UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 9:20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al.,

Defendants.
_____/

JOHN W. PAUCIULO AND ECKERT SEAMANS CHERIN & MELLOTT, LLC'S *CORRECTED* MOTION AND MEMORANDUM TO INTERVENE TO FILE A RESPONSE IN OPPOSITION TO DEFENDANT DEAN VAGNOZZI'S MOTION FOR CLARIFICATION, OR IN THE ALTERNATIVE, LIMITED RELIEF FROM THE STAY OF LITIGATION

John W. Pauciulo ("Pauciulo") and Eckert Seamans Cherin & Mellott, LLC ("Eckert Seamans") (collectively, the "Proposed Intervenors") file this *Corrected* Motion to Intervene and respectfully request permission to intervene in this action pursuant to Federal Rule of Civil Procedure 24(b) for the limited purpose of filing a response in opposition to Defendant Dean Vagnozzi's ("Vagnozzi") motion for clarification, or in the alternative, limited relief from the stay of litigation (ECF No. 742) (the "Motion for Clarification") and to participate in any related briefing or hearings concerning the Motion for Clarification. This Motion is corrected solely to reflect a change in the conferral status on page 9 and is otherwise identical to the previously filed Motion to Intervene (ECF No. 767).

A copy of the proposed Response to the Motion for Clarification is attached hereto (and is also identical to the previously filed Response attached to docket entry number 767).

INTRODUCTION

In his Motion for Clarification, Vagnozzi asks this Court for clarification as to whether the litigation stay set forth within the amended receivership order entered on August 13, 2020 (the "Amended Receivership Order") (ECF No. 141) applies to Vagnozzi's legal malpractice claim filed in the Philadelphia Court of Common Pleas against Pauciulo and Eckert Seamans (the "Vagnozzi Action."). Given that the Motion for Clarification directly affects the Proposed Intervenors by determining whether the Vagnozzi Action may proceed against them at this time, the Proposed Intervenors (Pauciulo and Eckert Seamans) have claims and defenses that share common questions of law and fact with Vagnozzi's Motion for Clarification filed in this action. *See* Fed. R. Civ. P. 24(b)(1)(B).

As set forth in the attached Response in Opposition to the Motion for Clarification, the Vagnozzi Action clearly falls within this Court's stay order as it directly implicates Vagnozzi, Vagnozzi's entities, Joseph LaForte ("LaForte"), and his company, Complete Business Solutions Group, Inc. d/b/a Par Funding ("PAR Funding"), who are all subject to the Amended Receivership Order. Moreover, if the Vagnozzi Action is permitted to proceed at this stage, Pauciulo and Eckert Seamans would suffer irreparable harm and prejudice, particularly concerning the inability to obtain discovery from the plaintiff, Dean Vagnozzi, as well as key individuals and entities who are mentioned extensively throughout the Vagnozzi Complaint and also subject to the stay, such as Vagnozzi's ABFP-entities, LaForte and Par Funding, because discovery as to all of these entities and individuals is stayed.

RELEVANT BACKGROUND AND FACTS

A. The SEC Action

On July 24, 2020, the SEC brought claims against, among others, Par Funding, its principals, Vagnozzi, and certain entities that Vagnozzi controlled, including,

ABetterFinancialPlan.com LLC d/b/a Better Financial Plan ("ABFP"), ABFP Management Co., LLC ("ABFP Management"), and ABFP Income Fund, LLC, and ABFP Income Fund 2, L.P. (the "ABFP Income Funds"), for fraud in violation of the federal securities laws and for the sale of unregistered securities (referred to herein as the "SEC Action"). The SEC filed an Amended Complaint on August 10, 2020, alleging that PAR Funding issued merchant cash advances to businesses from funds raised in part by entities Vagnozzi controlled. ECF No. 119, SEC Compl. ¶¶ 4, 6.

On July 27, 2020, this Court appointed the Receiver for several entities, including: PAR Funding, ABFP, ABFP Management, and the ABFP Income Funds (collectively, the "Receivership Entities"). ECF No. 36. On August 13, 2020, this Court amended the order appointing the Receiver to include a broad stay, which stated:

> All civil legal proceedings of any nature, including, but not limited to . . . actions of any nature involving . . . (c) any of the Receivership Entities, including subsidiaries and partnerships; or, (d) any of the Receivership Entities' past or present officers, directors, managers, agents, or general or limited partners sued for, or in connection with, any action taken by them while acting in such capacity of any nature, whether as plaintiff, defendant, third-party plaintiff, third-party defendant, or otherwise (such proceedings are hereinafter referred to as 'Ancillary Proceedings').

ECF No. 141 (referred to herein as the "Amended Receivership Order"), ¶ 32. Pursuant to the Amended Receivership Order, "[t]he parties to any and all Ancillary Proceedings are enjoined from commencing or continuing any such legal proceeding, or from taking any action, in connection with any such proceeding." *Id.* ¶ 33. In addition, "[a]ll Ancillary Proceedings are stayed in their entirety, and all Courts having any jurisdiction thereof are enjoined from taking or permitting any action until further Order of this Court." *Id.* ¶ 34.

B. The Related Cases that Are Currently Stayed

To date, three cases have been filed in federal courts by investors against various defendants, including Proposed Intervenors Pauciulo and Eckert Seamans, all arising out of the same conduct alleged in the SEC Action: (1) *Joseph and Joan Caputo v. Dean Vagnozzi et al.*, ECF No. 1, No. 1:20-cv-01042 (D. Del. Aug. 5, 2020) (the "Caputo Action"); (2) *Robert Montgomery et al. v. Eckert Seamans et al.*, ECF No. 1, No. 1:20-cv-23750-DPG (S.D. Fla. Sept. 9, 2020) (the "Montgomery Action"); and (3) *Dennis Melchior et al. v. Dean Vagnozzi et al.*, ECF No. 7-1, No. 2:20-cv-05562-BMS (E.D. Pa. November 12, 2020) (the "Melchior Action"). Each case has been stayed by the respective federal district court based on the plain language of the litigation stay in this SEC Action.

