No. 22-13412-B

In the United States Court of Appeals for the Eleventh Circuit

SECURITIES AND EXCHANGE COMMISSION,
***Plaintiff-Appellee*,**

and

JONATHAN E. PERLMAN,
***Court-Appointed Receiver-Appellee*,**

v.

ELEANOR FISHER and TAMMY FU,
Appellants.

Appeal from the United States District Court
for the Southern District of Florida

No. 1:20-cv-21964- Altonaga/Goodman

APPELLEE'S MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

W. Barry Blum, Esq. (FBN 379301)
Gregory Garno, Esq. (FBN 87505)
GENOVESE JOBLOVE & BATTISTA, P.A.
100 S.E. Second Street, 44th Floor
Miami, Florida 33131
Tel.: (305) 349-2300
Fax: (305) 349-2310

Counsel for Appellee Jonathan E. Perlman, Court-Appointed Receiver

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, Appellee, Jonathan E. Perlman, as Receiver (the "Receiver"), submits the following list of all persons and entities known to the Receiver to have an interest in the outcome of this appeal:

1. Altonaga, Hon. Cecilia M., United States District Judge (S.D. Fla)
2. Avila, Rodriguez, Hernandez, Mena & Ferri, Attorneys for Respondent, Ocean Bank
3. AW Exports Pty Ltd, Claimant
4. Baker & McKenzie LLP, Attorneys for Appellant
5. Banque Pictet & CIE S.A., Petitioner in Cayman Islands Liquidation Proceeding
6. Bast Amron LLP, Attorneys for Armand Zohari, Tritium Fund,Hsueh-Feng Tseng, and Fide Funds Growth
7. Bast, Jeffrey P., Esq., Attorney for Armand Zohari, Tritium Fund, Hsueh-Feng Tseng, and Fide Funds Growth
8. Battista, Paul J., Esq., Attorney for Appellee Jonathan E. Perlman, Receiver
9. Benjamin, Todd, Claimant
10. Berger, Evan B., Counsel for claimants David Manning, Paycation Travel, Inc., and Xstream Travel, Inc.
11. Berger & Poliakoff, P.A., Counsel for Claimants David Manning, Paycation Travel, Inc., and Xstream Travel, Inc.
12. Berkovitz, Dan M., Counsel for Appellee Securities and Exchange Commission

13. Bloom, Mark D., Esq., Attorney for Appellants

14. Blum, W. Barry, Esq., Attorney for Appellee Jonathan E. Perlman, Receiver

15. Bradylyons, Morgan, Counsel for Appellee Securities and Exchange Commission

16. Broxom, Warwick, Claimant

17. Caesarea Medical Electronics Holding (2000) Ltd., Claimant

18. Cahill Gordon & Reindel LLP, Attorneys for Credit Suisse Claritas, LLC, Cayman Islands Counsel for Appellants Clearstream Banking S.A., Limited Objector

