UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff, **Case No. 20-CIV-81205-RAR**

v.

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

Defendants.

JOHN W. PAUCIULO AND ECKERT SEAMANS CHERIN & MELLOTT, LLC'S MOTION AND MEMORANDUM TO INTERVENE TO FILE A RESPONSE IN OPPOSITION TO NON-PARTIES MARK NARDELLI, FRANCIS CASSIDY, DAVID GOLLNER, AND CHRISTOPHER MCMORROW'S MOTION TO LIFT LITIGATION STAY

John W. Pauciulo ("Pauciulo") and Eckert Seamans Cherin & Mellott, LLC ("Eckert Seamans") (collectively, the "Proposed Intervenors") 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 Non-Parties Mark Nardelli, Francis Cassidy, David Gollner, and Christopher McMorrow's ("Movants'") Motion to Lift Litigation Stay [ECF No. 1152] (the "Motion") and to participate in any related briefing or hearings concerning the Motion. A copy of the proposed Response to the Motion is attached hereto as **Exhibit 1**.

INTRODUCTION

In their Motion, Movants ask this Court to lift the broad stay set forth in the amended receivership order entered on August 13, 2020 (the "Amended Receivership Order") (ECF No. 141) to allow Movants to move forward with their legal malpractice claim filed in the Philadelphia Court of Common Pleas against Pauciulo and Eckert Seamans, captioned *Parker et al. v. Pauciulo*

et al., Case No. 201200892, Philadelphia Court of Common Pleas, March 16, 2021 (the "Parker Action"). The Motion directly affects the Proposed Intervenors because it determines whether the Parker Action may proceed against them at this time, and therefore the Proposed Intervenors (Pauciulo and Eckert Seamans) have claims and defenses that share common questions of law and fact with the Motion. *See* Fed. R. Civ. P. 24(b)(1)(B).

As set forth in the attached Response in Opposition to the Motion to Lift the Litigation Stay, the Parker Action clearly falls within this Court's stay order as it directly implicates Dean Vagnozzi ("Vagnozzi"), Vagnozzi's entities, Joseph LaForte ("LaForte"), and his company, Complete Business Solutions Group, Inc. d/b/a Par Funding ("Par Funding"), and other former directors, officers, and/or agents of the Company, who are all subject to the Amended Receivership Order. Moreover, if the Parker 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 Dean Vagnozzi, as well as key individuals and entities who are mentioned extensively throughout the Parker 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, Dean Vagnozzi, and certain entities that Dean Vagnozzi controlled, including, ABetterFinancialPlan.com LLC d/b/a Better Financial Plan ("ABFP") and ABFP Management Co., LLC ("ABFP Management") 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 Movants controlled. ECF No. 119, SEC Compl. ¶ 4 (so-called "Agent Funds"). The SEC alleged those Agent Funds were managed by Dean Vagnozzi through his company ABFP Management, and that former officer of Par Funding, Perry Abbonizio, oversaw and coordinated the Agent Funds. SEC Compl. ¶ 6.

On July 27, 2020, this Court appointed the Receiver for several entities, including: Par Funding, ABFP, ABFP Management, ABFP Income Fund, LLC and ABFP Income Fund 2, L.P. (collectively, the "ABFP Income Funds", and together with Par Funding, ABFP, and ABFP Management, 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 relating to the SEC Action: (1) *Joseph and Joan Caputo v. Dean Vagnozzi et al.*, No. 1:20-cv-01042 (D. Del. Aug. 5,

2020); (2) *Robert Montgomery et al. v. Eckert Seamans et al.*, No. 1:20-cv-23750-DPG (S.D. Fla. Sept. 9, 2020); and (3) *Dennis Melchior et al. v. Dean Vagnozzi et al.*, No. 2:20-cv-05562-BMS (E.D. Pa. November 12, 2020). Each case has been stayed by the respective federal district court based on the plain language of the Amended Receivership Order in this SEC Action.

