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 U.S. District Court for
the Southern District of Florida
Hon. Cecilia M. Altonaga
No. 1:20-cv-21964-CMA

SECURITIES AND EXCHANGE COMMISSION'S RESPONSE TO JURISDICTIONAL QUESTION

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, Appellee Securities and Exchange Commission submits the following list of all persons and entities known to the Commission to have an interest in the outcome of this appeal:

1. Altonaga, Hon. Cecilia M., U.S. District Court Judge (S.D. Fla.);
2. AW Exports Pty Ltd., claimant;
3. Bado, Jean-Pierre, counsel for appellee Jonathan E. Perlman;
4. Baker & McKenzie LLP, counsel for appellants;
5. Banque Pictet & Cie, S.A., petitioner in Cayman Islands liquidation proceeding of relief defendant TCA Global Credit Fund, Ltd.;
6. Bast Amrom LLP, counsel for claimants Fide Funds Growth, Tritium Fund, Hsueh-Feng Tseng, and Armand Zohari;
7. Bast, Jeffrey P., counsel for claimants Fide Funds Growth, Tritium Fund, Hsueh-Feng Tseng, and Armand Zohari;
8. Battista, Paul J., counsel for appellee Jonathan E. Perlman;
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., counsel for appellants;

14. Blum, W. Barry, counsel for appellee Jonathan E. Perlman;

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, counsel for objector Credit Suisse;

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, objector;

23. Cuccia II, Richard A., counsel for claimants David Manning, Paycation Travel, Inc., and Xstream Travel, Inc.;

24. Cuccia Wilson, PLLC, counsel for claimants David Manning, Paycation Travel, Inc., and Xstream Travel, Inc.;

25. Dodd, John R., counsel for appellants;

26. Dorchak, Joshua, counsel for objector Clearstream Banking S.A.;

27. EY Cayman Ltd.;

28. Fide Funds Growth, claimant;

29. Fisher, Eleanor, appellant and foreign representative of relief defendant TCA Global Credit Fund, Ltd.;

30. Friedman, Michael A., counsel for appellee Jonathan E. Perlman;

31. Fu, Tammy, appellant and foreign representative of relief defendant TCA Global Credit Fund, Ltd.;

32. Garno, Gregory M., counsel for appellee Jonathan E. Perlman;

33. Genovese, John H., counsel for appellee Jonathan E. Perlman;

34. Genovese, Joblove & Batista, P.A., counsel for appellee Jonathan E. Perlman;

35. Hall, Jason, counsel for objector Credit Suisse;

36. Halsey, Brett M., counsel for appellee Jonathan E. Perlman;

37. Harmon, Heather L., counsel for appellee Jonathan E. Perlman;

38. Hill, Ezekiel L., counsel for appellee Securities and Exchange Commission;

39. Jacobs, Eric D., counsel for appellee Jonathan E. Perlman;

40. Kaplan Saunders Valente & Beninati, LLP, counsel for claimants AW Exports Pty Ltd., Warwick Broxom, and Jonathan J. Kaufman;

41. Kaufman, Jonathan J., claimant;

42. Kellogg, Jason K., counsel for claimants Todd Benjamin and Todd Benjamin International, Ltd.;

43. Leggett, Jaime B., counsel for claimants Fide Funds Growth, Tritium Fund, Hsueh-Feng Tseng, and Armand Zohari;

44. Levine Kellogg Lehman Scheider + Grossman LLP, counsel for claimants Todd Benjamin and Todd Benjamin International, Ltd.;

