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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

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 AND BRUCE FORMAN'S OBJECTIONS TO MAGISTRATE JUDGE PAPAK'S DECEMBER 11, 2017 FINDINGS AND RECOMMENDATION [DKT. 564]

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I. Introduction

It is premature to further crowd the Ninth Circuit's docket with Weider Health & Fitness and Bruce Forman's sham claims. Weider/Forman try to elbow their way past other investors by falsely claiming they held security interests in certain receivables that have now been sold by the Receiver (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 situation is similar to that of hundreds of other investors in entities that now comprise the Receivership Entity. These investors claim to be owed money, which debts were purportedly secured by, *inter alia*, ownership interests in subsidiaries. *Reply ISO Mot. re: Hr'g* [Dkt. 418], pp. 9-10. In time, all investors will be allowed to submit claims against the Receivership Entity. The Receiver will litigate any voidable transfer and other defenses, including as appropriate against Weider/Forman. In conjunction with the Court eventually approving a plan of distribution, investors will have an opportunity to address, among other issues, whether the Receivership Entity should ultimately be deemed a unitary enterprise or whether funds should be distributed to investors from assets corresponding to particular entities.

Weider/Forman seek an immediate appeal [Dkt. 552], which Magistrate Judge Papak recommends denying in his Findings and Recommendation ("Recommendation" or "*F&R*") [Dkt. 564]. Weider/Forman do not present the unusual case in which a Rule 54(b) partial judgment is proper. In particular:

- This Court did not dispose of any "claim at issue in this action," *F&R*, p. 15;

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- An immediate appeal does not serve "the interests of justice" and would likely provoke "needless litigation," dissipating receivership assets, *id*.; and

- Considerations of judicial efficiency "militate against entry of final judgment," particularly given that Weider/Forman—who have no colorable interest in the Receivables Assets—face "little risk" of "severe financial harm" from delay, *id.* at 16.

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, *F&R*, pp. 16-17;

- This Court's denial of Weider/Forman's demand for a segregated fund does not raise "substantial ground for difference of opinion," *id* at 17; and

- An appeal would not "advance termination of the litigation materially" because the SEC's claims do not turn on Weider/Forman's demand for a reserve, *id*.

Moreover, even if Weider/Forman could meet the bare requirements for an immediate appeal under either Rule 54(b) or 28 U.S.C. § 1292(b), the proper exercise of judicial discretion precludes an immediate appeal. *F&R*, pp. 16, 17.

Regardless, Weider/Forman fail to carry their heavy burden of establishing that, on balance, equity is served by the extraordinary relief of a "stay" pending an appeal. "Stay" is a misnomer; the sale proceeds are no longer segregated. That is, Weider/Forman seek the same relief this Court just denied them—segregation of funds 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.

[1] In 2016, the median civil appeal lasted more than 25 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. *See also* Ninth Circuit 2016 Annual Report 45, *available at* https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2016.pdf (even including criminal appeals only brings the median length of an appeal down to 15.2 months).

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II. Procedural history

On March 10, 2016, the U.S. Securities and Exchange Commission (the "SEC") filed the above-captioned action. The SEC alleged that the individual defendants engaged in a Ponzi-like scheme. *Compl*. [Dkt. 1], ¶ 1. In order to marshal and preserve the assets of the entity defendants, this Court appointed a receiver for the "Receivership Entity," which consists of the entity defendants as well as certain affiliated entities. *Order Appointing Receiver* [Dkt. 156]. CarePayment Holdings LLC ("CP Holdings") is among those entities that now comprise the Receivership Entity. *Id*. at ¶ 1 & Ex. A. CP Holdings' subsidiaries held certain Receivables Assets. *Receiver's Resp. to Obj. re: CCM Sale* [Dkt. 353], pp. 3-4 (showing pertinent corporate structure and describing ownership).

In conjunction with establishing this receivership, this Court ordered 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 … and incurring expenses as may be necessary or advisable in the ordinary course of business in discharging his duties as Receiver.

Id. at ¶ 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*.

Weider/Forman are not parties to the SEC's action. They did not intervene to oppose the Court's order appointing a receiver or to oppose those portions of the order that (a) make CP Holdings part of the Receivership Entity; (b) make CP Holdings' assets part of the Receivership Property; and (c) require the Receiver to treat the Receivership Entity as "a consolidated enterprise" at this procedural juncture. Instead, Weider/Forman first appeared on January 18, 2017, to object to the Receiver's motion seeking approval to option the Receivables Assets to a buyer. *Weider/Forman Obj. to CCM Sale* [Dkt. 344].