Similarly, three other legal malpractice actions have been brought against Pauciulo and Eckert Seamans in the Philadelphia Court of Common Pleas: (1) *Vagnozzi v. Pauciulo et al.*, Case No. 210402115 (Phila. CCP), (2) *Kohler, et al. v. Pauciulo and Eckert Seamans*, Case No. 210502334 (Phila. CCP); and (3) *Legacy Advisory Grp., Inc. et al. v. Pauciulo et al.*, Case No. 211001003 (Phila. CCP). These legal malpractice claims, like the Parker Action, relate to the instant SEC Action. All of these malpractice cases are currently stayed based on the Amended Receivership Order.

C. The Parker Action

On December 16, 2020, Movants commenced their legal malpractice action against the Proposed Intervenors in the Court of Common Pleas of Philadelphia County by filing a Praecipe for Writ of Summons. On March 16, 2021, they filed a complaint (the "Parker Complaint"). Movants' action clearly involves Receivership Entities, including but not limited to Par Funding, ABFP Management, and the ABFP Income Funds. The Parker Complaint also implicates former directors and officers of those entities, including Joe LaForte, Lisa McElhone, Perry Abbonizio, Dean Vagnozzi, and others.

As set forth in the very first sentence of the Parker Complaint, the malpractice action "aris[es] out of the representation of multiple individuals . . . in connection with the creation of various investment funds formed for the express purpose of investing in an entity commonly referred to as Par Funding." Compl. at 2. It continues, stating that "[m]illions of dollars in Plaintiffs' principal investments were lost as a result of the Florida Federal Court's action." *Id.* at

4. Specifically, the Complaint is grounded in allegations about Proposed Intervenors' conduct as it relates to Par Funding, Dean Vagnozzi, and the SEC lawsuit.

For example, the Parker Complaint alleges that "Vagnozzi agreed, for a fee, to team up with the principals of Par, Joseph LaForte ('LaForte') and Lisa McElhone ('McElhone'), in order to promote Par Funding and attract investors" (Compl. ¶ 47). Similarly, the Parker Complaint further alleges that "[f]or legal reasons having to do with the sale of securities, Pauciulo, Vagnozzi, and others at Par determined that individuals could not make an investment in Par" (Compl. ¶ 51). The Parker Complaint implicates Par Funding, its former owner, other individuals associated with Par, Dean Vagnozzi, and Receivership Entities.

Thus, while the Motion claims that the Parker Plaintiffs' malpractice claims "are independent of any investment made in Par Funding or its affiliates," that is patently false, as every claim depends on the investments made in Par Funding and its affiliates, and the conduct surrounding the relationship between Dean Vagnozzi, Par Funding, and Pauciulo and Eckert Seamans. Movants further emphasize the importance of the SEC Action to their malpractice claim. Movants allege the "[m]illions of dollars in Plaintiffs' principal investments were lost as a result of the Florida Federal Court's action." Parker Compl. at 4.

On April 30, 2021, Eckert Seamans and Pauciulo filed a motion to stay the Parker Action. On May 27, 2021, the court entered an order staying proceedings in the Parker Action. On June 9, 2021, the Parker Plaintiffs filed a Motion for Reconsideration of the May 27, 2021 Order Staying Proceedings, which was denied on June 16, 2021. The case remains stayed.

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 Movants' Motion for Lift of the Litigation Stay and to participate in any related briefing or hearings regarding the Motion. A copy of Proposed Intervenors' response in opposition is attached as **Exhibit 1**.

Rule 24(b)(1)(B) provides permissive intervention to any party who timely files a motion to intervene and "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.

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 v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989)).

The Parker Plaintiffs' Motion to Lift the Litigation Stay was filed less than two weeks ago, on February 15, 2022, and the Court ordered a response from the Receiver as well as set a deadline for any responses on March 1, 2022. 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 Intervenors' response was filed by the Court's deadline for responses and no other party has yet filed a response to the Motion.