19. Clearstream Banking S.A., Objector

20. Claritas, LLC, Counsel for Appellants

21. Conley, Michael A., Counsel for Appellee Securities and Exchange Commission

22. Credit Suisse, Limited Objector

23. Cuccia II, Richard A., Esq., Attorney for Paycation Travel, Inc., Xstream Travel, Inc., and David Manning

24. Cuccia Wilson, PLLC, Attorneys for Paycation Travel, Inc., Xstream Travel, Inc., and David Manning

25. Dodd, John R., Esq., Attorney for Appellant

26. Dorchak, Joshua, Esq., Attorney for Clearstream Banking S.A. EY Cayman Ltd.

27. EY Cayman Ltd.

28. Fide Funds Growth

29. Fisher, Eleanor, Foreign Representative of Relief Defendant TCA Global Credit Fund, Ltd.

30. Friedman, Michael A., Esq., Counsel for Appellee Jonathan E. Perlman

31. Fu, Tammy, Foreign Representative of Relief Defendant TCA Global Credit Fund, Ltd.

32. Fulton, Andrew, IV, Esq., Attorney for Lease Corporation of America

33. Garno, Gregory M., Esq., Attorney for Appellee Jonathan E. Perlman, Receiver

34. Genovese, Joblove & Batista, P.A. Attorneys for Appellee Jonathan E. Perlman, Receiver

35. Genovese, John H., Esq., Attorney for Appellee Jonathan E. Perlman, Receiver

36. Hall, Jason, Esq. Attorney for Credit Suisse

37. Halsey, Brett M., Esq., Counsel for Appellee Jonathan E. Perlman

38. Harmon, Heather L., Esq., Counsel for Appellee Jonathan E. Perlman

39. Hill, Ezekiel L., Esq., Counsel for Appellee Securities and Exchange Commission

40. Jacobs, Eric D., Esq,, Counsel for Appellee Jonathan E. Perlman

41. Kaplan Saunders Valente & Beninati, LLP, Attorneys for AW Exports Pty Ltd, Warwick Broxom, and Jonathan James Kaufman

42. Kaufman, Jonathan James, Claimant

43. Kellogg, Jason Kenneth, Esq., Attorney for Todd Benjamin International, Ltd. and Todd Benjamin

44. Kelley & Fulton, P.A., Attorneys for Claimant, Lease Corporation of America Lease Corporation of America, Claimant

45. Leggett, Jaime B., Esq., Attorney for Armand Zohari, Tritium Fund, Hsueh-Feng Tseng, and Fide Funds Growth

46. Levine Kellogg Lehman Schneider & Grossman, Counsel for Todd Benjamin International, Ltd. and Todd Benjamin

47. Manning, David, Claimant

48. McIntosh, Elizabeth G., Esq., Attorney for Appellee Jonathan E. Perlman, Receiver

49. Moot, Stephanie N., Esq., Attorney for Securities and Exchange Commission

50. Mora, Martha Rose, Esq., Attorney for Respondent, Ocean Bank

51. Morgan, Lewis & Bockius LLP, Attorneys for Clearstream Banking S.A.

52. Ocean Bank, Non-Party Respondent

53. Paycation Travel, Inc., Claimant

54. Pearson, Katharine Lucy Bladen, Esq., Cayman Islands Attorney for Appellants

55. Perlman, Jonathan, E., Receiver, Appellee

56. Roldan Cora, Javier A., Esq., Attorney for Clearstream Banking S.A.

57. TCA Fund Management Group Corp., Defendant, Receivership Entity

58. TCA Global Credit Fund GP, Ltd., Defendant, Receivership Entity

59. TCA Global Credit Fund, L.P., Relief Defendant, Receivership Entity

60. TCA Global Credit Fund, Ltd., Relief Defendant, Receivership Entity

61. TCA Global Credit Master Fund, L.P., Relief Defendant, Receivership Entity

62. TCA Global Lending Corp., Receivership Entity

63. Todd Benjamin International, Ltd., Claimant

64. Tritium Fund, Claimant

65. Tseng, Hsueh-Feng, Claimant

66. Todd Benjamin International, Ltd., Claimant

67. United States Securities and Exchange Commission, Plaintiff

68. Valente, Charles A., Esq., Attorney for AW Exports Pty Ltd, Warwick Broxom, and Jonathan James Kaufman

69. van de Linde, Peter, Claimant

70. Xstream Travel, Inc., Claimant

71. Zohari, Armand, Claimant

This Certificate of Interested Persons does not include all persons and entities who may be claimants or trade creditors in the receivership proceeding.

CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rule 26.1-3(b), the Receiver certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

Appellee Jonathan E. Perlman ("Receiver"), the court-appointed receiver over TCA Fund Management Group Corp., TCA Global Credit Fund GP, Ltd., TCA Global Credit Fund, LP, TCA Global Credit Fund, Ltd., TCA Global Credit Master Fund, LP, and TCA Global Lending Corp., under FED. R. APP. P. 27(a), files this motion to dismiss this appeal for lack of jurisdiction.

I. Introduction

1. This appeal must be dismissed because no notice of appeal was filed within sixty days of the entry of the appealed order as required by FED. R. APP. P. 4(a)(1)(B) and 28 U.S.C. § 2107(b)(2).

