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 RECEIVER'S RESPONSE TO JURISDICTIONAL QUESTION

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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.

APPELLEE RECEIVER'S RESPONSE TO JURISDICTIONAL QUESTION

Jonathan E. Perlman, the court-appointed receiver ("Receiver") over six entities (collectively, "Receivership Entities"), responds to the Court's Jurisdictional Question posed on November 6, 2022.[1] The Court's Jurisdictional Question asks "whether the district court's (1) August 4, 2022 order . . . and (2) September 2, 2022 order . . . are immediately appealable." As explained in further detail below, the August 4, 2022, order ("August 4 Order") approving the Receiver's distribution plan for investors was, under this Court's precedent, immediately appealable under the collateral order doctrine. But the September 2, 2022, order ("September 2 Stay Order") was not an appealable order. It did not grant or deny any substantive relief, or substantively affect any relief granted by the district court in any prior order; and it did nothing more than grant (or extend) a temporary stay of the August 4 Order pending an expected appeal.[2]

[1] The Receivership Entities are: 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.

[2] Because the August 4 Order was appealable, this Court's jurisdiction to review that order required that a notice of appeal be filed within sixty days from the date the order was entered—or by October 3, 2022. No notice of appeal was filed until October 12. Thus, for reasons not directly raised by the Jurisdictional Question, this Court lacks jurisdiction over the appeal because no timely notice of appeal was filed. The Receiver filed a separate motion to dismiss this appeal for lack of jurisdiction contemporaneously with this submission.

Background and Proceedings Below

This case stems from an SEC investigation into the fraudulent revenue recognition practices of the Receivership Entities. The SEC filed its Complaint on May 11, 2020 against five of the six Receivership Entities. Dkt. No. 1. The district court appointed Jonathan E. Perlman (the "Receiver") as receiver over the defendants, and a sixth entity, TCA Global Lending Corp., was later added to the receivership. The district court's receivership order:

> empowered the Receiver to "use reasonable efforts to determine the nature, location and value of all property interests of the Receivership Entities . . . (collectively, the 'Receivership Estates')[;]" to "take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Entities[;]" and to "use Receivership Property for the benefit of the Receivership Estates, making payments and disbursements and incurring expenses as may be necessary or advisable[.]"

Dkt. No. 284, at 8 (citing Dkt. No. 5 ¶ 7).

Two days after the district court appointed the Receiver, a Cayman Islands court appointed Eleanor Fisher and Tammy Fu, in their capacities as Foreign Representatives of Relief Defendant TCA Global Credit Fund, Ltd. ("Appellants"), as liquidators over TCA Global Credit Fund, Ltd., one of the Receivership Entities. *See In re TCA Global Credit Fund, Ltd.*, No. 21-11513, Dkt. No. 1, at 18, *et seq.* (Bankr. S.D. Fla.).

When the Receiver was appointed in May 2020, the Receivership Entities had $287,683 in cash. Dkt. No. 284, at 10. The Receiver marshalled the Receivership

Entities' assets so that, when the Receiver filed his proposed distribution plan in February 2022, the Receivership Entities had more than $67 million in the bank and also held "four types of non-cash assets." *Id.* (citing Dkt. No. 208, at 24-26). By July 15, 2022, the Receiver identified 1,485 investors in the Receivership Entities. The Receiver also identified 27 non-investor creditors of the Receivership Entities with possible liquidated claims of approximately $2,100,000.

On February 28, 2022, the Receiver filed a Motion for Approval of Distribution Plan and First Interim Distribution and sought an order approving the Receiver's Proposed Distribution Plan ("Distribution Plan"). Dkt. No. 208. The Distribution Plan established different investor categories (largely based on any pre-Receivership redemptions and the sufficiency of supporting information provided to the Receiver), and it provided for a First Interim Distribution of "$55,452,651 on a pro-rata basis to the 764 Unsubordinated Net Losers whose losses exceed 76.95% of their aggregate cash investment. Of those investors, 589 who "have not yet recovered any of their investments . . . would receive a distribution equal to 23.05% of their actual cash loss" and "[t]he remaining 175 would receive a distribution that, combined with their previous redemptions, would restore 23.05% of their investments." Dkt. No. 284, at 11-12. The Distribution Plan also implemented a pro rata "rising tide" distribution structure so 156 Unsubordinated Net Losers that already received payments from the Receivership Entities in excess of 23.05% of

their investments would not receive any distribution until all Unsubordinated Net Losers reached that threshold amount. *Id.*