On the other hand, the Intervenors will be prejudiced if not permitted to intervene and file their response to the Motion at this time given that the Motion directly impacts them and their rights, as discussed herein. Indeed, the whole purpose of the Motion is to avoid this Court's stay order so Movants can pursue litigation against the Proposed Intervenors, who are handicapped by the stay order's stay of discovery relevant to the Parker Action.

Finally, there are no unusual circumstances militating against a finding of timeliness where, as indicated above, the Motion 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 Lift Litigation Stay.

Next, the Court must determine whether the Proposed Intervenors' response to the Motion to Lift Litigation Stay 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 the Motion, and their arguments in opposition to the Motion address the claims asserted by Parker Plaintiffs in that Motion as well as those in the Parker Action pending in Philadelphia.

As discussed above, the issues raised in the Motion directly impact the Proposed Intervenors as the determination of the Motion will determine whether Movants can pursue their legal malpractice action 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. 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, 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 here.

CONFERRAL

Pursuant to Local Rule 7.1(a)(3), undersigned counsel for the Proposed Intervenors has conferred with counsel for the Receiver and the SEC. Counsel is authorized to represent that the SEC does not oppose this request to intervene and the Receiver does not take any position on it. Movants' counsel opposes this 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 the Motion to Lift the Litigation Stay (ECF No. 1152) and participating in any briefing or hearings regarding same; permit the Proposed Intervenors to file the attached Response in Opposition to the Motion; and grant such other relief as this Court deems just.

Dated: March 1, 2022

Respectfully submitted,

By: *<u>/s/ Melanie E. Damian</u>*
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[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.").

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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 on or about March 1, 2022, a true and correct copy of the foregoing was served upon the parties via the Court's electronic filing system.

/s/ Melanie E. Damian
Melanie E. Damian

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	**Case No. 20-CIV-81205-RAR**
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 NON-PARTIES MARK NARDELLI, FRANCIS CASSIDY, DAVID GOLLNER AND CHRISTOPHER MCMORROW'S MOTION TO LIFT LITIGATION STAY

I. INTRODUCTION

John W. Pauciulo ("Pauciulo") and Eckert Seamans Cherin & Mellott, LLC ("Eckert Seamans") file this Response in Opposition to Non-Parties Mark Nardelli, Francis Cassidy, David Gollner, and Christopher McMorrow's ("Movants'" or "Parker Plaintiffs'") Motion to Lift the Litigation Stay [ECF No. 1152] (the "Motion"). Movants ask this Court to lift the broad stay set forth in the amended receivership order entered on August 13, 2020 (the "Amended Receivership Order") (ECF No. 141) to allow the case captioned *Parker et al. v. Pauciulo et al.*, No. 892 (December Term, 2020) (the "Parker Action") to proceed in the Philadelphia Court of Common Pleas.

While the Movants are not parties to this case, the Parker Action clearly would require – at minimum – discovery from parties to this case who are subject to the Amended Receivership Order. The complaint (the "Parker Complaint") directly implicates, among others, Dean Vagnozzi ("Vagnozzi), Vagnozzi's entities, Joseph LaForte ("LaForte"), and Complete Business Solutions

EXHIBIT 1

Group, Inc. d/b/a Par Funding ("Par Funding"), who are all subject to the Amended Receivership Order.

Movants 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*"), Movants underlying claims are meritless and a stay of the Parker Action is necessary to maintain the status quo and will not cause any further harm to Movants. Instead, if successful on their underlying claims, Movants, who controlled so-called Agent Funds – a major feature of the SEC's Amended Complaint filed in this action on August 10, 2020 (ECF No. 119) – may 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 key individuals and entities who are mentioned extensively throughout the Parker Complaint and which are also subject to the stay, such as Vagnozzi's ABFP-entities, LaForte and Par Funding.