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Weider/Forman demanded either immediate payment of their unfiled claim against the Receivership Entity or liens on the proceeds from the sale of the Receivables Assets. Their demand was predicated on their statement that CP Holdings had granted them "perfected first-priority, secured interest[s] in [the Receivables Assets]." *Id*. at 16. *See also id.* at 1, 6, 16 (similar). About those secured interests, they told the Court, "[t]here can be no question[.]" *Id*. at 24.

In response, the Receiver disputed whether Weider/Forman held *any interest* in the Receivables Assets and raised additional bases for proceeding with optioning the sale of the Receivables Assets. *Receiver's Resp. to Obj. re: CCM Sale* [Dkt. 353], pp. 7-8. Briefing was compressed against the date of the hearing on Weider/Forman's objections.[2] At oral argument, the Receiver conditionally stipulated and Magistrate Judge Papak orally ruled that the sale proceeds would be segregated for a short period of time, pending a robust hearing. *Jan. 20, 2017 Hr'g Tr.* [Dkt. 364], pp. 21-22.

Later, upon further review, this Court concluded that Weider/Forman had no colorable security interests in the Receivables Assets.[3] 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

[2] The Receiver responded to Weider/Forman's objections on January 19, 2017, the day before the hearing. *Receiver's Resp. to Obj. re: CCM Sale* [Dkt. 353]. Weider/Forman then filed a supplemental brief on January 20, 2017 [Dkt. 355], the day their objections were heard.

[3] *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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[subsidiaries]" as well as sundry monetizations of those equity interests. *Opinion & Order* [Dkt. 465], pp. 5-6.[4] 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. As such:

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

Accordingly, this Court dissolved the 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 26, 2017, Weider/Forman sought an immediate appeal and stay. *Mot.* [Dkt. 552]. After Magistrate Judge Papak recommended that their motion be denied on

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

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December 11, 2017 [Dkt. 564], Weider/Forman filed objections [Dkt 572].

The Receiver is no longer subject to any order or stipulation to segregate proceeds from the sale of the Receivables Assets.[5] As such, the Receiver is utilizing those funds as it does other Receivership Property: to benefit the Receivership Entity, as a consolidated enterprise, pending a distribution order. *Nov. 30, 2017 Hr'g Tr.* [Dkt. 571], pp. 12-13; *Order Appointing Receiver* [Dkt. 156], ¶ 6.D.

The Receiver is presently conducting a forensic investigation and has not yet proposed a plan of distribution for Court approval, let alone litigated the details of such a plan. In relation to such a plan, the Court will need to make a separate determination about whether to isolate each entity and its assets or treat the Receivership Entity as a unitary enterprise for purposes of making distributions. *See, e.g.*, *SEC v. Byers*, 637 F. Supp. 2d 166 (S.D.N.Y. 2009) (overruling objections to consolidation). At that juncture, this Court will also decide whether to employ fund tracing, whereupon, for example, Weider/Forman might contend that the Receivables Assets were purchased with money they paid to CP Holdings, which should enhance their recovery. *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 distribute this inadequate fund pro rata, [the investor] seeks to better its position by using

[5] The Receiver continued to segregate sale proceeds for the sake of this Court's judicial economy pending this Court's consideration and ultimate rejection of Weider/Forman's objections to Magistrate Judge Papak's *Opinion and Order* [Dkt. 465]. *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 noted, the median length of a civil appeal to the Ninth Circuit in 2016 was *more than two years*. *See supra* Note 1.

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tracing fictions to make a claim to all proceeds from the sale of the Idaho property") *with SEC v. Capital Consultants, LLC*, 397 F.3d 733, 736 (9th Cir. 2005) (*Capital Consultants I*) (noting distribution plan called for tracing of some types of assets but not others).

III. Standard of review

Weider/Forman contend that their motions for entry of a partial judgment under Rule 54(b), certification under 28 U.S.C. § 1292(b), and stay are all dispositive matters, implicating *de novo* review. *Obj.*, pp. 5-6. Weider/Forman, however, cite no authority that addresses whether any of the particular motions they have filed are dispositive.