The court invited and received responses and seven objections to the Distribution Plan [Dkt. No. 284, at 2], and in addition, a third party ("Manning Creditor") asserted an objection based upon a disputed unliquidated litigation tort claim valued by the Manning Creditor at "more than $10 million." *Id*. at 32 (citing Dkt. No. 237 ¶ 9). The district court held a hearing on the motion and objections on July 11, 2022. Then, on August 4, 2022, the district court entered its detailed and well-reasoned 34-page August 4 Order [Dkt. No. 284] approving the Receiver's Distribution Plan and the First Interim Distribution.

As outlined in the August 4 Order, of the seven timely objections, four were mooted by agreements between the objectors and Receiver (the objections at Dkt. Nos. 228, 238, 244, and 242), the objections of Appellants (Dkt. No. 240) and certain unpaid subscribers (Dkt. No. 243) arguing that Cayman law applied were overruled. The court deferred ruling on the objection filed by the Manning Creditor, who was not an investor, but because disputed creditor claims do not prevent approval of a distribution, the court ultimately approved of the Receiver's distribution plan. Dkt. No. 284, at 30-34. The Receiver was also ordered to file a separate distribution plan for creditors within thirty days, and the court anticipated an appeal and stayed its order accordingly. *Id*. The court also discussed and rejected the untimely objection

of Peter van der Linde (Dkt. No. 270), which challenged the "rising tide" distribution methodology. Neither the unpaid subscribers, Mr. van der Linde, nor the Manning Creditor filed a notice of appeal of the August 4 Order.

Although no party requested a stay pending appeal, the last line of the August 4 Order stated: "This Order is stayed until September 6, 2022 to allow the filing of an interlocutory appeal." *Id.* at 34.

On September 1, 2022, Appellants filed in the district court a motion 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." Dkt. No. 298. The only relief sought in that motion was a further stay pending appeal of the August 4 Order until October 13, 2022 which Appellants acknowledged to the district court was ten days after the deadline to appeal the August 4 Order. There was no objection to the extended stay, and, on September 2, 2022, the district court entered an order staying the August 4 Order until October 13, 2022 pending the filing of an appeal ("September 2 Stay Order"). Dkt. No. 299.

Appellants filed a notice of appeal on October 12, 2022, sixty-eight days after entry of the August 4 Order. Dkt. No. 307.

Legal Discussion

I. The August 4, 2022 Order approving the Distribution Plan was appealable under the collateral order doctrine

Appellants did not timely appeal the district court's August 4 Order approving the Distribution Plan. Dkt. No. 307. Under the collateral order doctrine, orders approving a receiver's distribution plan are immediately appealable in this Circuit. *SEC v. Torchia*, 922 F.3d 1307, 1315-16 (11th Cir. 2019). Thus, had a timely notice of appeal been filed as to the August 4 Order, this Court would have had jurisdiction to hear this appeal. But, no notice of appeal was timely filed; so, despite that the August 4 Order was appealable, not timely appeal was filed, and this Court does not have jurisdiction over this appeal.

Although "'final decisions' typically are ones that trigger the entry of judgment," certain "orders that are 'collateral to' the merits of an action and 'too important' to be denied immediate review" are appealable. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). Under the collateral order doctrine, a "narrow class of decisions that do not terminate the litigation" may nonetheless be "treated as 'final'" under § 1291. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (citing *Cohen*, 337 U.S. at 541). The collateral order doctrine is thus a "practical construction," *id.*, of the final decision rule that permits courts of appeals to exercise jurisdiction over a "small class" of orders that "finally determine claims

of right separable from, and collateral to, rights asserted in the action," *Cohen*, 337 U.S. at 546.

To fall within the collateral order doctrine and be immediately appealable, a non-final order must satisfy three conditions. *Torchia*, 922 F.3d at 1315 (citing *Plaintiff A v. Schair*, 744 F.3d 1247, 1252–53 (11th Cir. 2014)). The order must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the case; and (3) effectively be unreviewable on appeal from a final judgment. *Id*.