Similarly, two legal malpractice actions have been brought against Proposed Intervenors Pauciulo and Eckert Seamans in the Philadelphia Court of Common Pleas: (1) *Parker et al. v. Pauciulo et al.*, Case No. 201200892, Philadelphia Court of Common Pleas, March 16, 2021 (the "Parker Action"), and (2) *Kohler, et al. v. Pauciulo and Eckert Seamans*, Case No. 210502334 (Phila. CCP) (the "Kohler Action"). These legal malpractice claims, like the Vagnozzi Action, arise out of the same conduct alleged in the instant SEC Action. Both actions are currently stayed.

C. The Vagnozzi Action

On May 12, 2021, Vagnozzi commenced his legal malpractice action against the Proposed Intervenors in the Court of Common Pleas of Philadelphia County by filing the Vagnozzi Complaint. While not parties to the lawsuit, Vagnozzi's action concerns his own entities, ABFP, ABFP Management, and the ABFP Income Funds. The Vagnozzi Complaint also implicates Par Funding and its owner, LaForte, a/k/a Joe Mack. All of the entities fall within the Amended Receivership Order.

As set forth in the Vagnozzi Complaint, the malpractice action "aris[es] out of the long-standing representation of Dean Vagnozzi…in connection with the creation of various investment funds formed for the express purpose of investing in alternative income-producing opportunities." Vagnozzi Complaint at p. 1. Specifically, Vagnozzi states in the introductory paragraphs of his Complaint against Pauciulo and Eckert Seamans that the malpractice action is a direct result of the SEC Action:

> Plaintiff's assets were either seized or frozen by the United States District Court for the Southern District of Florida in an action brought by the SEC, and along with that, the assets of most of Plaintiff's businesses and many of his investment vehicles. The Florida Federal Court's intervention was in connection with a lawsuit brought by the SEC against an entity known as PAR Funding, alleging significant securities law violations with respect to the Vagnozzi PPMs. The SEC has stated in that litigation that the PPMs prepared by Pauciulo and Eckert were woefully incomplete, inaccurate, and contrary to various state and federal securities laws, and that they were in direct violation of the registration requirements. ***Such SEC allegations have subjected Vagnozzi to enormous adverse consequences and widespread negative publicity***.

Id. at 2. In other words, the Vagnozzi Action (against the Proposed Intervenors) is directly related to and arises as a result of the instant SEC Action.

The Vagnozzi Complaint seeks damages arising from the SEC Action, as well as the other currently-stayed federal actions in the District of Delaware, the Southern District of Florida, and the Eastern District of Pennsylvania. Specifically, Vagnozzi pleads that his damages result from having "to defend, at great expense: i. The Florida Action, brought by the United States Securities and Exchange Commission; ii. Three class-action lawsuits: one in Florida, another in Delaware, and the third in Pennsylvania[; and] iii. Numerous other regulatory investigative proceedings by the SEC and various State regulatory commissions." *Id.* at ¶ 125.

Vagnozzi further emphasizes the importance of the SEC Action to his malpractice claim. Vagnozzi alleges that "[i]ndeed, until the time [he] was subjected to the SEC litigation, he was widely considered one of the best and most effective life insurance salespersons in the Country." *Id.* at ¶ 130. Vagnozzi also states that "Defendants breached such fiduciary duties, ***exposing Vagnozzi to the SEC's allegations*** regarding failing to properly register the various funds under state and federal securities laws, failing to properly disclose the necessary and required risk factors in the various PPMs associated with the various investment funds, failing to properly disclose the numerous material risks associated with investments in PAR Funding…, and failing to properly advise Plaintiff concerning his efforts to advertise his business to the general public." *Id.* at ¶ 162 (emphasis added).

On June 11, 2021, the Receiver filed a Petition to Intervene in the Vagnozzi Action in order to file a motion to stay proceedings based on the applicability of this Court's stay order entered in the instant SEC Action. On June 23, 2021, the court in the Vagnozzi Action granted the Receiver's Motion to Intervene. (Vagnozzi has sought reconsideration of the order granting the Receiver's Motion to Intervene, which is presently pending.) Eckert Seamans and Pauciulo also filed a motion to stay on June 8, 2021. On July 6, 2021, the court entered an order staying proceedings in the Vagnozzi Action. Shortly thereafter, during oral argument in the Vagnozzi action, Vagnozzi offered to file the Motion for Clarification now before this Court. The court in the Vagnozzi Action therefore entered an Order staying proceedings for sixty days and ordering a status hearing on September 23, 2021, pending this Court's determination of the Motion for Clarification.

MEMORANDUM OF LAW

Proposed Intervenors, Eckert Seamans and Pauciulo, move for leave to intervene in this action pursuant to Federal Rule of Civil Procedure 24(b), which provides for permissive intervention for the limited purpose of filing a Response and supporting Memorandum of Law in opposition to Vagnozzi's Motion for Clarification, a copy of which is attached as Exhibit 1, and to participate in any related briefing or hearings regarding the Motion for Clarification.

