36. As a result, it appears that Weider/Forman accordingly became concerned regarding the value of the collateral securing their loans. *See* Declaration (#414) of Brad Foster ("Foster Decl."), Exh. A. It appears to be undisputed that at or around this time, CSFLI repaid $6 million of the $12 million it owed to Weider/Forman, leaving an outstanding debt of $6 million.

In October 2014, CPH and Weider/Forman entered into a set of agreements pursuant to which those parties agreed that CPH would repay CSFLI's outstanding debt to Weider/Forman of $6 million, *see* Forman Decl., Exhs. E, F, G, and, in exchange for no new consideration, that CPH's new obligation to Weider/Forman would be secured by CPH's equity interests in CP and in CP Leveraged I, LLC, or any successor thereto, including any later-acquired equity interests in those two companies and any right to acquire such interests in those two companies. *See* Forman Decl. I, Exh. G, ¶ 2. The collateral additionally included all "products and produce" of such equity interests, all "accounts, general intangibles, instruments, rents, monies, payments and all other rights, arising out of a sale, lease or other disposition of" those same equity interests, and all "proceeds" from the sale or other disposition of those same equity interests. *Id.*

In June 2015, in connection with an additional loan of $4.5 million to CPH, Weider/Forman sought further renegotiation of the terms of the foredescribed loans, specifically seeking to change the collateral from CPH's equity interests in CP and in CP Leveraged I, LLC,

to the accounts receivable of CP and CP Trust (and also seeking to raise the interest rate applicable to arrears on the loan from 7% to 12%). *See* Forman Decl., Exh. C. CPH refused to consent to the requested modification. *See id.* Ultimately, the parties agreed that Weider/Forman would lend CPH the additional $4.5 million, and that the parties would expand the collateral securing the entire debt of $10.5 million from CPH's equity interests in CP and in CP Leveraged I, LLC, to CPH's equity interests in those two companies plus CPH's equity interests in CP Trust (and to raise the interest rate on arrears from 7% to 17%, rather than the requested 12%). *See* Forman Decl. I, Exh. B. The terms of the parties' agreement governing collateral were not otherwise materially changed from those of the agreements of October 2014 discussed above. *See id.*

The proceeds that Weider/Forman seek to segregate for their benefit arise out of the sale of accounts receivable of CP and CP Trust. By and through my Opinion and Order (#465) dated June 9, 2017, I determined on the basis of the foregoing facts that the "accounts receivable of CP and/or CP Trust do not constitute CPH's equity interests in CP, CP Trust, or CP Leveraged I, LLC, 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," I found, "it follows that Weider/Forman have no security interest in the assets approved for sale January 20, 2017." I further found that this court was not bound by the Bankruptcy Code to segregate the proceeds of the sale, and that to refrain from segregating the proceeds of the asset sale would not violate the Fifth Amendment's prohibition against government takings without due process. By and through his Opinion and Order (#549) dated October 12, 2017, Judge Hernández agreed with each of those

conclusions.

ANALYSIS

Before granting a motion to enter partial final judgment as to fewer than all claims for relief presented in an action pursuant to Federal Civil Procedure Rule 54(b):

> A district court must first determine that it has rendered a "final judgment," that is, a judgment that is "'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Curtiss-Wright* [*Corp. v. General Electric Co.*], 446 U.S. 1,] 7. . . [(1980)] (*quoting* [*Sears, Roebuck & Co. v.*] *Mackey*, 351 U.S. [427,] 436. . . [(1956)]. Then it must determine whether there is any just reason for delay. "It is left to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal. This discretion is to be exercised 'in the interest of sound judicial administration.'" *Id.* at 8 (*quoting Mackey*, 351 U.S. at 437). Whether a final decision on a claim is ready for appeal is a different inquiry from the equities involved, for consideration of judicial administrative interests "is necessary to assure that application of the Rule effectively 'preserves the historic federal policy against piecemeal appeals.'" *Id.* (*quoting Mackey*, 351 U.S. at 438).

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

The Ninth Circuit has opined that, "in the interest of judicial economy Rule 54(b) should be used sparingly. The rule was not meant to displace the 'historic federal policy against piecemeal appeals.'" *Gausvik v. Perez*, 392 F.3d 1006, 1009 n.2 (9th Cir. 2004), *quoting Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 438 (1956). The courts of the Ninth Circuit have considered the following factors in determining whether or not to enter partial final judgment:

> whether certification would result in unnecessary appellate review; 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; and whether delay in payment of the judgment . . . would inflict severe financial harm.

Wood, 422 F.3d at 878 n.2.