In *Torchia*, this Court explicitly extended the collateral order doctrine to district court orders approving a receiver's distribution plan. *Id*. (citing *SEC v. Wealth Mgmt. LLC*, 628 F.3d 323, 330–31 (7th Cir. 2010); *SEC v. Forex Asset Mgmt.*, 242 F.3d 325, 330–31 (5th Cir. 2001); *SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 666–67 (6th Cir. 2001)); *see also CFTC v. U.S. Ventures LC*, 630 F. App'x 783, 786 (10th Cir. 2015) (order denying individual investor's claim against receivership estate is appealable as a collateral order).

Following the Fifth, Sixth, and Seventh Circuits, this Court articulated why a district court order approving a receiver's distribution plan fit squarely within the collateral order doctrine:

> First, it conclusively determines the manner in which the receivership assets should be distributed. Second, it resolves an important issue regarding distribution of the assets, which is separate from the merits of the SEC's complaint against [the defendant]. Third, it is effectively

> unreviewable on appeal because the assets from the receivership will be distributed, and likely unrecoverable, long before the action brought by the SEC is subject to appellate review.

Torchia, 992 F.3d at 1315-16 (quoting *Forex*, 242 F.3d at 330); *see U.S. Ventures*, 630 F. App'x at 786 ("Interlocutory review makes sense out of fairness . . . and as a matter of judicial economy.").

As in *Torchia*, the August 4 Order clearly satisfied the conditions of the collateral order doctrine. It conclusively determined how more than $55 million of receivership assets will be distributed to investors and also, by approving the "rising tide" construct, established how any future distributions to investors will be made. The August 4 Order also resolved an important issue regarding distribution of receivership assets that is entirely separate from the merits of the SEC's complaint against the Receivership Entities. Indeed, the SEC's claims against the Receivership Entities were adjudicated in a Judgment of Permanent Injunction and Other Relief (Dkt. No. 7), entered on May 12, 2020, so the August 4 Order would effectively have been unreviewable on appeal because the $55,452,651 in assets being distributed (to investors around the world) will likely, indeed almost certainly, not be recoverable before there is a final order winding up the receivership that might be subject to appellate review. Under *Torchia*, the August 4 Order squarely fits within the

collateral order doctrine. So, the answer to the first Jurisdictional Question is YES: the August 4 Order was immediately appealable.[3]

The district court's deferral of the Manning Creditor's objection in the August 4 Order does not deprive this Court of jurisdiction under the collateral order doctrine. *See, e.g.*, *SEC v. Torchia*, 1:15-CV-3904-WSD, 2017 WL 4456905, at *14 (N.D. Ga. Aug. 7, 2017) ("The Court defers consideration of Mr. Berman's claim until the claims in Hill v. Guess are adjudicated."). The August 4 Order approved the Receiver's Distribution Plan for investors under a "rising tide" model, and it authorized the Receiver to distribute $55.4 million to certain (but not all) investors. Neither the viability nor amount of the Manning Creditor's claim, as opposed to investor claims, is determined by the August 4 Order. Whether Manning's claim is ultimately allowed has no effect on the Distribution Plan that is the subject of this appeal, and any distribution to the Manning Creditor will be under a separate creditor's plan, so the deferral of the objection would not deprive this Court of jurisdiction to review the August 4 Order under the collateral order doctrine.

Indeed, the August 4 Order is a final determination on the method of distribution to investors that explicitly approves the Receiver's decision to employ

[3] Again, however, no notice of appeal was timely filed as to the August 4 Order. So, while the August 4 Order was appealable, this Court does not have jurisdiction over this appeal because Appellants did not file their notice of appeal within sixty days of entry of the August 4 Order.

the "rising tide" methodology, and it conclusively determines "how the recovered assets in the receivership will be distributed." *Wealth Mgmt. LLC*, 628 F.3d at 330.[4] The August 4 Order also authorizes the Receiver to distribute $55.4 million to investors. The district court's decision to defer ruling on the Manning Creditor's objection has no impact on the finality of the August 4 Order approving a distribution of $55.4 million to investors under the collateral order doctrine.