2. This is an appeal by Eleanor Fisher and Tammy Fu, in their capacity as Foreign Representatives of Relief Defendant TCA Global Credit Fund, Ltd. ("Appellants"), from an Order [Dkt. No. 284], entered on August 4, 2022, approving the Receiver's proposed distribution plan and authorizing an initial distribution by the Receiver of more than $55 million to 764 investors ("August 4 Order"). App. 001.[1] The August 4 Order was "appealable as a collateral order" under *SEC v. Torchia*, 922 F.3d 1307, 1315 (11th Cir. 2019) (citing three circuit court decisions). *See* Dkt. No. 284; App. 001. Because the SEC, an agency of the United States, is a

[1] The August 4 Order and the other filings referred to in this motion are included in Appellee's Appendix to Motion to Dismiss filed with this motion. Reference to specific pages of the Appendix will be to "App. __."

party to the action, the time to file a notice of appeal from the August 4 Order was "within 60 days of entry of the judgment or order appealed from." FED. R. APP. P. 4(a)(1)(B); 28 U.S.C. § 2107(b)(2) (notice of appeal must be filed within "60 days from such entry" of the challenged order).

3. The 60-day deadline to appeal the August 4 Order was October 3, 2022, and Appellants did not timely file a notice of appeal. Instead, Appellants filed a notice of appeal [Dkt. No. 307] of the August 4 Order on October 12, 2022—sixty-eight days after entry of the August 4 Order. App. 043. Appellants did not file in the district court a motion that extended the time to appeal under FED. R. APP. P. 4(a)(1)(B) or a motion under FED. R. APP. P. 4(a)(5) asking the district court to extend the time to appeal.

4. "Th[e Supreme] Court has long held that the taking of an appeal within the prescribed time is "mandatory and jurisdictional." *Bowles v. Russell*, 551 U.S. 205, 209–10 (2007). "[W]hen an 'appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.'" *Id.* at 213 (quoting in part *United States v. Curry*, 47 U.S. (6 How.) 106, 113 (1848)); *cf. United States ex rel. Postel Erection Grp., L.L.C. v. Travelers Cas. & Sur. Co. of Am.*, 711 F.3d 1274, 1275 (11th Cir. 2013) (dismissing untimely appeal for lack of jurisdiction based on *Bowles*).

5. This Court must dismiss this appeal for lack of jurisdiction because Appellants failed to file a notice of appeal by October 3, 2022 as required by FED. R. APP. P. 4(a)(1)(B) and 28 U.S.C. § 2107(b)(2).

II. Relevant Proceedings Below

6. On August 4, 2022, following extensive briefing of the receiver's motion and seven objections and responses and a hearing held on July 11, the district court entered its detailed and reasoned 34-page August 4 Order approving the Receiver's proposed Distribution Plan and First Interim Distribution of more than $55 million to 764 investors. App. 011. Although no party requested a stay pending appeal, the last line of the August 4 Order immediately before the "DONE AND ORDERED" provision stated: "This Order is stayed until September 6, 2022 to allow the filing of an interlocutory appeal." App. 034.

7. The August 4 Order was "appealable as a collateral order." *Torchia*, 922 F.3d at 1315. *See generally* Receiver's Response to Jurisdictional Question. As an order from which an appeal could be taken, the August 4 Order was a "judgment" as used in the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies."). Because the SEC is a party to the action, an appeal of the August 4 Order had to be filed "within 60 days of entry of the judgment or order appealed

from." FED. R. APP. P. 4(a)(1)(B); 28 U.S.C. § 2107(b)(2). So, the deadline to appeal the August 4 Order was October 3, 2022.

8. Appellants did not file a notice of appeal until October 12, 2022. App. 043; Dkt. No. 307. Nor did Appellants file in the district court a motion under FED. R. APP. 4(a)(5) seeking an order extending the time to appeal, and the time for filing a Rule 4(a)(5) motion expired on November 2, 2022, thirty days after expiration of the original 60-day deadline for an appeal. *See* FED. R. APP. 4(a)(5)(i).

9. Rather, on September 1, 2022, Appellants filed in the district court a motion [Dkt. No. 298] titled: "Foreign Representatives' Motion to Alter or Amend Order Dated August 4, 2022 [ECF No. 284] to Extend Stay Pending Appeal, and Accompanying Memorandum of Law" ("September 1 Motion"). App. 035-40.

10. The September 1 Motion stated it was filed "pursuant to Fed. R. Civ. P. 59(e)," App. 035, but the motion did not request the "district court to substantively reconsider its original judgment," *Osterneck v. E.T. Barwick Indus.*, 825 F.2d 1521, 1525 (11th Cir. 1987), *aff'd sub nom.*, *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), or otherwise seek "reconsideration of substantive issues resolved in the judgment." *Finch v. City of Vernon*, 845 F.2d 256, 259 n.3 (11th Cir. 1988).