The Receiver has not identified any binding authority addressing the standard of review when a magistrate judge denies certification under section 1292(b). Judge Aiken has recognized this presents "a difficult and novel question," which she avoided because she agreed with the magistrate judge, no matter the standard of review. *Juliana v. United States*, No. 6:15-cv-01517-TC, 2017 U.S. Dist. LEXIS 88122, at *7 (D. Or. June 8, 2017). The Eastern District of Michigan has treated a party's motion for certification under section 1292(b) as a nondispositive matter that a magistrate judge may decide. *Compressor Eng'g Corp. v. Thomas*, No. 10-10059, 2014 U.S. Dist. LEXIS 137974, at *6 (E.D. Mich. Sep. 30, 2014). That standard makes sense.

Weider/Forman's motion to certify under section 1292(b) is not "a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, [or] to involuntarily dismiss an action." 28 U.S.C. § 636(b)(1) (listing matters that a magistrate judge may not decide). Even under the Ninth Circuit's functional approach, whereby courts "look to the effect of the motion," *United States v. Rivera-Guerrero*, 377 F.3d 1064, 1068

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(9th Cir. 2004) (quotation marks and authority omitted), Weider/Forman's motion for certification under section 1292(b) does not itself dispose of any claim or defense presently before this Court. Indeed, the denial of such certification is so inconsequential as to be "unreviewable." *Exec. Software N. Am., Inc. v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 24 F.3d 1545, 1550 (9th Cir. 1994).

This Court reviews nondispositive issues under the clearly erroneous or contrary to law standard. *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1414 (9th Cir. 1991). But as when the classification of a motion to certify under section 1292(b) arose before Judge Aiken, this Court may decline to decide what standard of review applies because, even on *de novo* review, Magistrate Judge Papak's Recommendation is correct. *Juliana*, 2017 U.S. Dist. LEXIS 88122, at *7.

IV. This Court's order denying Weider/Forman a segregated fund does not present the "unusual case" that merits a Rule 54(b) partial judgment.

It is premature for the Ninth Circuit to take any portion of this case on appeal. No claim has been decided and regardless, material issues—whether Weider/Forman's future claims will be satisfied and from where—are best addressed *after* this 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 Capital Consultants I*, 397 F.3d at 737 n.4 (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 that 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 consider issues that may become moot or, alternatively, require review later.

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

Weider/Forman take no issue with Magistrate Judge Papak's recitation of the applicable standards under which a Rule 54(b) motion is decided.[6] Consistent with his Recommendation, Rule 54(b) should be used "sparingly." *Gausvik v. Perez*, 392 F.3d 1006, 1009 n.2 (9th Cir. 2004). 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.

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[6] 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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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;"
- "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. And ultimately, "'the express determination [and] the express direction mentioned in Rule 54(b) … are matters 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)).

B. This Court has not disposed of any claim, which precludes entry of a Rule 54(b) partial judgment.

As Magistrate Judge Papak recognizes, a "final judgment" for purposes of Rule 54(b) is the "ultimate disposition of an individual claim entered in the course of a multiple claims action." *F&R*, p. 12 (block quote from *Wood*, 422 F.3d at 878). No "final judgment" entered here. This Court's order "was limited to dissolving the receiver's obligation to create a reserve

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for asset sale proceeds on behalf of Weider/Forman, a third-party to this action." *Id*. at 15. *See also Nov. 30, 2017 Hr'g Tr.* [Dkt. 571], pp. 8-10 (Magistrate Judge Papak discussing the Court's "limited and circumscribed" order and the Receiver's counsel agreeing that "there is a lot of litigation to come with Weider/Forman"). The Court's order simply re-imposes the status quo that existed before Weider/Forman propounded their objections to the sale of the Receivables—namely, that the Receiver "use Receivership Property for the benefit of the Receivership Entity, which … shall be treated as a consolidated enterprise …." *Order Appointing Receiver* [Dkt. 156], ¶ 6(D). By its order, the Court does not purport to adjudicate Weider/Forman asserted security interests in CP Holdings' ownership interests in its subsidiaries, the amount of Weider/Forman's future claim, or any of the Receiver's defenses. The Court's order dissolving a temporary asset freeze is not a "final judgment."