By contrast, the courts of the Ninth Circuit have discretion to certify an order for interlocutory appeal only where the order was premised on (i) a "controlling question of law," as to which (ii) "there is substantial ground for difference of opinion," and (iii) immediate appeal might "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). A "question of law" is "controlling" for purposes of Section 1292(b) if resolving it on appeal could materially affect the outcome of litigation in the district court. *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir 1982). For purposes of Section 1292(b), the Seventh Circuit has held that the phrase "question of law" refers to a "pure question of law" rather than to a mixed question of law and fact or to an application of law to a particular set of facts. *See Ahrenholz v. Bd. of Trs. of the Univ. of Illinois*, 219 F.3d 674, 675-77 (7th Cir 2000).

For purposes of Section 1292(b), there is "substantial ground for difference of opinion" where an order presents an issue "over which reasonable judges might differ" such that there is "a credible basis for a difference of opinion" on the issue. *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011), *quoting Cement Antitrust*, 673 F.2d at 1028 (Boochever, J., dissenting). Where an issue is of first impression and, additionally, presents a novel and difficult question, the courts will generally find that a substantial ground for difference of opinion exists. *See Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010), *quoting* 3 *Federal Procedure*, Lawyers Ed. § 3:212 (2010).

For purposes of Section 1292(b), an interlocutory appeal need not dispose of all pending claims in order to materially advance litigation. *See Reese*, 643 F.3d at 688. For a discussion of district court cases addressing the material advancement element in various and mutually contradictory ways, *see Best W. Int'l, Inc. v. Govan*, Case No. CIV 05-3247-PHX RCB, 2007

U.S. Dist. LEXIS 39172, at *17-22 (D. Ariz. May 29, 2007).

The Ninth Circuit has had occasion to compare entry of partial final judgment under Federal Civil Procedure Rule 54(b) and certification of an order for interlocutory appeal pursuant to Section 1292(b), and to discuss the circumstances under which each is appropriate:

> Some of our cases use the phrase" Rule 54(b) certification." *E.g.*, *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 923 (9th Cir. 2001); *Holley v. Crank*, 258 F.3d 1127, 1130 (9th Cir. 2001); *Brookes v. Comm'r*, 163 F.3d 1124, 1129 (9th Cir. 1998); *Int'l Techs. Consultants, Inc. v. Pilkington PLC*, 137 F.3d 1382, 1386 (9th Cir. 1998); *Zucker v. Maxicare Health Plans, Inc.*, 14 F.3d 477, 483 (9th Cir. 1994). This is a misnomer born of confusion between Rule 54(b) and 28 U.S.C. § 1292(b), only the latter of which requires a certification. The two procedures apply to different situations. *See generally* 10 Charles Alan Wright et al., *Federal Practice and Procedure* § 2658.2, at 89-95 (1998) [hereinafter Wright & Miller]. Rule 54(b) applies where the district court has entered a final judgment as to particular claims or parties, yet that judgment is not immediately appealable because other issues in the case remain unresolved. Pursuant to Rule 54(b), the district court may sever this partial judgment for immediate appeal whenever it determines that there is no just reason for delay. A court of appeals may, of course, review such judgments for compliance with the requirements of finality, but accords a great deference to the district court. *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797-98 (9th Cir. 1991).
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> By contrast, section 1292(b) addresses the situation where a party wishes to appeal an interlocutory order, such as pertaining to discovery, *see Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 338-39 (9th Cir. 1996), denying summary judgment, *Brewster v. Shasta County*, 275 F.3d 803, 805 (9th Cir. 2001), denying a motion to remand, *Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1000 (9th Cir. 2001), or decertifying a class, *Smith v. Univ. of Wash., Law School*, 233 F.3d 1188, 1192-93 (9th Cir. 2000). Normally, such interlocutory orders are not immediately appealable. In rare circumstances, the district court may approve an immediate appeal of such an order by certifying that the 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." 28 U.S.C. § 1292(b). Even where the district court makes such a certification, the court of appeals nevertheless has discretion to reject the interlocutory appeal, and does so quite frequently. *See* 16 Wright & Miller § 3929, at 363.
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> Section 1292(b) is a departure from the normal rule that only final judgments are

> appealable, and therefore must be construed narrowly. This explains the reasons for the specific form of the certification required of the district court and *de novo* review thereof by the court of appeals. *See, e.g.*, In *re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1982). By contrast, a Rule 54(b) severance is consistent with the final judgment rule because the judgment being severed is a final one, whose appeal is authorized by 28 U.S.C. § 1291. Referring to a Rule 54(b) severance order as a "certification" misleadingly brings to mind the kind of rigorous judgment embodied in the section 1292(b) certification process. In reality, issuance of a Rule 54(b) order is a fairly routine act that is reversed only in the rarest instances. *See, e.g., In re First T.D. & Inv., Inc.*, 253 F.3d 520, 531-33 (9th Cir. 2001); *Ariz. State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1040 (9th Cir. 1991).