11. Instead, the September 1 Motion expressly sought only "to alter or amend the Court's [August 4] Order . . . solely to extend the Stay Provision of that Order as further described herein." App. 035-36 (emphasis added). Specifically,

Appellants sought only a stay of the August 4 Order "through and including **October 13, 2022.**" App. 037-38 ¶ 5 (emphasis in original). Appellants acknowledged that October 13 was ten days after the deadline for filing an appeal of the August 4 Order. *Id*. ("the full 60-day period . . . for the interlocutory appeal . . . plus an additional ten (10) days within which to seek a formal stay pending that appeal under Fed. R. App. P. 8.").

12. In Paragraph 3 of the September 1 Motion, Appellants stated:

> The Foreign Representatives respectfully submit that in including the Stay Provision [in the August 4 Order], the [District] Court fully contemplated that they [Appellants] would perfect an interlocutory appeal from the Distribution Order. *See Securities & Exchange Commission v. Torchia,* 922 F.3d 1307, 1312-1313 (11th Cir. 2019) (citations omitted) (agreeing with 5th, 6th and 7th Circuits that a "district court order approving [a] receiver's distribution plan is appealable as a collateral order."). For the reasons set forth below, the Distribution Order should be amended so as to extend the stay for the full 60-day period within which the Foreign Representatives must file their notice of appeal under Fed. R. App. 4.

App. 036 ¶ 3 (emphasis added; footnote omitted). The September 1 Motion did not address, let alone seek reconsideration of, any other part of the August 4 Order.

13. In Paragraph 5 of the September 1 Motion, Appellants conceded the October 3, 2022, deadline to appeal the August 4 Order, and they explained that the October 3 deadline drove the request for a stay until October 13. As Appellants stated:

> Accordingly, it is respectfully submitted that in order to afford the Foreign Representatives the full 60-day period provided under Fed. R.

> App. P. 4(a)(1)(B)(ii) within which to assess and formulate the grounds for the interlocutory appeal that the Court clearly contemplated in the Distribution Order, plus an additional ten (10) days within which to seek a formal stay pending that appeal under Fed. R. App. P. 8, the Court should amend the Stay Provision of the Order so as to extend the stay through and including October 13, 2022, being a period of seventy (70) days from entry of the Amended Distribution Order sought in this Motion.

App. 037-38 ¶ 5 (emphases added; footnote omitted).

14. Finally, in Paragraph 7 of the September 1 Motion, Appellants, while referring to Rule 59(e), reiterated that the only relief sought in the September 1 Motion was a stay pending appeal under FED. R. APP. P. 8. App. 038 ¶ 7.

15. The September 1 Motion thus sought one thing: a further stay of the August 4 Order pending appeal. It was functionally and in substance a motion for stay (or to extend stay) pending appeal under FED. R. APP. P. 8(a) that did not affect the time for appeal of the August 4 Order. *See* FED. R. APP. P. 4(a)(4)(A) (listing the six motions extending the time to appeal until thirty days after disposition of the motions); *United States ex rel. Hoggett v. Univ. of Phoenix*, 863 F.3d 1105, 1108 (9th Cir. 2017) ("post-judgment motion, although styled as a Rule 59(e) motion, was in substance a motion only to stay the entry of judgment, which does not toll the time to file a notice of appeal."); *Milligan v. Matthews*, 166 F. App'x 335, 338 (10th Cir. 2006) ("The pendency of certain motions tolls the running of the time for filing a notice of appeal. However, a motion to stay is not one of these 'tolling' motions") (citation omitted).