Weider/Forman argue that they are subject to a final judgment because "the Receiver has never denied that, without adequate protection, Weider and Forman will not be able to recover anything remotely resembling the value of their [putative] security." *Obj*., pp. 8-9. That is, Weider/Forman argue that they cannot presently be certain whether their future claims (assuming they survive the Receiver's defenses) will be paid in full in an eventual plan of distribution, which will only be entered after Weider/Forman and other investors have an opportunity to litigate whether to utilize fund tracing and whether to treat the Receivership Entity as a unitary enterprise for purposes of making distributions. By equating uncertainty with a "final judgment," Weider/Forman would transform literally *any order*—a lengthy discovery schedule, for example—into a final judgment, provided that a defendant's financial condition could change materially while the litigation was pending. Treating the Receivership Entity as consolidated for present purposes does not adjudicate Weider/Forman's future claim against the Receivership any

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more than it adjudicates the future claims of any other investors.

Magistrate Judge Papak properly found that no "final judgment" has entered.

C. An immediate appeal does not serve "the interests of justice" and would likely provoke "needless litigation."

Even if this Court's order disposed of a cognizable claim at issue in this action, Magistrate Judge Papak concluded that no Rule 54(b) order should enter. As he found:

> [T]o 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*.

F&R, pp. 15-16 (emphasis added).

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 some unspecified interest in the assets of those subsidiaries.[7] Likewise, they have failed to offer any cogent support for their contention 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

[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.").

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Entity.[8] 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]

Still, if this Court lets Weider/Forman jump the queue with these arguments, other investors will follow suit. Per Weider/Forman, courts should blindly segregate funds whenever a party asserts a security interest in some Receivership Property or in some ownership interest in an entity, no matter how factually or legally untenable the assertion. If accepted, copycat claims are likely and could wholly encumber the Receivership Entity with demands for segregated funds. Weider/Forman do not lessen this danger by asserting (wrongly) that they hold priority over all other investors.[11] *See Obj.*, p. 1 (incorrectly asserting that their security interests are

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[8] The argument is a *non sequitur* and the principle case Weider/Forman identify, *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 the term "sale …or other disposition of collateral" encompasses 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 been no monetization (whether by tort claim or otherwise) of the collateral in which Weider/Forman were purportedly granted security interests, CP Holdings' ownership interests in its subsidiaries.

[9] *See Reply re: Reserve Hr'g* [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 Hr'g* [Dkt. 391], p. 34. That, of course, is exactly what the Court ultimately did.

[11] The Receiver has submitted an exemplar security agreement. *Foster Decl. ISO Reply re: Reserve Hr'g* [Dkt. 419], Ex. C. Weider/Forman previously argued that that agreement 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 Hr'g* [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

(*continued on next page*)

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unique). Nor can Weider/Forman dismiss other investors' claims as "speculative" and make that label stick. *Obj.*, p. 12. It is, after all, these other investors' competing claims to Receivership Property and the manner in which this Court eventually may, within the bounds of equity, apportion payment of such claims under a distribution plan that leaves Weider/Forman uncertain whether their future claims, such that they are, will be paid in full. *Obj.*, pp. 8-9 (arguing that without a dedicated fund, Weider and Forman may not recover the full amount of their future claim).

Magistrate Judge Papak correctly recognized that entering a Rule 54(b) order is "not in the interests of justice" and would likely dissipate receivership assets through needless litigation.

D. Considerations of judicial efficiency and other issues "militate against entry of final judgment."

As a third basis for concluding that Weider/Forman are not entitled to a Rule 54(b) order, Magistrate Judge Papak found that the *Wood* factors "militate against entry of final judgment."

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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 Hr'g* [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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F&R, p. 16. His five component findings are correct.

First, "Weider/Forman's contemplated appeal would likely be superfluous" because Weider/Forman are not foreclosed "from seeking repayment of the amounts [they are] owed by the Aequitas entities" in due course even if they lack "a secured interest in the specific assets approved for sale January 20, 2017[.]" *Id.* Weider/Forman protest that the Court has "render[ed] the collateral companies worthless." *Obj*., p. 9. But they did not object to CP Holdings being designated a component of the Receivership Entity, or to this Court's order specifying that Receivership Property would be used in the "consolidated enterprise," pending an eventual distribution plan. This Court's order denying Weider/Forman's request for a segregated fund reaffirms that status quo; such order does not itself affect the value of CP Holdings' subsidiaries. Moreover, as has been the case since the Court appointed the Receiver, the value of Weider/Forman's putative security interests in CP Holdings' ownership interests in its subsidiaries is wholly indeterminate, pending a final distribution plan.