45. Manning, David, claimant;

46. McIntosh, Elizabeth G., counsel for appellee Jonathan E. Perlman;

47. Moot, Stephanie N., counsel for appellee Securities and Exchange Commission;

48. Morgan, Lewis & Bockius LLP, counsel for objector Clearstream Banking S.A.;

49. Paycation Travel, Inc., claimant;

50. Pearson, Katherine L.B., counsel for appellants;

51. Perlman, Jonathan E., appellee and court-appointed receiver for the receivership entities;

52. Roldán Cora, Javier A., counsel for objector Clearstream Banking S.A.;

53. Securities and Exchange Commission, appellee;

54. TCA Fund Management Group Corp., defendant and receivership entity;

55. TCA Global Credit Fund GP, Ltd., defendant and receivership entity;

56. TCA Global Credit Fund, LP, relief defendant and receivership entity;

57. TCA Global Credit Fund, Ltd., relief defendant and receivership entity;

58. TCA Global Credit Master Fund, LP, relief defendant and receivership entity;

59. Todd Benjamin International, Ltd., claimant;

60. Tritium Fund, claimant;

61. Tseng, Hsueh-Feng, claimant;

62. Valente, Charles A., counsel for claimants AW Exports Pty Ltd., Warwick Broxom, and Jonathan J. Kaufman;

63. van de Linde, Peter, claimant;

64. Xstream Travel, Inc., claimant; and

65. Zohari, Armand, claimant.

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

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

SECURITIES AND EXCHANGE COMMISSION'S
RESPONSE TO JURISDICTIONAL QUESTION

The Securities and Exchange Commission submits this response to the Court's November 16, 2022 jurisdictional question. In the Commission's view, the district court's August 4, 2022 and September 2, 2022 orders are immediately appealable.

I. Background

On May 11, 2020, the Commission brought this civil law enforcement action against defendants TCA Fund Management Group Corp. ("TCA"), a Florida corporation, and TCA Global Credit Fund GP, Ltd. ("GP"), a Cayman Islands company, for violations of the federal securities laws. Dkt. 1.

Relief defendants TCA Global Credit Fund, LP ("Feeder Fund LP"), a Cayman Islands limited partnership, and TCA Global Credit Fund, Ltd. ("Feeder Fund Ltd."), a Cayman Islands company, raised money from investors for relief defendant TCA Global Credit Master Fund, LP ("Master Fund"), a Cayman Islands limited partnership, which provided financing and investment banking services. TCA served as an investment advisor to Feeder Fund LP, Feeder Fund Ltd., and Master Fund and was compensated based on their net asset values. GP served as the general partner of Master Fund and Feeder Fund LP and was compensated based on Master Fund's profitability. The Commission alleged that TCA and GP violated the federal securities laws by engaging in fraudulent revenue recognition

practices to inflate the net asset values of Feeder Fund LP, Feeder Fund Ltd., and Master Fund, and the profitability of Master Fund. Dkt. 1.

Also on May 11, 2020, the Commission moved—without opposition—for entry of a judgment (including a permanent injunction) against the defendants and for appointment of a receiver over the defendants and the relief defendants. Dkt. 3, 6. The district court entered the judgment and appointed a receiver. Dkt. 5, 7.

Thereafter, the district court recognized the Cayman Islands liquidation proceeding of Feeder Fund Ltd. as a foreign nonmain proceeding and appellants Eleanor Fisher and Tammy Fu, the joint official liquidators of Feeder Fund Ltd., as foreign representatives thereof. *See* Dkt. 147.

On February 28, 2022, the receiver moved for approval of a distribution plan and an initial distribution thereunder of $55,452,651. Dkt. 208. The proposed distribution plan provided for funds to be distributed to all unsubordinated investors on a *pro rata*, rising tide basis. A number of entities and individuals filed responses or objections thereto. *See* Dkt. 228, 237, 238, 240, 242, 243, 244, 270.

Claimants Paycation Travel, Inc., Xstream Travel, Inc., and David Manning objected (the "Manning Objection") on the ground that the proposed initial distribution would leave the receivership without sufficient assets to satisfy other claims, including potential future judgments against the receivership entities. Dkt. 237.

Appellants Fisher and Fu objected on the grounds that, *inter alia*, the distribution should be governed by Cayman law, under which "investors who have validly issued notices of the redemption of their equity interests with a redemption date prior to the earlier of the suspension of redemptions or the commencement of liquidation are treated as creditors, and in such capacity hold priority over investors who have not so redeemed and are treated as shareholders." Dkt. 240 at 7. Fisher and Fu claimed that in applying principles of equity rather than Cayman law, the proposed distribution plan "ignore[d] this statutory distinction," thereby "depriving [certain claimants] of their statutory priority as creditors." Dkt. 240 at 7-8.