II. The September 2, 2022 Order is not Immediately Appealable for Any Reason

Unlike the August 4 Order, the September 2 Stay Order was not appealable. Under the final judgment rule, courts of appeals have jurisdiction over "appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. "However, there are narrow exceptions to the finality rule." *LaTele Television, C.A. v. Telemundo Commc'ns Grp., LLC*, 9 F.4th 1349, 1355 (11th Cir. 2021). Four such exceptions are found in: (a) 28 U.S.C. § 1292(a)(2); (b) the collateral order doctrine; (c); the practical finality doctrine; and (d) the marginal finality doctrine. *See In re F.D.R. Hickory House, Inc.*, 60 F.3d 724, 725 (11th Cir. 1995). None of these limited

[4] Per the district court's instructions, the Receiver subsequently filed a creditor distribution plan to separately address creditor claims. The Manning Creditor's objection to the investor distribution plan is appropriately addressed to and resolved by that separate plan.

exceptions work to exclude the September 2 Stay Order from the application of the final judgment rule.

A. Traditional Finality

On September 1, 2022, Appellants filed in the district court a motion titled: "Foreign Representatives' Motion to Alter or Amend Order Dated August 4, 2022 (Dkt. No. 284) to Extend Stay Pending Appeal, and Accompanying Memorandum of Law." Dkt. No. 298 ("September 1 Motion"). The September 1 Motion sought only to extend the stay initially provided for in the August 4 Order to October 13, 2022.

Functionally and in substance, the September 1 Motion was a motion to extend a stay pending appeal under FED. R. APP. P. 8(a). Although filed under FED. R. CIV. P. 59(e), the September 1 Motion did not seek any relief from the underlying judgment, *i.e.*, the August 4 Order. *See Finch v. City of Vernon*, 845 F.2d 256, 259 n.3 (11th Cir. 1988) (explaining that Rule 59 motions must seek "reconsideration of substantive issues resolved in the judgment"); *Osterneck v. E.T. Barwick Indus.*, 825 F.2d 1521, 1525 (11th Cir. 1987) (to be a Rule 59 motion, a filing must ask the "district court to substantively reconsider its original judgment").[5] Instead, the September 1 Motion sought only "to alter or amend the Court's [August 4] Order

[5] This issue is explained more fully in the Receiver's contemporaneously-filed motion to dismiss appeal for lack of jurisdiction.

. . . *solely* to extend the Stay Provision of that Order" and expressly opposed entry of an amended order that would initiate a new appeal period. Dkt. No. 298 at 1-2 (emphasis added).

The district court's September 2 Stay Order made clear that Appellants sought, and the court was considering and granting, only an extended stay pending appeal:

> **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**.

Because no such relief was requested in the September 1 Motion, the September 2 Stay Order did not adjudicate the substantive rights of any party or alter or amend the August 4 Order. The September 2 Stay Order was thus not a ruling

disposing of a timely Rule 59(e) motion that was appealable as a "final judgment" under 28 U.S.C. § 1291.

The September 2 Stay Order merely extends a stay for thirty-seven days. An order extending a stay cannot end a litigation on the merits and is not a final judgment. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988) (Supreme Court has "long has stated that as a general rule a district court's decision is appealable under [§ 1291] only when the decision ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.").

B. 28 U.S.C. § 1292(a)(2)

Courts of appeals may review "[i]nterlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property." 28 U.S.C. § 1292(a)(2). "Congress decided to make interlocutory orders appointing receivers appealable under § 1292(a)(2) because they curtail property rights in a way that may cause great harm." *United States v. Solco I, LLC*, 962 F.3d 1244, 1250 (10th Cir. 2020). "Congress, however, did not intend § 1292(a)(2) to burden the appellate courts with ongoing supervision of every action a receiver might be ordered to take." *Id.* (alteration adopted) (ellipsis and internal quotation marks omitted).

Courts "have narrowly construe[d] § 1292(a)(2) 'to permit appeals only from the three discrete categories of receivership orders specified in the statute, namely

[1] orders appointing a receiver, [2] orders refusing to wind up a receivership, and [3] orders refusing to take steps to accomplish the purposes of winding up a receivership.'" *Id.* (quoting *In re Pressman-Gutman Co.*, 459 F.3d 383, 393 (3d Cir. 2006)). As the September 2 Stay Order does none of these things, it does not provide an independent grant of appellate jurisdiction.