Second, Magistrate Judge Papak observed 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[.]" *F&R*, p. 16. Weider/Forman retort that such independence is not a prerequisite for entry of a Rule 54(b) order. *Obj.*, p. 10 (citing *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797-98 (9th Cir. 1991)). But Magistrate Judge Papak did not treat it as such and the interdependence of claims is undeniably a factor weighing against entry of a Rule 54(b) order. *See Wood*, 422 F.3d at 878 n.2. Weider/Forman betray the existence of interdependent claims by voicing their fear that their future claims will not be paid in full. *Obj*., pp. 8-9.

Third, Magistrate Judge Papak found that "future developments in this action (in particular, determination of Weider/Forman's appropriate share of the receivership assets) could

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moot the contemplated appeal[.]" *F&R*, p. 16. Weider/Forman object that the Ninth Circuit will inevitably need to resolve Weider/Forman's security interests, *Obj*., p. 10, but only succeed in begging the question of mootness. Many developments could moot any issues raised by this Court re-imposing the status quo as to assets Weider/Forman want to segregate, including:

- 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 CP Holdings and its assets instead of treating the Receivership Entity as a unitary enterprise for purposes of making distributions; or (b) employ fund tracing, whereupon Weider/Forman 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.

Weider/Forman cannot eliminate the possibility that any presently existing issues they would litigate regarding the use of Receivership Property will later become moot.

Fourth, Magistrate Judge Papak recognized that "there is a risk of duplicative appeals if the contemplated appeal were permitted to go forward[.]" *F&R*, p. 16. Weider/Forman respond that "once the Ninth Circuit considers whether Weider and Forman have interests requiring adequate protection, it will never have to do so again." *Obj*., p. 10. Weider/Forman misunderstand this concern for judicial efficiency. Even assuming *arguendo* that Weider/Forman have colorable claims to the sale proceeds from the Receivables Assets in the abstract, other intertwined issues exist that are not yet ripe—namely, whether the transfers of any security interests to Weider/Forman are voidable, whether Weider/Forman's claim should be equitably subordinated due in part to their apparent fraud upon the Court, the Receiver and, at least indirectly, the other investors, whether distributions to Weider/Forman will be affected by

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tracing of funds, and whether the Receivership Entity, including CP Holdings, will be treated as a unitary enterprise under this Court's eventual 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. As the Ninth Circuit stresses:

> "[a] similarity of legal or factual issues will weigh heavily against entry of judgment under [Rule 54(b)] . . . ." *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981).
>
> The greater the overlap the greater the chance that this court will have to revisit the same facts—spun only slightly differently—in a successive appeal. The caseload of this court is already huge. … *We cannot afford the luxury of reviewing the same set of facts in a routine case more than once without a seriously important reason*.

Wood, 422 F.3d at 882.[12] *See also Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 747 (9th Cir. 2008) ("[p]iecemeal appellate review … undermines the efficient use of judicial resources by exposing appellate panels to the costs of repeated familiarization with the [same] case"). Magistrate Judge Papak properly assessed the importance of judicial economy.

Fifth, Magistrate Judge Papak concluded 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)." *F&R*, p. 16. Dropping the word "risk," Weider/Forman accuse Magistrate Judge Papak

[12] Weider/Forman have previously argued that, by relying on *Morrison-Knudsen Co.*, the Receiver "espouses … an 'outdated and overly restrictive view of … Rule 54(b)[.]'" *Weider/Forman Reply ISO Mot. to Appeal* [Dkt. 561], p. 1 (quoting *Texaco*, 939 F.2d at 797-98). Weider/Forman disregard not only *Wood*'s embrace of *Morrison-Knudsen*, but also the Ninth Circuit's explicit repudiation of its own critique of *Morrison-Knudsen*. "[A] subsequent panel cannot modify the law of this circuit by a critical remark. *Morrison-Knudsen* is the law of this circuit unless and until we overrule it *en banc*." *Cadillac Fairview/California, Inc. v. United States*, 41 F.3d 562, 567 (9th Cir. 1994).

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of circularity: his "conclusion (no harm because appeal will be unsuccessful) assumes the premise (appeal will be unsuccessful)." *Obj.*, p. 10. Far from being circular, the supposed *risk* of financial harm necessarily turns in part on the merits of Weider/Forman's demand for a segregated fund. Magistrate Judge Papak properly discounted Weider/Forman's contention that they held a security interest (or some other unspecified "interest") in the Receivables Assets when assessing the risk of harm. Given their dubious basis for seeking a segregated fund, Weider/Forman face little *risk* of severe financial harm as a consequence of denying them an immediate appeal.