Rule 24(b)(1)(B) provides permissive intervention to any party "who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). The requirements for permissive intervention are straightforward and easily satisfied here: the motion to intervene must be timely and must involve "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

1. The Instant Motion to Intervene Is Timely.

In determining whether a motion to intervene is timely, the Court must consider:

> (1) the length of time during which the proposed intervenor knew or reasonably should have known of the interest in the case before moving to intervene; (2) the extent of prejudice to the existing parties as a result of the proposed intervenor's failure to move for intervention as soon as it knew or reasonably should have known of its interest; (3) the extent of prejudice to the proposed intervenor if the motion is denied; and (4) the existence of unusual circumstances militating either for or against a determination that their motion was timely.

Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1259 (11th Cir. 2002) (citing *Chiles*, 865 F.2d at 1213)).

Vagnozzi's Motion for Clarification was filed less than two weeks ago, on September 1, 2021, and the Intervenors have been diligent in reviewing the Motion, preparing a response, and determining the most appropriate means for leave to file their response in this Action, including conferring with those parties to this action affected by the proposed intervention. No party will be prejudiced by the Intervenors' filing of a response at this time given that the Motion for

Clarification is not yet ripe and no other party has yet filed a response to the Motion. Indeed, Vagnozzi's counsel has indicated that he does not oppose the Motion to Intervene for the purpose of filing Pauciulo's and Eckert Seamans's Response in Opposition to his Motion for Clarification and for the purpose of participating in briefing or hearings on the Motion for Clarification.

On the other hand, the Intervenors will be prejudiced if not permitted to intervene and file their response to the Motion for Clarification at this time given that the Motion for Clarification directly impacts them and their rights, as discussed herein. Indeed, the whole purpose of the Motion for Clarification is to seek to get around this Court's stay order so Vagnozzi can sue the Proposed Intervenors while they are themselves handicapped by the stay order's stay of discovery relevant to the Vagnozzi Action.

Finally, there are no unusual circumstances militating against a finding of timeliness where, as indicated above, Vagnozzi does not oppose the Motion to Intervene and the Motion for Clarification is not yet ripe or fully briefed by the parties to this action.

2. The Proposed Intervenors' Response Has Questions Of Law And Fact In Common With The Motion To Clarify.

Next, the Court must determine whether the Proposed Intervenors' Response to the Motion to Clarify has questions of law or fact in common with the underlying action.

The Proposed Intervenors seek to intervene in this matter for the limited purpose of filing their Response in Opposition to Vagnozzi's Motion for Clarification, and their arguments in opposition to Vagnozzi's Motion address the claims asserted by Vagnozzi in that Motion as well as those in the Vagnozzi Action pending in Philadelphia.

As discussed above, the issues raised in the Motion for Clarification directly impact the Proposed Intervenors as the determination of the Motion will determine whether Vagnozzi can

pursue his legal malpractice action against them at this time despite this Court's stay order. The Proposed Intervenors' Response certainly has questions of law and fact in common with the underlying action and, most specifically, with the Motion for Clarification. Permitting the intervention will not cause any foreseeable delay or prejudice, as the requested intervention is limited to seeking to participate only in briefing and hearings regarding the Motion for Clarification, which is not yet ripe, and does not seek to permit the Proposed Intervenors involvement in any other matters in this action.[1]

As such, the Proposed Intervenors respectfully submit that permissive intervention is appropriate.

CORRECTED CONFERRAL

Pursuant to Local Rule 7.1(a)(3), undersigned counsel for the Proposed Intervenors has conferred with counsel for Vagnozzi, the Receiver, and the SEC and is authorized to indicate that Vagnozzi does not oppose the request to intervene, and the Receiver takes no position on the request. Undersigned counsel attempted to confer with the SEC. After an initial email on September 14, 2021, asking for their position, SEC counsel, Amie Berlin, requested additional information about the arguments in support of the motion to intervene. On September 15, 2021, undersigned counsel sent an advance copy of the Motion. By email on September 15, 2021, Ms. Berlin acknowledged receipt of the draft motion and indicated she would provide the SEC's

[1] A court may limit intervention to particular issues, making the intervention less burdensome. *See U.S. v. S. Fla. Water Mgmt. Dist*., 922 F.2d 704, 707 (11th Cir. 1991) ("[a] nonparty may have a sufficient interest for some issues in a case but not others, and the court may limit intervention accordingly.").

position later that same day. As of the filing of the instant corrected motion, the SEC has not indicated its position regarding the instant request to intervene.

CONCLUSION

WHEREFORE, for the reasons set forth herein, John Pauciulo and Eckert Seamans Cherin & Mellott, LLC respectfully request that this Court grant their Motion to Intervene for the limited purpose of filing a Response in Opposition to Defendant Dean Vagnozzi's Motion for Clarification of the Amended Receivership Order and participating in any briefing or hearings regarding same; permit the Proposed Intervenors to file the attached Response in Opposition to the Motion for Clarification; and grant such other relief as this Court deems just.

Dated: September 17, 2021

Respectfully submitted,

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Counsel for John W. Pauciulo and Eckert Seamans Cherin & Mellott, LLC
Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic transmission via this Court's CM/ECF filing system on the 17th day of September, 2021, on all counsel or parties who have appeared in the above-styled action.

/s/Melanie E. Damian
Melanie E. Damian

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 9:20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al.,

Defendants.
_____/

JOHN W. PAUCIULO AND ECKERT SEAMANS CHERIN & MELLOTT, LLC'S OPPOSITION TO DEFENDANT DEAN VAGNOZZI'S MOTION FOR CLARIFICATION, OR IN THE ALTERNATIVE, LIMITED RELIEF FROM THE STAY OF LITIGATION

I. INTRODUCTION

John W. Pauciulo ("Pauciulo") and Eckert Seamans Cherin & Mellott, LLC ("Eckert Seamans") file this response in opposition to defendant Dean Vagnozzi's ("Vagnozzi") motion for clarification, or in the alternative, limited relief from the stay of litigation ("Motion for Clarification") (ECF No. 742). Vagnozzi asks this Court for clarification as to whether the litigation stay set forth within the amended receivership order entered on August 13, 2020 (the "Amended Receivership Order") (ECF No. 141) applies to Vagnozzi's legal malpractice claim filed in the Philadelphia Court of Common Pleas against Pauciulo and Eckert Seamans (the "Vagnozzi Action.").