On July 11, 2022, the district court held a hearing on the receiver's motion. Dkt. 279. On August 4, 2022, the district court entered an order granting the receiver's motion in part. Dkt. 284. The district court denied Fisher and Fu's objection, concluding that it had "not persuade[d] the Court to adopt Cayman law," which "would produce a harsh and unequal result without a proper basis." Dkt. 284 at 13-26. And the district court "defer[red] ruling on the Manning Objection until appeals of [the August 4, 2022 order] have been fully resolved" because the district court was "in no position to predict the status of the [r]eceivership [e]state post-appeal." Dkt. 284 at 32-33. The district court noted that "[d]isputed claims against a receivership estate do not prevent a court from authorizing a distribution, provided the receiver sets aside funds sufficient to cover those claims" and that

"[h]ow much a receiver must set aside is fact dependent and may be subject to modification in the face of changing circumstances." Dkt. 284 at 32-33. Finally, the district court stayed its August 4, 2022 order "until September 6, 2022 to allow the filing of an interlocutory appeal." Dkt. 284 at 34 (emphasis omitted).

On September 1, 2022, Fisher and Fu moved under Federal Rule of Civil Procedure 59(e) for the district court to alter or amend its August 4, 2022 order to extend the stay thereof until October 13, 2022 to permit "the full 60-day period afforded them to perfect their appeal to the Eleventh Circuit under Fed. R. App. P. 4(a)(1)(B)(ii), plus an additional ten (10) days within which to seek a stay pending such appeal pursuant to Fed. R. App. P. 8." Dkt. 298 at 4. On September 2, 2022, the district court granted the motion, staying its August 4, 2022 order until October 13, 2022. Dkt. 299.

On October 12, 2022, Fisher and Fu filed a notice of appeal of the district court's "August 4, 2022 Order . . . as amended by the September 2, 2022 Order." Dkt. 307.

On November 16, 2022, this Court posed a jurisdictional question, asking the parties to address whether each of the district court's August 4, 2022 order and September 2, 2022 order "is immediately appealable under 28 U.S.C. § 1292(a)(2), the collateral order doctrine, the doctrine of practical finality, or as [a] final order[] disposing of a discrete postjudgment proceeding."

II. Discussion

A. The August 4, 2022 Order

i. Section 1292(a)(2)

Section 1292(a)(2) provides that "the courts of appeals shall have jurisdiction of appeals from . . . [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).

As this Court recognized earlier this year, its "predecessor . . . interpreted section 1292(a)(2) as 'provid[ing] for appeals from interlocutory orders which take steps to accomplish the purpose of receiverships such as directing the sale or disposal of property.'" *Acheron Cap., Ltd. v. Mukamal*, 22 F.4th 979, 993 (11th Cir. 2022) (quoting *United States v. "A" Mfg. Co.*, 541 F.2d 504, 505-06 (5th Cir. 1976). In *"A" Manufacturing*, this Court's predecessor concluded that an order directing a receiver to sell receivership property was appealable under Section 1292(a)(2). 541 F.2d at 505-06.

In *Acheron*, however, this Court recognized that, "*'A' Manufacturing* is in significant tension with even earlier decisions of our predecessor Court." 22 F.4th at 993*; see Netsphere, Inc. v. Baron*, 799 F.3d 327, 334 (5th Cir. 2015) (finding that *"A" Manufacturing* "conflicts with other, previous panel decisions").

Specifically, if *"A" Manufacturing* is construed as holding that Section 1292(a)(2) permits review of all interlocutory orders which take steps to accomplish the purpose of receiverships, it is "irreconcilable with earlier precedent because [this Court's predecessor] held that it did not have jurisdiction over two such interlocutory orders." *Acheron*, 22 F.4th at 993.[1] If, however, *"A" Manufacturing* is construed as holding only that Section 1292(a)(2) permits review of interlocutory orders directing the disposal of property, "the decision could at least arguably be read as not entirely irreconcilable because [the earlier precedent at issue did not] involve[] such an order." *Id.*