Individually and collectively, Weider/Forman's attempts to rebut Magistrate Judge Papak's findings are unavailing. Magistrate Judge Papak correctly concluded that the *Wood* factors mandate denial of Weider/Forman motion under Rule 54(b).

Magistrate Judge Papak properly concluded that Weider/Forman failed to carry their burden on their Rule 54(b) motion. If a Rule 54(b) partial judgment is to eventually enter, it should not enter until *after* this Court is certain that an appeal to the Ninth Circuit will resolve all issues material to Weider/Forman's future 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). No doubt, Weider/Forman see some strategic benefit 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).

V. Weider/Forman do not present an "extraordinary case" such that certification under 28 U.S.C. § 1292(b) would be proper.

As with Rule 54(b), certification under 28 U.S.C. § 1292(b) would prematurely and

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unnecessarily burden the Ninth Circuit. Moreover, certification is improper because Weider/Forman seek certification of legal issues that are now either moot or unripe. As a factual matter separate from the legal questions Weider/Forman pose, Weider/Forman held no security interest (or other interest) in the Receivables Assets that could have entitled them to have funds sequestered from the rest of the Receivership Property.

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

Weider/Forman do not object to Magistrate Judge Papak's recitation of the standards under which a motion for certification under 28 U.S.C. § 1292(b) is decided.[13] Consistent with his Recommendation, 28 U.S.C. § 1292(b) does not displace the court system's aversion toward fragmented appeals. As the Ninth Circuit has long recognized, a district court should 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, 1027 (9th Cir. 1982).

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[13] 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.

(Emphasis in original.)

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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*.

Each element is construed narrowly, *James v. Price Stern Sloan*, 283 F.3d 1064, 1068 (9th Cir. 2002), and, per the legislative history, section 1292(b) was 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[,]'" *U.S. Rubber*, 359 F.2d at 785 n. 2 (emphasis added; quoting legislative record).

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.) (citation and internal quotation marks omitted). *See also Exec. Software N. Am., Inc.*, 24 F.3d at 1550 (a district court's certification decision is "unreviewable").

Here, Magistrate Judge Papak properly concluded that Weider/Forman fail to establish any of the three elements.

B. Rather than present "controlling questions of law," Weider/Forman present issues collateral to the merits and establish no exceptional circumstances.

Weider/Forman present no "question of law" that "materially affect[s] the outcome of the litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d at 1026. "[T]he 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." *F&R*, p. 13 (citing *Ahrenholz v. Bd.*

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of Trs. of the Univ. of Illinois, 219 F.3d 674, 675-77 (7th Cir 2000)). When a question is "collateral to the merits," such a question is not "controlling" absent "exceptional circumstances." *In re Cement Antitrust Litig.*, 673 F.2d at 1027 n.5. *See also U.S. Rubber Co.*, 359 F.2d at 785 n. 2 (noting congressional intent that statute apply to questions that are "dispositive of the litigation"). Weider/Forman's motion to certify an interlocutory appeal fails because, rather than present "controlling questions of law," 28 U.S.C. § 1292(b), Weider/Forman raise "matters that are collateral to the merits of the claims actually at issue in the SEC's action against the Aequitas defendants." *F&R*, pp. 16-17.

Weider/Forman object because, according to them a controlling question of law exists any time "a party challenges a court's approval of a free and clear sale." *Obj*., p. 14. Weider/Forman's contention is disproved by the circumstances here. Not only does this Court's rejection of a segregated fund for Weider/Forman not materially affect any party's claim presently being adjudicated in this Court, but this Court's order denying them a segregated fund does not turn on any of the legal questions they want to pose on appeal. Weider/Forman would have the Ninth Circuit 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," and what procedure is dictated by the Fifth and Fourteenth Amendments in relation to voiding a fraudulent transfer and equitably subordinating a claim. *Obj*., p. 14. Weider/Forman's proposed questions, however, were eclipsed by this Court's analysis that, critically, Weider/Forman had no cognizable interest in the Receivables Assets. Under the circumstances, the questions Weider/Forman pose are collateral even to the Court's order and none of the authority Weider/Forman cite suggests that this Court can or should certify

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such academic questions under 28 U.S.C. § 1292(b).[14]

Weider/Forman find only another dead end when they assert that even collateral issues "*may* be the proper subject of an interlocutory appeal." *Obj*., p. 14 (internal quotation marks and citations omitted; emphasis supplied by Weider/Forman). Certification of collateral issues is only proper in "exceptional circumstances." *In re Cement Antitrust Litig.*, 673 F.2d at 1027 n.5. *Accord Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) (question was controlling because of the "needless expense and delay of litigating an entire case in a forum that has no power to decide the matter"). None exists here. 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.