In short, no clarification is needed. The Amended Receivership Order is neither ambiguous nor vague, and the Vagnozzi Action clearly falls within the litigation stay order. The complaint (the "Vagnozzi Complaint") directly implicates Vagnozzi, Vagnozzi's entities, Joseph LaForte ("LaForte"), and his company, Complete Business Solutions Group, Inc. d/b/a Par

EXHIBIT 1

Funding ("PAR Funding"), who are all subject to the Amended Receivership Order. In fact, by filing the Vagnozzi Complaint, Vagnozzi violated the express language of the Amended Receivership Order, which prohibits him from commencing any new legal proceedings concerning himself and certain entities he controlled, as well as other receivership entities and officers. Allowing the Vagnozzi Action to proceed is therefore improper, and the Vagnozzi Action is and should remain subject to the stay.

Additionally, Vagnozzi should not be granted any relief from the Amended Receivership Order. On balance of the relevant factors set forth in *S.E.C. v. Wencke*, 633 F.2d 1363 (9th Cir.1980) ("*Wencke I*"), and *S.E.C. v. Wencke*, 742 F.2d 1230 (9th Cir.1984) ("*Wencke II*") (collectively "*Wencke*"), a stay of the Vagnozzi Action is necessary to maintain the status quo and will not cause any further harm to Vagnozzi. Instead, if allowed to proceed with the Vagnozzi Action, Vagnozzi, a participant in the alleged misconduct, would be able to jump the line in front of the allegedly defrauded investors and unfairly take a first bite of the apple. Further, Pauciulo and Eckert Seamans would suffer irreparable harm and prejudice, particularly concerning the inability to obtain discovery from both the plaintiff, Dean Vagnozzi, as well as key individuals and entities who are mentioned extensively throughout the Vagnozzi Complaint and also subject to the stay, such as Vagnozzi's ABFP-entities, LaForte and Par Funding (unless the Court is willing to lift the stay as to discovery of all of these entities and individuals in the Vagnozzi Action).

II. STATEMENT OF RELEVANT FACTS

A. The SEC Action

On July 24, 2020, the SEC brought claims against, among others, Par Funding, its principals, Vagnozzi, and certain entities that Vagnozzi controlled, including, ABetterFinancialPlan.com LLC d/b/a Better Financial Plan ("ABFP"), ABFP Management Co.,

LLC ("ABFP Management"), and ABFP Income Fund, LLC and ABFP Income Fund 2, L.P. (collectively, the "ABFP Income Funds"), for fraud in violation of the federal securities laws and for the sale of unregistered securities (referred to herein as the "SEC Action"). The SEC filed an Amended Complaint on August 10, 2020, alleging that PAR Funding issued merchant cash advances to businesses from funds raised in part by entities controlled by Vagnozzi. (ECF No. 119; SEC Compl. ¶¶ 4, 6).

On July 27, 2020, this Court appointed a receiver for several entities, including: PAR Funding, ABFP, ABFP Management, and the ABFP Income Funds (collectively, the "Receivership Entities"). (ECF No. 36). On August 13, 2020, this Court amended the order appointing the Receiver to include a broad litigation stay, which stated:

> ***All civil legal proceedings of any nature***, including, but not limited to . . . actions of any nature ***involving . . . (c) any of the Receivership Entities***, including subsidiaries and partnerships; or, (d) ***any of the Receivership Entities' past or present officers, directors, managers, agents, or general or limited partners*** sued for, ***or in connection with, any action taken by them while acting in such capacity of any nature, whether as plaintiff***, defendant, third-party plaintiff, third-party defendant, or otherwise (such proceedings are hereinafter referred to as 'Ancillary Proceedings').

(ECF No. 141 (referred to herein as the "Amended Receivership Order") at ¶ 32 (emphasis added)). Pursuant to the Amended Receivership Order, "[t]he parties to any and all Ancillary Proceedings are enjoined from commencing or continuing any such legal proceeding, or from taking any action, in connection with any such proceeding." *Id*. ¶ 33. In addition, "[a]ll Ancillary Proceedings are stayed in their entirety, and all Courts having any jurisdiction thereof are enjoined from taking or permitting any action until further Order of this Court." *Id*. ¶ 34.

B. The Related Cases that Are Currently Stayed

To date, three cases have been brought by investors in federal court against various defendants, including Pauciulo and Eckert Seamans, arising out of the same conduct

alleged in the SEC Action: (1) *Joseph and Joan Caputo v. Dean Vagnozzi et al.*, ECF No. 1, No. 1:20-cv-01042 (D. Del. Aug. 5, 2020) (the "Caputo Action"); (2) *Robert Montgomery et al. v. Eckert Seamans et al.*, ECF No. 1, No. 1:20-cv-23750-DPG (S.D. Fla. Sept. 9, 2020) (the "Montgomery Action"); and (3) *Dennis Melchior et al. v. Dean Vagnozzi et al.*, ECF No. 7-1, No. 2:20-cv-05562-BMS (E.D. Pa. November 12, 2020) (the "Melchior Action"). Each case has been stayed by the respective federal district court based on the plain language of the litigation stay in the SEC Action.