C. Collateral-Order Doctrine

A temporary stay until an appeal is filed also does not conclusively resolve any issue to be appealable under the collateral order doctrine. *See Plaintiff A v. Schair*, 744 F.3d 1247, 1252 (11th Cir. 2014). A temporary stay cannot be characterized as an "important issue" that "would be unreviewable on appeal from the final judgment." The stay is both temporary and assumes the taking of an appeal on which a full stay pending appeal can be sought. The parties to the appeal would then have to litigate a full stay pending appeal. As such, orders granting a temporary stay pending appeal cannot be included in the "small set of prejudgment orders that are 'collateral to' the merits of an action and 'too important' to be denied immediate review. *Cohen*, 337 U.S. at 546.

D. Practical-Finality Doctrine

The doctrine of practical finality also is inapplicable. In order for the doctrine to apply to an interlocutory order, the order must either (1) "decide[] the right to the property in contest, and direct[] it to be delivered up by the defendant to the

complainant," or (2) "direct[] it to be sold, or direct[] the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution." *See Forgay v. Conrad*, 47 U.S. (6 How.) 201, 204 (1848). In addition, the interlocutory order must "subject[] the losing party to irreparable harm if appellate review is delayed until conclusion of the case." *F.D.R. Hickory House*, 60 F.3d at 727 (quotation marks omitted).

First, the September 2 Stay Order does not "direct immediate execution." *Acheron Capital*, 22 F. 4th at 992; *F.D.R. Hickory House*, 60 F.3d at 726. The September 2 Stay Order stays and preserves the status quo for an additional thirty-seven days to enable an appeal to be lodged. Second, the September 2 Stay Order does not determine any right to any property and courts have interpreted the doctrine as only applying to transfers of real property. *See S.E.C. v. Olins*, 541 F. App'x 48, 51 (2d Cir. 2013) (determining that the practical-finality doctrine does not apply to an order directing a receiver to pay receivership funds "because the challenged orders do not involve a transfer of real property or chattels") (internal quotation marks omitted).

E. Marginal Finality

Lastly, the doctrine of marginal finality does not apply to the September 2 Stay Order because an order extending a stay for thirty-seven days pending the filing of an appeal presents no "unique facts" or "unsettled issue of national significance."

See Acheron Capital, 22 F.4th at 992) (finding the Supreme Court limited the marginal finality doctrine to the unique facts of *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153–54 (1964)).

Conclusion

The August 4 Order was an appealable order under the collateral order doctrine, and an appeal from that order had to be filed within sixty days of August 4. While this Court would have had jurisdiction to consider an appeal of the August 4 Order under the collateral order doctrine, Appellants did not timely invoke that jurisdiction by filing a notice of appeal by October 3, 2022—sixty days after entry of the August 4 Order. No notice of appeal was filed until October 12, 2022, well after the sixty-day deadline under 28 U.S.C. § 2107.

Moreover, the September 2 Stay Order merely extended a temporary stay pending the filing of an appeal, and it was not an appealable order. Nor, as detailed in the Receiver's motion to dismiss appeal filed contemporaneously with this submission, did the September 2 Stay Order affect the October 3, 2022, deadline to appeal the August 4 Order. Specifically, the September 2 Stay Order was not an order disposing of a Rule 59(e) motion, because Appellants' September 1 Motion was not a "motion to alter or amend the judgment under Rule 59" for purposes of FED. R. APP. P. 4(a)(4)(A)(iv). For the reasons stated above, and as shown in the

Receiver's motion to dismiss for lack of jurisdiction filed together with this statement, the Court should dismiss this appeal for lack of jurisdiction.

Dated: November 30, 2022
Miami, Florida

Respectfully Submitted,

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Receiver for the Receivership Entities

-and-

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CERTIFICATE OF COMPLIANCE

I certify that this Response to Jurisdictional Question complies with the type-volume limitation of FED. R. APP. P. 32 because it contains 3976 words, excluding the parts exempted by FED. R. APP. P. 32(f).

I also certify that this Response to Jurisdictional Question 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 it has been prepared in proportionally-spaced, Times New Roman at 14-point typeface.

/s/Gregory M. Garno
Gregory M. Garno

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.

/s/Gregory M. Garno
Gregory M. Garno