Magistrate Judge Papak properly determined that Weider/Forman raise no controlling question of law. None of the questions they raise impact those claims presently being litigated before this Court or even present a credible basis for attacking this Court's well-reasoned decision to reject Weider/Forman's demand for a segregated fund. Weider/Forman fail to present "controlling questions of law" for purposes of 28 U.S.C. § 1292(b).

C. This Court's denial of Weider/Forman's demand for a segregated fund does not raise "substantial ground for difference of opinion."

"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 v. Am. Osteopathic Ass'n*, No. 3:16-cv-01494-SB, 2017 U.S. Dist. LEXIS 149339, *8 (D. Or. July 27,

[14] *SEC v. Capital Consultants LLC*, 453 F.3d 1166, 1172 (9th Cir. 2006) (*Capital Consultants II*), arose after a plan of distribution had been entered. Here, no creditor or investor has even filed a claim. *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 578-79, 582 (4th Cir. 1996), does not address whether section 1292(b) certification was litigated. And *Prudential Ins. Co. of Am. v. Boston Harbor Marina Co.*, 159 B.R. 616, 617, 623 (D. Mass. 1993), does not even cite that statute.

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2017) (Beckerman, M.J.), *adopted by* 2017 U.S. Dist. LEXIS 147110 (Sept. 12, 2017) (Simon, J.) (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). Magistrate Judge Papak properly concluded that this Court's denial of Weider/Forman's demand for a segregated fund to pay their claims does not raise "substantial ground for difference of opinion" because the Court's order "is premised on a sound construction of the plain language of Weider/Forman's agreements with the Aequitas entities." *F&R*, p. 17.

In objecting, Weider/Forman argue that, pursuant to *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009), "'courts should not hesitate to certify an interlocutory appeal' in cases involving 'new legal question[s].'" *Obj*., p. 15. Weider/Forman misunderstand that case. In *Mohawk*, 558 U.S. 100, the Supreme Court found that it had no jurisdiction *under 28 U.S.C. § 1291* to review an order to produce attorney-client privileged materials. The quoted portion is *dicta* because no issue under section 1292(b) was before the court and omits the material context, which binds the quote to the disclosure of attorney-client materials. *See id.* at 110-11 ("The preconditions for § 1292(b) review … are most likely to be satisfied *when a privilege ruling* involves a new legal question or is of special consequence, and district courts should not hesitate to certify an interlocutory appeal *in such cases*." (Emphasis added.)).

Weider/Forman next argue that Magistrate Judge Papak deviated from "the proper inquiry" when he addressed the Court's *actual basis* for rejecting Weider/Forman's demand for a segregated fund rather than focusing only on the "novel and complex" questions Weider/Forman

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would raise for "immediate appellate review." *Obj.*, p. 15. Weider/Forman's argument is wholly incongruent with their earlier contention that they can present some "controlling question of law." By admitting that the Court's *actual basis* for denying Weider/Forman the relief they sought does not implicate Weider/Forman's "novel and complex" questions, Weider/Forman tacitly admit that the issues they wish to appeal are the very definition of collateral questions.

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 a segregated fund 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 would not "advance termination of the litigation materially."

Weider/Forman fail to establish that an interlocutory appeal would "materially advance the ultimate termination of the litigation[.]" 28 U.S.C. § 1292(b). Magistrate Judge Papak recognized, "[f]or purposes of Section 1292(b), an interlocutory appeal need not dispose of all pending claims in order to materially advance litigation." *F&R*, p. 13 (citing *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011)). But he found that Weider/Forman's intended appeal would not have "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." *F&R*, p. 17.

Weider/Forman 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.'" Obj., p. 16 (citations omitted). They also argue that

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"resolution of claims to SEC receivership assets 'directly affect[s] the ongoing litigation'" by impacting the asset pool. *Obj*., p. 16 (alterations by Weider/Forman; quoting *Capital Consultants II*, 453 F.3d at 1172). Weider/Forman, however, cannot align themselves with those situations. Because Weider/Forman's proposed legal question do not intersect with the basis by which this Court denied them a segregated fund, it follows that appealing that order in relation to Weider/Forman's questions will not impact the asset pool or further the ultimate resolution of either the claims presently being litigated in this action, or the ultimate distribution of assets pursuant to a yet-to-be-litigated distribution plan. Weider/Forman fail to carry their burden of establishing that an interlocutory appeal would "materially advance the ultimate termination of the litigation[.]" 28 U.S.C. § 1292(b).