Similarly, two legal malpractice actions have been brought against Pauciulo and Eckert Seamans in the Philadelphia Court of Common Pleas: (1) *Parker et al. v. Pauciulo et al.*, Case No. 201200892, Philadelphia Court of Common Pleas, March 16, 2021 (the "Parker Action"), and (2) *Kohler, et al. v. Pauciulo and Eckert Seamans*, Case No. 210502334 (Phila. CCP) (the "Kohler Action").[1] Each legal malpractice claim arises out of the same conduct alleged in the SEC Action. Both of the legal malpractice actions are currently stayed.

C. The Vagnozzi Action

On May 12, 2021, Vagnozzi commenced his legal malpractice action against Pauciulo and Eckert Seamans in the Court of Common Pleas of Philadelphia County by filing the Vagnozzi Complaint. While they are not parties to the lawsuit, Vagnozzi's action concerns his own entities, ABFP, ABFP Management, and the ABFP Income Funds. The Vagnozzi Complaint also implicates Par Funding as well as its owner, LaForte, a/k/a Joe Mack.

As set forth in the Vagnozzi Complaint, the malpractice action "aris[es] out of the long-standing representation of Dean Vagnozzi…in connection with the creation of various investment funds formed for the express purpose of investing in alternative income-producing

[1] One of the two individual named plaintiffs in the Kohler Action is Dean Vagnozzi's brother, Albert Vagnozzi.

opportunities." Vagnozzi Complaint at p. 1. Specifically, Vagnozzi admits in the introductory paragraphs that the malpractice action is a direct result of the SEC Action:

> Plaintiff's assets were either seized or frozen by the United States District Court for the Southern District of Florida in an action brought by the SEC, and along with that, the assets of most of Plaintiff's businesses and many of his investment vehicles. The Florida Federal Court's intervention was in connection with a lawsuit brought by the SEC against an entity known as PAR Funding, alleging significant securities law violations with respect to the Vagnozzi PPMs. The SEC has stated in that litigation that the PPMs prepared by Pauciulo and Eckert were woefully incomplete, inaccurate, and contrary to various state and federal securities laws, and that they were in direct violation of the registration requirements. ***Such SEC allegations have subjected Vagnozzi to enormous adverse consequences and widespread negative publicity***.

Id. at 2. In other words, by Vagnozzi's own pleadings, the action is directly related to and arises as a result of the SEC Action.

Vagnozzi further pleads that the SEC sued Vagnozzi and his various funds and business entities based on the Private Placement Memorandums (PPMs) and other documents prepared by Pauciulo and Eckert Seamans. *Id.* at ¶ 119. As a result of the SEC Action, the SEC froze Vagnozzi's funds' assets. *Id.* at ¶ 112. Vagnozzi seeks damages arising from the SEC Action, as well as the other currently-stayed federal actions in the District of Delaware, the Southern District of Florida, and the Eastern District of Pennsylvania. Specifically, Vagnozzi pleads that his damages result from having "to defend, at great expense: i. The Florida Action, brought by the United States Securities and Exchange Commission; ii. Three class-action lawsuits: one in Florida, another in Delaware, and the third in Pennsylvania[; and] iii. Numerous other regulatory investigative proceedings by the SEC and various State regulatory commissions." *Id.* at ¶ 125.

Vagnozzi further emphasizes the importance of the SEC Action on his malpractice claim. Vagnozzi alleges that "[i]ndeed, until the time [he] was subjected to the SEC litigation, he was widely considered one of the best and most effective life insurance salespersons in the Country." *Id.* at ¶ 130. Vagnozzi also states that "Defendants breached such fiduciary duties, ***exposing Vagnozzi to the SEC's allegations*** regarding failing to properly register the various funds under state and federal securities laws, failing to properly disclose the necessary and required risk factors in the various PPMs associated with the various investment funds, failing to properly disclose the numerous material risks associated with investments in PAR Funding…, and failing to properly advise Plaintiff concerning his efforts to advertise his business to the general public." *Id.* at ¶ 162 (emphasis added).

On June 11, 2021, the Receiver filed a petition to intervene in the Vagnozzi Action in order to file a motion to stay proceedings based on the applicability of the stay order entered in the SEC Action. On June 23, 2021, the court granted the Receiver's petition to intervene. Eckert Seamans and Pauciulo filed a motion to stay on June 8, 2021 and a reply in support of the motion to stay on July 1, 2021. That same day, Vagnozzi filed a motion for reconsideration of the Court's order allowing the Receiver to intervene. The Receiver filed an opposition to Vagnozzi's motion for reconsideration on July 2, 2021. The court then entered an order staying proceedings on July 6, 2021. Shortly thereafter, the court held oral argument on July 23, 2021 concerning both the Receiver's intervention and the stay order. During the oral argument, counsel for Vagnozzi offered to file the instant motion for clarification. The court

agreed and entered an order staying proceedings for sixty days and ordering a status hearing on September 23, 2021.[2]

III. LEGAL STANDARD.

As suggested by Vagnozzi in his Motion, there is no Federal Rule of Civil Procedure specifically governing motions for clarification. *United States v. Timmons Corp.*, 1:03-CV-951 (CFH), 2017 WL 11237145, at *7 (N.D.N.Y. Sept. 20, 2017). Typically, a motion for clarification would be governed by Federal Rule of Civil Procedure 60(b) unless the court is being asked to "explain or clarify something ***ambiguous or vague***" and not to "alter or amend." *United States v. Phillip Morris USA, Inc.*, 793 F. Supp. 2d 164, 168 (D.D.C. 2011) (emphasis added); *Resolution Tr. Corp. v. KPMG Peat Marwick*, CIV. A. 92-1373, 1993 WL 211555, at *2 (E.D. Pa. June 8, 1993) (denying motion for clarification where party essentially asked court to alter its previous ruling). In order for a motion for clarification to be valid, the moving party must point to the language that is ambiguous or vague. *Trantham v. Zurn Indus., LLC*, 1:17-CV-00408, 2017 WL 11068763, at *2 (M.D. Pa. Nov. 2, 2017) (explaining that moving party did not point to any part of the court's order that was vague or in need of clarification and converting motion to clarify to motion seeking relief under Rule 60(b)). Otherwise, the motion must be considered pursuant to Rule 60(b), which sets forth the following six specific grounds for providing relief from a final judgment, order or proceeding:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

[2] The court's order also applied to the Kohler Action, which was stayed for 60 days until the next status conference in order to provide Vagnozzi with time to file his instant motion for clarification.

> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

F.R.C.P. 60(b).

With respect to motions for relief from litigation stays, the Ninth Circuit set forth the standard for whether a court should lift a receivership stay. *See S.E.C. v. Wencke*, 633 F.2d 1363 (9th Cir.1980) ("*Wencke I*") and *S.E.C. v. Wencke*, 742 F.2d 1230 (9th Cir.1984) ("*Wencke II*") (collectively "*Wencke*"). In deciding whether to lift a receivership stay, the district court must apply a three-part test:

> (1) Whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is made; and (3) the merit of the moving party's underlying claim.

Wencke II, 742 F.2d at 1231. While the Eleventh Circuit has not officially adopted the *Wencke* test, courts in this district, including this Court, have applied the *Wencke* factors when considering whether to provide relief from a stay order. *Sec. & Exch. Comm'n v. Complete Bus. Sols. Grp., Inc.*, 20-CIV-81205-RAR, 2021 WL 3211690, at *1 (S.D. Fla. July 28, 2021) (denying non-party Lead Funding II, LLC's amended motion to intervene and lift litigation injunction); *Sec. & Exch. Comm'n v. Onix Capital, LLC*, 16-24678-CIV, 2017 WL 6728814, at *1 (S.D. Fla. July 24, 2017). "The burden is on the movant to prove that the balance of the factors weighs in favor of lifting the stay." *United States Sec. & Exch. Comm'n v. Ahmed*, 3:15CV675 (JBA), 2019 WL 11824929, at *2 (D. Conn. May 21, 2019).

IV. ARGUMENT

A. Vagnozzi's Motion for Clarification Should Be Denied.

1. *The Amended Receivership Order is neither Ambiguous nor Vague.*

As set forth above, in order to seek clarification of a motion, the moving party must cite to the language at issue that is actually ambiguous or vague. *Trantham*, 2017 WL 11068763 at *2. Vagnozzi does not even attempt to do so here. *See* Brief generally (no reference to "vague" or "ambiguous" language in the Amended Receivership Order anywhere in the brief). Rather, Vagnozzi argues that the stay order does not apply to his legal malpractice complaint. *See*, *e.g.*, Br. at p. 8 ("Clarification is necessary in this instance because Pauciulo and Eckert are seeking to use this Court's litigation stay to prevent Dean Vagnozzi from pursuing his affirmative claims against non-Receivership Entities. The language does not support this interpretation."). This argument is not enough to support a request for clarification. *See Philip Morris*, 793 F. Supp. 2d at 168 (noting that "[i]t is significant that Defendants fail to identify anywhere in their Motion which provisions of Order # 1015 are 'ambiguous' or 'vague.'").

2. *The Amended Receivership Order Is Clear and Requires Vagnozzi's Action to Be Stayed.*

The plain language of the Amended Receivership Order requires the Vagnozzi Action to be stayed. The Amended Receivership Order expressly provides that all civil legal proceedings involving any of the Receivership Entities are stayed. (ECF No. 141, Amended Receivership Order, ¶ 32). The Amended Receivership Order defines Receivership Entities to include ABFP, ABFP Management, and the ABFP Income Funds. *Id.*, ¶ 1. Additionally, the Receivership Order expressly provides that all civil legal proceedings involving any of the Receivership Entities' "past or present officers, directors, managers, agents, or general or limited

partners" are stayed. *Id.*, ¶ 32. Vagnozzi controlled many of the Receivership Entities (ABFP, ABFP Management, and the ABFP Income Funds) and is therefore subject to the stay.[3]

The need for a stay in the Vagnozzi Action is compelling. The Vagnozzi Action is *brought* by Dean Vagnozzi himself and implicates his own funds, such as ABFP, ABFP Management and the ABFP Income Funds. Compl., ¶ 120. By his own pleading, Vagnozzi admits that the malpractice action directly arises from the SEC Action. Further, the Complaint concerns both LaForte and Par Funding, who are referenced consistently throughout the Complaint. *See generally* Compl. (Par Funding is referenced approximately 116 times). Like ABFP, ABFP Management, and the ABFP Income Funds, Par Funding is also named in the Receivership Order as a Receivership Entity. Similarly, LaForte, as the owner of Par Funding, is covered by the stay order.

The language of the Receivership Order is broad and clearly covers the following individuals:

> [a]ll civil legal proceedings of any nature…involving…(d) any of the Receivership Entities' past or present officers, directors, managers, agents, or general or limited partners sued for, ***or in connection with***, any action taken by them while acting in such capacity of any nature, ***whether as a plaintiff***, defendant, third-party plaintiff, third-party defendant, or otherwise (such proceedings are herein after referred to as "Ancillary Proceedings").