In *Acheron*, this Court did not "decide between reconciling *'A' Manufacturing* and affording the decision no precedential force at all because [this Court] lack[ed] jurisdiction . . . under either approach." *Id.* at 994. Should this Court now construe *"A" Manufacturing* as holding that Section 1292(a)(2) permits review of interlocutory orders directing the disposal of property by a receiver, the August 4, 2022 order approving the distribution plan and directing that distributions be made would be immediately appealable under Section 1292(a)(2). Such an interpretation of Section 1292(a)(2), however, would be at odds with that

[1] Those two interlocutory orders were (1) an order "requiring appellants to turn over certain bonds to the [r]eceiver in a receivership proceeding," *Wark v. Spinuzzi*, 376 F.2d 827, 827 (5th Cir. 1967), and (2) an order "authorizing the . . . receiver . . . to execute a lease . . . upon [receivership] property," *Belleair Hotel Co. v. Mabry*, 109 F.2d 390, 390 (5th Cir. 1940). *See Acheron,* 22 F.4th at 993.

of other courts of appeals. *See, e.g., Netsphere*, 799 F.3d at 332 ("[W]e interpret the verb phrase 'refusing orders' to modify both the infinitive phrase 'to wind up receiverships' and the infinitive phrase 'to take steps to accomplish.'"); *Yufa v. TSI, Inc.*, 730 F. App'x 905, 908 (Fed. Cir. 2018) (same); *United States v. Antiques Ltd. P'ship*, 760 F.3d 668, 672 (7th Cir. 2014) (same); *FTC v. Peterson*, 3 F. App'x 780, 782 (10th Cir. 2001) (same); *SEC v. Black*, 163 F.3d 188, 195 (3d Cir. 1998) (same); *State St. Bank & Tr. Co. v. Brockrim, Inc.*, 87 F.3d 1487, 1490-91 (1st Cir. 1996) (same); *SEC v. Am. Principals Holdings, Inc.*, 817 F.2d 1349, 1351 (9th Cir. 1987) (same); *SEC v. Am. Bd. of Trade, Inc.*, 829 F.2d 341, 344 (2d Cir. 1987) (same).

ii. The Collateral Order Doctrine

Under the collateral order doctrine, this Court has jurisdiction "to review a district court order that (1) conclusively determines the question in dispute, (2) resolves an important issue completely separate from and collateral to the merits of the action, and (3) would effectively be unreviewable on appeal from the final judgment." *SEC v. Torchia*, 922 F.3d 1307, 1315 (11th Cir. 2019). In *Torchia*, a Commission civil law enforcement action, this Court concluded that "[a] district court's order approving the receiver's distribution plan is appealable as a collateral order." *Id.* As this Court explained, such an order "'conclusively determines the manner in which the receivership assets should be distributed,'" "'resolves an

important issue regarding distribution of the assets, which is separate from the merits of the SEC's complaint against [the defendant],'" and "'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.'" *Id.* at 1315-16 (quoting *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 330 (5th Cir. 2001)).

Thus the August 4, 2022 order is immediately appealable under the collateral order doctrine.[2]

iii. The Doctrine of Practical Finality

The doctrine of practical finality "permits review of an order that decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain

[2] The August 4, 2022 order deferred resolution of the Manning Objection because the district court decided that it would not determine the "proper set-aside amount" until appeals of the August 4, 2022 order are resolved. Dkt. 284 at 33. That the Manning Objection is unresolved, however, does not preclude application of the collateral order doctrine to the August 4, 2022 order, which was nonetheless a final determination of the distribution scheme. *See* Dkt. 284 at 34 ("[The Court] approves the Receiver's . . . distribution scheme. At the same time, the Court declines to pass on how much the Receiver must set aside for future claims until this matter has been fully litigated on appeal."). Indeed, in *Torchia*, this Court found that the collateral order doctrine conferred jurisdiction over an order approving a receiver's distribution plan for the assets of a receivership entity despite the order deferring resolution of a particular claim against that receivership entity (and not addressing the assets of other receivership entities). *See SEC v. Torchia*, No. 1:15-CV-3904-WSD, 2017 WL 4456905, at *14 (N.D. Ga. Aug. 7, 2017).

sum of money to the complainant." *Acheron*, 22 F.4th at 991 (cleaned up). "To fall within the rule, the order must also direct immediate execution and subject the losing party to irreparable harm if appellate review is delayed until conclusion of the case." *Id.* at 992 (cleaned up).