As with Weider/Forman's motion under Rule 54(b), their motion for certification of questions for an interlocutory appeal under 28 U.S.C. § 1292(b) should be denied. They pose questions that, even relative to this Court's disposition of their demand for segregation of funds, are 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*. Magistrate Judge Papak properly concluded that Weider/Forman cannot obtain certification under 28 U.S.C. § 1292(b).

VI. Magistrate Judge Papak properly found that, as an exercise of judicial discretion, an immediate appeal is improper under either Rule 54(b) or 28 U.S.C. § 1292(b).

Magistrate Judge Papak recognized that the district court has discretion to deny an immediate appeal under both Rule 54(b) and 28 U.S.C. § 1292(b) even if the prerequisites for each are met. *See F&R*, pp. 5, 7 (citing *Dannenberg*, 16 F.3d at 1078, and *Exec. Software N.*

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Am., 24 F.3d at 1550). Magistrate Judge Papak found that, even if Weider/Forman had made an adequate showing under Rule 54(b) and section 1292(b), an immediate appeal should be denied as a matter of judicial discretion. *See F&R*, pp. 16, 17 (citing "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").

Weider/Forman do not dispute that the district court has such discretion to deny an immediate appeal. Instead, Weider/Forman argue in relation to Rule 54(b) that Magistrate Judge Papak "refus[ed] to entertain an argument," "ignor[ed] … federal policy" about preventing undue hardship and injustice, and relied "solely on [his] belief" that "his prior ruling was correct" and thereby "render[ed] Rule 54(b) meaningless." *Obj*., pp. 12-13. Regarding 28 U.S.C. § 1292(b), they argue that Magistrate Judge Papak "refus[ed] to even consider allowing Weider and Forman an opportunity at a direct appeal" and "ignore[d] the federal policy underlying section 1292(b)." *Id*. at 17. *See also id.* at 19 (arguing that their motion puts the Court in the "awkward position" of evaluating the strength of its own opinion).

Weider/Forman take liberties with the record. Magistrate Judge Papak's Recommendation does not resemble Weider/Forman's complaints. Moreover, by suggesting that Magistrate Judge Papak lacks the impartiality to decide their instant motion because he previously rejected their demand for a segregated fund, Weider/Forman prove too much. By that standard, *no district court*, having decided an underlying motion, could ever exercise the discretion required to enter a Rule 54(b) order or certify an appeal under section 1292(b).

Magistrate Judge Papak properly found that, as an exercise of judicial discretion, an immediate appeal is improper under either Rule 54(b) or 28 U.S.C. § 1292(b).

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VII. Magistrate Judge Papak properly concluded that Weider/Forman's motion to stay is moot.

On October 12, 2017, this Court entered its order dissolving the Receiver's obligation to create a reserve for asset sale proceeds on behalf of Weider/Forman. *Order* [Dkt. 549]. Two weeks later, Weider/Forman moved to stay this Court's order [Dkt. 552]. Following entry of this Court's order, however, the Receiver ceased segregating proceeds from the sale of Receivables Assets and began treating those funds as it does other Receivership Property: for the benefit of the Receivership Entity, as a consolidated enterprise, pending a distribution order. *Nov. 30, 2017 Hr'g Tr.* [Dkt. 571], pp. 12-13; *Order Appointing Receiver* [Dkt. 156], ¶ 6.D.

Magistrate Judge Papak properly concluded that Weider/Forman's motion to "stay" is moot because no immediate appeal is proper.[15] The Receiver incorporates its prior response herein by reference. *See Receiver's Resp*. [Dkt. 558], pp. 16-26.

VIII. Conclusion

This Court should deny Weider/Forman's objection in its entirety. It is simply premature for this Court to send Weider/Forman's claims to the Ninth Circuit when material

[15] Motions to stay are not uniformly dispositive or non-dispositive for purposes of 28 U.S.C. § 636(b)(1). *S.E.C. v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1260 (9th Cir. 2013). The Receiver does not concede that Weider/Forman's motion for a segregated fund pending appeal is a dispositive motion.

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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.

Dated this 5th day of January, 2017.

Respectfully submitted,

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