[3] In the Montgomery and Caputo Notices of Stays, the Receiver acknowledged that ABFP, ABFP Management and the ABFP Income Funds are "Receivership Entities" as defined in the Receivership Order. *E.g.*, Caputo Notice of Stay, at 2. In addition, the Receiver recognized that Vagnozzi "is the principal of [ABFP] and manages, oversees, and coordinates ABFP Management Company, LLC and the ABFP Income Funds." *Id.* Thus, according to the Receiver, "these entities and Mr. Vagnozzi are subject to the litigation stay entered by the [court in the SEC Action]." *Id.* The District Court in the Melchior Action agreed, holding that "Vagnozzi is an agent of the Receivership Entity ABFP, and [the] case against him is subject to the stay Order in the SEC Action." Melchior Stay Order. Similarly, Judge Tucker in the Parker Action held that the SEC Action precluded seeking discoverable information from Dean Vagnozzi. Parker Stay Order.

Motion to Stay at 4. The "sued for, or in connection with" language is not limited, as Vagnozzi suggests, to cases brought only *against* the individuals named in subsection (d) above. Rather, subsection (d) makes clear that "civil legal proceedings of any nature" brought for or against such individuals are subject to the stay. This is made obvious by the inclusion of the language "whether as a plaintiff, defendant, third-party plaintiff, third-party defendant, or otherwise." This language must be given meaning, and cannot be ignored as Vagnozzi seeks to do here. *See Equity Lifestyle Properties, Inc. v. Florida Mowing and Landscape Serv., Inc.*, 556 F.3d 1232, 1242 (11th Cir. 2009) (recognizing canon of interpretation that must "give meaning to each and every word it contains" and "avoid treating a word as redundant or mere surplusage."). Therefore, the broad language of the Amended Receivership Order covers actions brought by or against any of the Receivership Entities' past or present officers, directors, managers, agents, or general or limited partners, whether as plaintiffs or defendants. This includes Dean Vagnozzi.

Vagnozzi attempts to circumvent the stay order by arguing that he brought the Vagnozzi Action "personally for the damages he has suffered." Br. at 11. While it may be true that Vagnozzi alleges that he personally suffered damages, this does not change the fact that those alleged damages are, in his own words, a result of the SEC Action itself. Vagnozzi is not seeking to litigate an unrelated malpractice suit that happens to implicate Receivership Entities or their officers or directors. Instead, the Vagnozzi Action is inextricably intertwined with the SEC Action and thus clearly subject to the litigation stay order.

3. *Vagnozzi's Motion Fails Under Federal Rule 60(b).*

Even if this Court were to analyze Vagnozzi's motion for clarification under the Rule 60(b) standard, Vagnozzi's motion still fails. The only potentially applicable provision is the Rule 60(b)(6) catchall for "any other reason that justifies relief." However, The Supreme Court has held that only extraordinary circumstances can justify relief under this section.

Ackermann v. United States, 340 U.S. 193, 199–202 (1950); *Agostini v. Felton*, 521 U.S. 203, 239 (1997); *see also Jackson v. St. Jude Med. Neuromodulation Div., Medtronic, Inc.*, 214CV717FTM38DNF, 2015 WL 12830410, at *2 (M.D. Fla. Mar. 30, 2015) (clarification under Rule 60(b)(6) "is an extraordinary remedy and, thus, is a power the court should use sparingly."). No such extraordinary circumstances exist here, nor are any argued by Vagnozzi, and thus Vagnozzi's motion should be denied.

B. Vagnozzi's Request for Limited Relief from the Stay Should Be Denied.

Vagnozzi, in the alternative, requests that if this Court finds that the Vagnozzi Action is subject to the Amended Receivership Order, then this Court should grant him limited relief and allow him to pursue the Vagnozzi Action in spite of the Amended Receivership Order. Vagnozzi pleads for a so-called "escape valve" to prevent alleged substantial harm to himself based on the purported actions of Pauciulo and Eckert Seamans, yet conveniently ignores the fact that those purported actions directly relate to his dealings with Par Funding and arise out of the SEC Action. Regardless, none of the *Wencke* factors set forth above weigh in favor of lifting the stay.

1. *Refusing to Lift the Stay Preserves the Status Quo.*

The first *Wencke* factor "balances the interests of the Receiver in preserving the status quo against the interests of the moving party." *S.E.C. v. Illarramendi*, 3:11CV78 JBA, 2012 WL 234016, at *5 (D. Conn. Jan. 25, 2012). Here, on balance, the Court should refuse to lift the stay in order to preserve the status quo. First, the interests of the Receiver in preserving the status quo outweigh the interests of Vagnozzi. This is a complicated case involving multiple parties and the Receiver is still in the early stages of marshalling and untangling assets.

Second, while Vagnozzi claims that he will suffer substantial injury if he cannot proceed, lifting the Amended Receivership Order will not alleviate that injury. Vagnozzi's

injury boils down to injury directly caused by the SEC Action. For example, in Vagnozzi's sworn affidavit, he states that "my income ceased because all of my bank accounts were frozen ***as a result of this litigation***." Br. at 15 (emphasis added). Similarly, Vagnozzi avers that ***"[a]s a result of this action***, my credit cards have been canceled and I no longer have any credit." *Id.* at 16 (emphasis added).[4] Vagnozzi essentially seeks to transfer the burden of the SEC Action onto Eckert Seamans and Pauciulo, which is improper.

Additionally, the fact that Vagnozzi is required to wait to litigate his claims against Pauciulo and Eckert Seamans is not even the type of "substantial injury" that courts recognize under the first *Wencke* factor. *S.E.C. v. Stinson*, CIV.A. 10-3130, 2012 WL 1994770, at *2 (E.D. Pa. June 4, 2012) ("The mere fact that Morningstar's claims will be postponed until after the Receiver has finished untangling the estate's assets is not a substantial injury."); *see also Schwartzman v. Rogue Int'l Talent Grp., Inc.*, CIV.A. 12-5255, 2013 WL 460218, at *2 (E.D. Pa. Feb. 7, 2013) (explaining that fact that claims will be postponed until receiver has finished untangling assets "is not a substantial injury").