16. The district court made plain in its September 2, 2022 Order [Dkt. No. 299] granting the September 1 Motion ("September 2 Stay Order") that the September 1 Motion was a motion for stay under FED. R. APP. P. 8 that did not go to the merits of the August 4 Order. The September 2 Stay Order provided in full as follows:

> **THIS CAUSE** came before the Court upon Foreign Representatives, Eleanor Fisher and Tammy Fu's Motion to Alter or Amend Order Dated August 4, 2022 to Extend Stay Pending Appeal [ECF No. 298], filed on September 1, 2022. The Foreign Representatives intend to appeal the August 4, 2022 Distribution Plan Order [ECF No. 284]. That Order is stayed until September 6, 2022. (*See id*. 34).
>
> The Motion seeks an extension of the stay through October 13, 2022. (*See* Mot. ¶ 7). Federal Rule of Appellate Procedure 4 provides 60 days within which to file an appeal if one of the parties is a United States agency, such as the Securities and Exchange Commission. *See* Fed. R. App. P. 4(a)(1)(B)(ii). The Foreign Representatives seek an additional 10 days under Federal Rule of Appellate Procedure 8. (*See* Mot. ¶ 7). This Motion being unopposed, it is
>
> **ORDERED AND ADJUDGED** that Foreign Representatives, Eleanor Fisher and Tammy Fu's Motion to Alter or Amend Order Dated August 4, 2022 to Extend Stay Pending Appeal **[ECF No. 298]** is **GRANTED**. The August 4, 2022 Order [ECF No. 284] is stayed until **October 13, 2022**.

App. 041 (emphases added).

17. The September 2 Stay Order did not refer to Rule 59; nor did it alter or amend the August 4 Order. Rather, after referring to the 60-day appeal deadline from August 4 and noting Appellants sought "an additional 10 days [after the appeal deadline] under Federal Rule of Appellate Procedure 8," the only relief granted was:

"The August 4, 2022 Order [ECF No. 284] is stayed until **October 13, 2022**." App. 041 (emphasis in original)

18. Despite Appellants' acknowledgement that the appeal deadline was October 3, 2022, and their assurance to the district court that they would file a notice of appeal by then, Appellants did not file a notice of appeal by the October 3, 2022 deadline.[2]

19. Instead, Appellants filed a notice of appeal [Dkt. No. 307] on October 12, 2022, sixty-eight days after entry of the August 4 Order. App. 043. That notice of appeal was untimely and it did not invoke this Court's appellate jurisdiction. *See Bowles*, 551 U.S. at 209–10.

[2] In a footnote to the September 1 Motion, Appellants incorrectly suggested "the entry of an Amended Distribution Order would initiate the running of a new 60-day period within which to file a notice of appeal under Fed. R. App. P. 4(a)(4)(A)(iv)," App. 038 n.4. That footnote misreads the law and the applicable rules as to the effect of the September 1 Motion, and it cannot be reconciled with concessions in the body of the September 1 Motion that the appeal deadline was October 3. App. 037-38 ¶¶ 5-7. Moreover, no "Amended Distribution Order" was entered; Appellant's September 1 Motion did not ask the district court to reconsider or amend any substantive part of the August 4 Order, and the court's September 2 Stay Order did not address, let alone alter or amend, any substantive ruling in the August 4 Order. The district court's September 2 Stay Order did nothing more than grant an additional thirty-seven stay of the August 4 Order until October 13, 2022. App. 041.

III. The September 1 Motion did not address "matters encompassed in a decision on the merits of the dispute" and thus was not a Rule 59 motion to alter or amend judgment that extended the time to appeal.

20. Although the September 1 Motion purportedly was filed under FED. R. CIV. P. 59(e), it was not in substance or function a "Rule 59 motion," and it did not extend the time for filing a notice of appeal under FED. R. APP. P. 4(a)(4)(A). Thus, the time to appeal ran on October 3, 2022.

21. This Court has made clear that the form or label attached to a motion does not determine whether it is actually a Rule 59 motion. *See Alimenta (U.S.A.), Inc. v. Anheuser-Busch Cos.*, 803 F.2d 1160, 1162–63 (11th Cir. 1986) ("motion, styled as a Rule 59 motion, which asked that the district court reconsider its decision to require each party to bear its own costs" was not a Rule 59 "motion to alter or amend judgment" that affected the appeal deadline because it did not address **"**matters encompassed in a decision on the merits of the dispute"); *Lucas v. Fla. Power & Light Co.*, 729 F.2d 1300, 1301–02 (11th Cir. 1984) (even when motion is "self-styled" as a Rule 59 motion, "'nomenclature is not controlling. The court will construe it, however styled, to be the type proper for the relief requested.'") (quoting *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983) (internal citation omitted)).