James v. Price Stern Sloan, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002) (modifications original).

I do not find that grounds are present here for either entry of final judgment in connection with Judge Hernández' order (#549) dated October 12, 2017, pursuant to Rule 54(b) or for certification of Judge Hernández' order for interlocutory appeal under Section 1292(b). As to entry of final judgment, I disagree with Weider/Forman that conditions are present such that this court could properly exercise its discretion to enter judgment in connection with the order pursuant to Rule 54(b). First, no claim at issue in this action was disposed of by and through Judge Hernández' order, which was limited to dissolving the receiver's obligation to create a reserve for asset sale proceeds on behalf of Weider/Forman, a third-party to this action. Second, even if Judge Hernández' order disposed of a cognizable claim at issue in this action, grounds for delay of entry of final judgment as to that order would exist, in that to treat disposition of Weider/Forman's claims on asset sale proceeds with greater expedition than the claims of other creditors of the receivership estate would not be in the interests of justice and would likely prompt other creditors to seek similar expedited consideration of their theories of entitlement to receivership assets, with the result that the receivership assets would be dissipated through

needless litigation. Moreover, the *Wood* factors militate against entry of final judgment, in that Weider/Forman's contemplated appeal would likely be superfluous (Judge Hernández' order did not purport to foreclose Weider/Forman from seeking repayment of the amounts it is owed by the Aequitas entities, but rather merely recognized that Weider/Forman lacks a secured interest in the specific assets approved for sale January 20, 2017, such that Weider/Forman's appropriate share of the receivership assets will be determined in the due course of this litigation), in that Weider/Forman's claim to have a secured interest in the assets approved for sale January 20, 2017, is not entirely independent of other claims on the receivership estate, in that future developments in this action (in particular, determination of Weider/Forman's appropriate share of the receivership assets) could moot the contemplated appeal, in that there is a risk of duplicative appeals if the contemplated appeal were permitted to go forward, and in that there is little risk of Weider/Forman suffering severe financial harm as a consequence of failure to enter final judgment (the plain language of Weider/Forman's agreements with the Aequitas entities establishes that Weider/Forman lacks a secured interest in the specific assets approved for sale January 20, 2017). Finally, even if this court had discretion to enter final judgment as requested, I would recommend that the court not exercise its discretion to do so, for the same reasons stated in my Opinion and Order (#465) dated June 9, 2017, and in Judge Hernández' Opinion and Order (#549) dated October 12, 2017.

As to certification for interlocutory appeal, I similarly find that conditions are not present such that this court could properly exercise its discretion to certify the order pursuant to Section 1292(b). First, Weider/Forman's appeal would not address a controlling question of law, in that the order addresses matters that are collateral to the merits of the claims actually at issue in the

SEC's action against the Aequitas defendants. Second, I do not find that substantial grounds exist for a difference of opinion as to Judge Hernández' order, in that the order is premised on a sound construction of the plain language of Weider/Forman's agreements with the Aequitas entities. Third, I do not find that Weider/Forman's contemplated appeal has any potential to advance termination of this litigation materially, in that the SEC's claims do not depend in any degree on the validity or invalidity of Weider/Forman's assertion of entitlement to a reserve. Moreover, even if conditions were present such that this court could properly exercise its discretion to certify the order for interlocutory appeal, I would recommend that it decline to do so, for the same reasons stated in my Opinion and Order (#465) dated June 9, 2017, and in Judge Hernández' Opinion and Order (#549) dated October 12, 2017.

For the foregoing reasons, Weider/Forman's motion (#552) should be denied to the extent Weider/Forman seek either entry of final judgment in connection with Judge Hernández' Opinion and Order (#549) dated October 12, 2017, pursuant to Rule 54(b) or certification of Judge Hernández' Opinion and Order (#549) dated October 12, 2017, for interlocutory appeal pursuant to Section 1292(b). In light of that recommended disposition, the court need not consider Weider/Forman's motion (#552) to the extent Weider/Forman seek a stay of further proceedings in connection with Judge Hernández' Opinion and Order (#549) dated October 12, 2017, pending resolution of Weider/Forman's contemplated appeal.

CONCLUSION

For the reasons set forth above, Weider/Forman's motion (#552) for entry of partial final judgment in connection with Judge Hernández' order (#549) of October 12, 2017, or in the alternative for certification of that order as appropriate for interlocutory appeal, and in either

event to stay enforcement of the order pending resolution of Weider/Forman's contemplated appeal therefrom should be denied in its entirety.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due fourteen (14) days from service of the Findings and Recommendation. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

Dated this 11th day of December, 2017.

Honorable Paul Papak
United States Magistrate Judge