"As the *Wencke I* court noted, the interests of the Receiver are very broad and include not only protection of the receivership res, but also protection of defrauded investors and considerations of judicial economy." *S.E.C. v. Universal Fin.*, 760 F.2d 1034, 1038 (9th Cir. 1985). Lifting the stay would not protect the defrauded investors but would rather provide a benefit to Vagnozzi who controlled certain Receivership Entities accused of defrauding investors in the SEC Action. Vagnozzi should not be able to get the "first bite of the apple" ahead of the

[4] In addition, Vagnozzi will not suffer any prejudice in the Vagnozzi Action as a result of the stay. The Receiver in the SEC Action has been collecting funds and marshalling other assets, all of which may be made available to Vagnozzi. Therefore, waiting until the conclusion of the SEC Action would likely benefit rather than prejudice Vagnozzi.

defrauded investors who were the victims of the alleged schemes. *See United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 449 (3d Cir. 2005) ("Not being allowed the first bite at the apple is not the kind of substantial injury we will recognize under the first prong of *Wencke*."). Additionally, this is a unique situation where a named defendant/alleged participant in the misconduct is seeking to lift the litigation stay to litigate the same issues. *Compare Schwartzman*, 2013 WL 460218, at *2 (denying movant's request to lift stay despite fact that he argued he was victim, not participate, in alleged Ponzi scheme).

2. *The Timing of the SEC Action and Vagnozzi's Request Weighs Against Lifting the Stay.*

"Where the motion for relief from the stay is made soon after the receiver has assumed control over the estate, the receiver's need to organize and understand the entities under his control may weigh more heavily than the merits of the party's claim." *Wencke*, 742 F.2d at 1231. Here, as Vagnozzi admits, this action was instituted by the SEC "just over one year ago." Br. at 16. Given the complicated nature of this case, it is not an appropriate time for the stay to be lifted. Other courts have denied requests to lift a stay in cases involving complicated facts with similar time periods. *E.g.*, *S.E.C. v. Callahan*, 2 F. Supp. 3d 427, 440 (E.D.N.Y. 2014) (stay order in place for one year and five months); *United States v. ESIC Capital, Inc.*, 685 F. Supp. 483, 485 (D. Md. 1988) ("[T]his motion comes at a fairly youthful age of the receivership--two years since its inception."); *S.E.C. v. Universal Fin.*, 760 F.2d 1034, 1039 (9th Cir. 1985) (upholding stay four years into the receivership).

3. *Vagnozzi's Legal Malpractice Claim Lacks Merit.*

Under the third *Wencke* factor, even if the movant can show that there is a "colorable" claim, "courts are generally unwilling to delve deeply into the merits where the first two factors weigh heavily in favor of maintaining the litigation stay." *Illarramendi*, 2012 WL

234016, at *6. Here, as set forth above, the first two factors weigh heavily in favor of maintaining the litigation stay.

However, if the court were to find that either of the first two factors weighs in favor of lifting the stay, Vagnozzi's legal malpractice claim lacks merit. As pled in their Answer in the Vagnozzi Action, Eckert Seamans and Pauciulo deny that they provided deficient legal services for several reasons, including that Vagnozzi disregarded the legal advice provided by them. In fact, Vagnozzi has asserted in the SEC Action that he did not violate any laws. Based on his own pleading, if there was no violation, then there was no malpractice. Yet, "even meritorious claims [would] not tip the scales in favor of lifting a litigation stay where the first and second prongs of the *Wencke II* inquiry favor the receiver." *United States v. JHW Greentree Capital, L.P.*, 3:12-CV-00116 VLB, 2014 WL 1669261, at *7 (D. Conn. Feb. 10, 2014). Here, Vagnozzi's meritless legal malpractice claims do not tip the scale in favor of lifting the stay.

4. *The Stay Promotes Judicial Economy and Fairness.*

A stay will promote judicial economy because according to Vagnozzi's own allegations, his legal malpractice action will require discovery from (i) himself (the named plaintiff), and (ii) other individuals and entities, including the ABFP-entities, Par Funding and LaForte, all of which are subject to the SEC stay. Discovery from Vagnozzi and the other Receivership Entities and individuals will be key to Pauciulo's and Eckert Seaman's defense, yet they will be unable to obtain such discovery, unless the Court is willing to lift the stay as to discovery of all of the Receivership Entities and individuals in the Vagnozzi Action. Otherwise, Vagnozzi could claim in the Vagnozzi Action that he is not required to provide certain (or any) discovery pursuant to the Amended Receivership Order.

Further, if discovery in the Vagnozzi Action were to proceed ahead of all of the other pending actions, Eckert Seamans and Pauciulo would be subject to different discovery

requests by different plaintiffs and may be required to testify on multiple occasions. A stay of the Vagnozzi action, including a stay of discovery, will avoid the undue burden and expense, including administrative burdens on the various courts, of piecemeal and duplicative discovery.

V. CONCLUSION

WHEREFORE, for the reasons set forth herein, John Pauciulo and Eckert Seamans Cherin & Mellott, LLC respectfully request that this Court deny Defendant Dean Vagnozzi's request for clarification of the Amended Receivership Order and deny Defendant Dean Vagnozzi's alternative request for limited relief from the stay order to pursue his legal malpractice claim.

Dated: September 15, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic transmission via this Court's CM/ECF filing system on the 15th day of September, 2021, on all counsel or parties who have appeared in the above-styled action.

/s/Melanie E. Damian
Melanie E. Damian