In approving a plan of distribution and an initial distribution, the August 4, 2022 order decided the right to the property in contest, namely receivership assets. The district court noted, however, that if the order was appealed, it would "stay [the order] pending resolution of the appeal." Dkt. 284 at 33; *see* Dkt. 286 at 9-10 (receiver's August 8, 2022 status report to the district court noting that "[i]f an objector files . . . an appeal, the first interim distribution is likely to be delayed until such time as the appeal is adjudicated"). Such a stay would foreclose any possibility of irreparable harm. *See Acheron*, 22 F.4th at 992 (concluding that the doctrine of practical finality is inapplicable where a stay will prevent irreparable harm). Thus the August 4, 2022 order is not immediately appealable under the doctrine of practical finality.

iv. Final Order Disposing of a Discrete Postjudgment Proceeding

This Court has jurisdiction over "appeals from . . . final decisions of . . . district courts." 28 U.S.C. § 1291. That includes certain "postjudgment decisions." *Acheron*, 22 F.4th at 986 (cleaned up). A postjudgment decision is final if "treat[ing] the postjudgment proceeding as a free-standing litigation," "the

order disposes of all the issues raised in the motion that initially sparked the postjudgment proceedings," and "is apparently the last order to be entered in the action." *Id.* at 987 (cleaned up).

Here, the motion that sparked the postjudgment proceedings at issue was the receiver's motion for approval of a distribution plan and an initial distribution. The August 4, 2022 order, however, did not dispose of all issues raised in that motion because issues stemming from the Manning Objection "remain outstanding." *Mayer v. Wall St. Equity Grp., Inc.*, 672 F.3d 1222, 1224 (11th Cir. 2012). Moreover, because the August 4, 2022 order contemplates resolution of the Manning Objection in a future order, it will not be the last order to be entered in this action. *Id.* ("Only if a postjudgment order is apparently the last order to be entered in the action is it final and appealable.") (cleaned up). The August 4, 2022 order is thus not a final order for purposes of Section 1291.

B. The September 2, 2022 Order

The district court's September 2, 2022 order granted Fisher and Fu's timely Federal Rule of Civil Procedure 59(e) motion for the district court to alter or amend its August 4, 2022 order. *See* Fed. R. Civ. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment."). For purposes of Rule 59(e), "judgment" "includes . . . any order from which an appeal lies." Fed. R. Civ. P. 54(a); *see, e.g.*, *Balla v. Idaho State Bd. of*

Corr., 869 F.2d 461, 466 (9th Cir. 1989) ("[T]he word 'judgment' encompasses . . . appealable interlocutory orders."). As this Court has held, "[w]hen a district court rules upon a timely filed Rule 59(e) motion, both its ruling on the motion and the underlying judgment are appealable." *Simmons v. Zloch*, 148 F. App'x 921, 921–22 (11th Cir. 2005) (citing *Stone v. INS,* 514 U.S. 386, 402-03 (1995)). And a district court's Rule 59(e) ruling is appealable on the same basis as the underlying judgment because "the ruling on the Rule 59(e) motion merges with the prior determination, so that the reviewing court takes up only one judgment." *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020). Thus because the August 4, 2022 order is immediately appealable (at least under the collateral order doctrine), the September 2, 2022 order is immediately appealable, too.

III. Conclusion

For the foregoing reasons, in the Commission's view, the district court's August 4, 2022 and September 2, 2022 orders are immediately appealable.

Respectfully submitted,

MORGAN BRADYLYONS
Bankruptcy Counsel

/s/ Ezekiel L. Hill
EZEKIEL L. HILL
Attorney

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
202.551.7724 (Hill)
hillez@sec.gov

November 30, 2022

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 2,651 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, Roman-style, 14-point typeface.

/s/ Ezekiel L. Hill
Ezekiel L. Hill

Dated: November 30, 2022

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/ Ezekiel L. Hill
Ezekiel L. Hill

Dated: November 30, 2022