22. In classifying post-judgment motions, this court has drawn a substantive/collateral distinction: "Rule 59 applies to motions for reconsideration of

matters encompassed in a decision on the merits of the dispute, and not matters collateral to the merits." *Lucas*, 729 F.2d at 1301 (holding that "motion respecting costs is not a motion to alter or amend a judgment under Rule 59."). "The determination [of whether a motion is a Rule 59 motion] is governed by functions rather than labels, for a Rule 59(e) motion is characterized as a motion seeking reconsideration of substantive issues resolved in the judgment and not as a motion that raises exclusively collateral questions regarding what is due because of the judgment." *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1131 (11th Cir. 1994) *(*citing *Osterneck,* 825 F.2d at 1526, and *Burnam v. Amoco Container Co.,* 738 F.2d 1230, 1231–32 (11th Cir.1984) (per curiam)) (court's edits and footnotes omitted). As stated in *Hertz*, the analysis includes whether a motion seeks "a *change* in the judgment" (a Rule 59 motion) or merely seeks relief "*because* of the judgment." *Id.* (quoting in part *White v. N.H. Dep't. of Emp. Sec.*, 455 U.S. 445, 452 (1982) (quoting *Knighton v. Watkins,* 616 F.2d 795, 797 (5th Cir.1980)) (emphasis added)).

23. A motion styled as a Rule 59 motion that does not address "matters encompassed in a decision on the merits of the dispute" is not effective as a Rule 59 motion to extend the time for appeal under Rule 4(a)(4)(A). *Alimenta*, 803 F.2d at 1162–63 (citing *Lucas,* 729 F.2d at 1301). In *Alimenta*, a judgment in defendant Anheuser's favor provided that no costs would be awarded, and "Anheuser filed a

motion, styled as a Rule 59 motion, which asked that the district court reconsider its decision to require each party to bear its own costs." *Id.* at 1162. Alimenta's timely Rule 59 motion challenging the judgment on the merits was denied on August 2, and Alimenta filed a notice of appeal of the judgment on August 29. Anheuser did not file a cross-appeal within fourteen days of the August 29 notice of appeal. "Anheuser's Rule 59 motion" relating only to costs was denied on October 22. "Alimenta then filed a second notice of appeal on October 25" and Anheuser filed a cross-appeal within fourteen days of that notice of appeal. *Id.* This Court, however, dismissed Anheuser's cross-appeal as untimely because Anheuser's purported "Rule 59 motion" seeking only to alter the district court's judgment as to costs was not "in fact" a Rule 59 motion that extended the appeal deadline; so Alimenta's August 29 appeal was the only effective notice of appeal, and Anheuser's cross-appeal had to filed within fourteen days of that notice. *Id.* at 1162-63.

24. In dismissing Anheuser's cross-appeal, this Court explained:

> Anheuser's "Rule 59" motion was not in fact a motion to alter or amend judgment. According to *Lucas v. Florida Power and Light Co.,* 729 F.2d 1300 (11th Cir.1984), "(a) motion respecting costs is not a motion to alter or amend a judgment under Rule 59. Rule 59 applies to motions for reconsideration of matters encompassed in a decision on the merits of the dispute and not matters collateral to the merits." *Id.* at 1301.

Alimenta, 803 F.2d at 1162. Because the so-called "Rule 59 motion" did not go to the merits of the judgment, but only to a collateral matter—costs—it did not toll the time for appeal and, "[i]n keeping with Rule 4(a)(4) of the *Federal Rules of Appellate*

Procedure, and with the *Lucas* case, Alimenta's first Notice of Appeal is valid" and Anheuser's cross-appeal, "filed two months after Alimenta's first Notice of Appeal, [] was therefore not timely filed." *Id.* at 1162-63.

25. Here, like Anheuser's "Rule 59 motion" seeking to alter taxation of costs, Appellant's September 1 Motion, while referring to Rule 59, "was not in fact a motion to alter or amend judgment." *Id.* at 1162. Instead, the motion sought only a further stay of the district court's judgment—the August 4 Order—until Appellants had the opportunity to file an appeal on the merits; by definition, therefore, the September 1 Motion was not a Rule 59 motion.

26. This Court's decisions comport with Supreme Court precedent. *See Buchanan v. Stanships, Inc.*, 485 U.S. 265, 266-69 (1988) (a "Motion to Alter or Amend Judgment" that "specifically invoked Rule 59 of the Federal Rules of Civil Procedure" and "asked that the District Court 'amend its judgment' to reflect that respondents were 'entitled to recover their taxable costs,'" was not a Rule 59 motion for purposes of Appellate Rule 4(a)(4)). Indeed, the Supreme Court traces the substantive/collateral distinction to the original enactment of Rule 59 over seventy-five years ago.

> Rule 59(e) was added to the Federal Rules of Civil Procedure in 1946. Its draftsmen had a clear and narrow aim. According to the accompanying Advisory Committee Report, the Rule was adopted to "mak[e] clear that the district court possesses the power" to rectify its own mistakes in the period immediately following the entry of judgment. . . .

> Consistently with this original understanding, the federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits.

White, 455 U.S. at 450–51 (emphasis added) (holding that a post-judgment request for attorney's fees under 42 U.S.C. § 1988 raises issues collateral to the main cause of action and does not invoke Rule 59). Rule 59 "enables a party to request that a district court reconsider a just-issued judgment" and "gives a district court the chance 'to rectify its own mistakes in the period immediately following' its decision." *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020) (citing *White*, 455 U.S. at 450). Thus, a Rule 59 motion is "tightly tied to the underlying judgment." *Id.* *See Miller*, 709 F.2d at 527 ("The history of Rule 59(e) shows that 'alter or amend' means a substantive change of mind by the court.").

27. So, even a motion "styled as a 'Motion to Alter or Amend Judgment'" that "specifically invoke[s] Rule 59 of the Federal Rules of Civil Procedure" but addresses only a request for costs is not a Rule 59 motion that affects the time for appeal. *Buchanan*, 485 U.S. at 266, 268-69; *accord Lucas*, 729 F.2d at 1300-02 (timely motion "'pursuant to Rule 59(e) of the Federal Rules of Civil Procedure' to alter or amend the final judgment with respect to the allocation of costs" was not a Rule 59 motion that affected the time for appeal under Rule 4(a)(4)). Likewise, a post-judgment motion for attorneys' fees is not a Rule 59 motion because it raises

only "legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply." *White*, 455 U.S. at 451.

28. It is almost tautological that a motion to stay a judgment or order pending appeal is "collateral to the merits" of the underlying judgment sought to be stayed. A motion for stay does not challenge the merits of a judgment or order; nor does granting or denying a stay affect the merits. Rather, a motion for stay pending appeal accepts the judgment as it stands and seeks interim relief based on alleged irreparable harm the party will suffer "because of the judgment or order" before the merits are considered on appeal. *See White*, 455 U.S. at 452 (a motion that "does not imply a change in the judgment" and merely seeks [relief] due because of the judgment [is] not governed by the provisions of Rule 59(e).") (quoting *Knighton*, 616 F.2d at 797).

29. The Ninth Circuit's decision in *Hoggett*, 863 F.3d 1105, is on all fours. In that qui tam action, the unsuccessful Relators "filed a post-judgment motion—styled as a FRCP 59(e) motion . . . and filed the notice of appeal within 30 days after the district court denied that motion." *Id.* at 1108.[3] The court dismissed the appeal because the "post-judgment motion, although styled as a Rule 59(e) motion, was in

[3] The Relators' motion was captioned "Relators' Motion, Pursuant to FRCP Rule 59(e), to Stay the Order Dismissing and Final Judgment, Pending Ninth Circuit Court of Appeals Decision in the *United States ex rel. Lee v. Corinthian Colleges*." *Id.* at 1107.

substance a motion only to stay the entry of judgment, which does not toll the time to file a notice of appeal.'" *Id.*[4] The *Hoggett* court explained:

> Relators' motion did not argue for a substantive change in the district court's decision. Relators did not contend that the district court clearly erred, present the district court with newly discovered evidence, or assert an intervening change in the controlling law. In other words, Relators presented no ground upon which the district court *could* grant a motion to alter or amend its judgment. Instead, Relators said they were asking the district court to "amend" the order and judgment, but actually only asked for a stay until this court decided the then-pending appeal in [a similar case]. We will not strain to characterize artificially a motion as something it is not, simply to keep an appeal alive. Relators' motion was not, in substance, an FRCP 59(e) request to alter or amend the judgment; it was a request to stay.

Id. at 1108-09 (citations and footnote omitted).

30. Appellants' September 1 Motion was a request for stay and not a Rule 59 motion. The only part of the August 4 Order addressed in the September 1 Motion was the stay granted *sua sponte* by the district court, and the only relief sought was an extended stay for forty days to allow an appeal by October 3. App. 035-36 ("Foreign Representatives . . . move to alter or amend the Court's Order dated

[4] *Cf. Milligan*, 166 F. App'x at 338 ("a motion to stay is not one of the[] . . . motions [that] tolls the running of the time for filing a notice of appeal" under FED. R.APP. P. 4(a)(4)(A)(i)-(vi)); *Martin v. Cnty. of Stanislaus*, 8 F.3d 28 (9th Cir. 1993) (Table) ("To the extent the motion requested clarification and a stay, it did not toll the time for appeal.") (citing *Bordallo v. Reyes*, 763 F.2d 1098, 1101 (9th Cir. 1985) (motion "seeking clarification and a stay under Fed. R.Civ. P. 62(c)" has no effect on time to appeal)); *In re Kwong*, 2017 WL 2661627, at *2 (D. Conn. June 20, 2017) ("a motion for a stay pending appeal (made pursuant to Bankruptcy Rule 8007(a)(1)(A))" does not toll the time for filing a notice of appeal).

August 4, 2022 . . . solely to extend the Stay Provision of that Order") (emphasis added). Thus, Appellants did not even ask the district court to alter or amend its August 4 order on the merits. The stay was unrelated and wholly collateral to the merits of the August 4 Order; and the only relief considered or granted was a stay until October 13—ten days after the deadline to appeal the August 4 Order. App. 041 ("Foreign Representatives, Eleanor Fisher and Tammy Fu's Motion to Alter or Amend Order Dated August 4, 2022 to Extend Stay Pending Appeal **[ECF No. 298]** is **GRANTED**. The August 4, 2022 Order [ECF No. 284] is stayed until **October 13, 2022**."). This Court likewise must not strain to artificially create appellate jurisdiction where none exists.

31. The August 4 Order, moreover, was appealable on the merits without regard to whether the district court granted or denied a stay, or even if the Order made no provision at all as to a stay. *Cf. White*, 455 U.S. 445, 452 n.14 ("If a merits judgment is final and appealable prior to the entry of a fee award, then the remaining fee issue must be 'collateral' to the decision on the merits. Conversely, the collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a merits judgment as 'final' and 'appealable.'").

32. The September 1 Motion seeking only a stay of the August 4 Order pending appeal was not a Rule 59 motion, the deadline to appeal the August 4 Order

was October 3, 2022, and the notice of appeal filed on October 12 was untimely and could not invoke this Court's jurisdiction.

33. The Securities and Exchange Commission has informed the Receiver that the Commission takes no position at this time on his motion to dismiss the appeal for lack of jurisdiction.

WHEREFORE, Appellee Jonathan E. Perlman, as Receiver, seeks an order dismissing this appeal for lack of jurisdiction because Appellants did not file a notice of appeal with sixty days of the entry of the August 4 Order that is the subject of this appeal.

By: /s/*W. Barry Blum*

W. Barry Blum, Esq. (FBN 379301)
bblum@gjblaw.com
Gregory M. Garno, Esq. (FBN 87505)
ggarno@gjblaw.com
GENOVESE JOBLOVE & BATTISTA, P.A.
100 S.E. Second Street, 44th Floor
Miami, Florida 33131
Tel.: (305) 349-2300
Fax: (305) 349-2310
Counsel for Appellee Jonathan E. Perlman, Court-Appointed Receiver

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this motion complies with the length limitations of FED. R. APP. P. 27(d)(1), (2), because it contains 4,574 words, excluding the parts of the motion exempted by FED. R. APP. P. 27(d)(2) and 32(a)(7)(B)(iii); and this motion complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this computer-generated motion has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font size.

By: */s/ W. Barry Blum*
Of Counsel

CERTIFICATE OF SERVICE

I certify that on November 30, 2022, I electronically filed the foregoing document with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit through the Court's CM/ECF system. Service on counsel of record will be accomplished through the Court's CM/ECF system.

By: */s/ W. Barry Blum*
Of Counsel