II. STATEMENT OF RELEVANT FACTS

A. The SEC Action

On July 24, 2020, the SEC brought claims against, among others, Par Funding, its principals, including Joe LaForte and Perry Abbonizio, Vagnozzi, and certain entities that Vagnozzi controlled, including ABetterFinancialPlan.com LLC d/b/a Better Financial Plan ("ABFP") and ABFP Management Co., LLC ("ABFP Management") 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 Movants controlled, so-called "Agent Funds." ECF No. 119, SEC Compl. ¶ 4. The SEC alleged those

Agent Funds were managed by Dean Vagnozzi through his company ABFP Management Company, LLC, and that former officer of Par Funding, Perry Abbonizio, oversaw and coordinated the Agent Funds. SEC Compl. ¶ 6.

On July 27, 2020, this Court appointed a receiver for several entities, including Par Funding, ABFP, ABFP Management, and the ABFP Income Fund, LLC and ABFP Income Fund 2, L.P. (collectively, the "ABFP Income Funds", and together with ABFP and ABFP Management, 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") 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. While the Defendants in the SEC Action settled or litigated the SEC's claims at trial, the stay remains in effect, and the Receiver continues to file motions for limited relief from the stay to marshal and collect assets – even as recently as February 23, 2022. *See, e.g.*, ECF No. 1164, Receiver Motion to Lift Litigation as to Certain Counterparties.

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

Similarly, three other legal malpractice actions have been brought against Pauciulo and Eckert Seamans in the Philadelphia Court of Common Pleas: (1) *Vagnozzi v. Pauciulo et al.*, Case No. 210402115 (Phila. CCP), (2) *Kohler, et al. v. Pauciulo and Eckert Seamans*, Case No. 210502334 (Phila. CCP); and (3) *Legacy Advisory Grp., Inc. et al. v. Pauciulo et al.*, Case No. 211001003 (Phila. CCP). These legal malpractice claims, like the Parker Action, relate to the instant SEC Action. All of these malpractice cases are currently stayed based on the Amended Receivership Order.

C. The Parker Action

On December 16, 2020, Movants commenced their legal malpractice action against the Proposed Intervenors in the Court of Common Pleas of Philadelphia County by filing a Praecipe for Writ of Summons. On March 16, 2021, Movants filed their complaint (the "Parker Complaint"). While not parties to the lawsuit, the Parker Action certainly *involves* Receivership entities as well as past officers, directors or agents of those entities. As set forth in the very first sentence of the Parker Complaint, the malpractice action "aris[es] out of the representation of multiple individuals . . . in connection with the creation of various investment funds formed for the express purpose of investing in an entity commonly referred to as Par Funding." Parker Compl.

at 2. It ties damages to this case, alleging that "[m]illions of dollars in Plaintiffs' principal investments were lost as a result of the Florida Federal Court's action." Parker Compl. at 4. Specifically, the Complaint is grounded in allegations about Pauciulo and Eckert Seamans' conduct as it relates to Par Funding, its former directors and officers, Dean Vagnozzi, and the SEC lawsuit.

For example, the Parker Complaint alleges that "Vagnozzi agreed, for a fee, to team up with the principals of Par, Joseph LaForte ("LaForte") and Lisa McElhone ("McElhone"), in order to promote Par Funding and attract investors." Parker Compl. ¶ 47. They allege that Vagnozzi and Par principals played a key role in the alleged wrongful conduct. *See, e.g.*, *id.* ¶ 55 ("Among other things, Pauciulo and Vagnozzi made the following representations, all of which turned out to be false, and were false when made . . ."); *id.* ¶ 51("For legal reasons having to do with the sale of securities, Pauciulo, Vagnozzi, and others at Par determined that individuals could not make an investment in Par"). The Parker Complaint implicates Par Funding, its former owner, other individuals associated with Par, Dean Vagnozzi, and Receivership Entities, and therefore will require extensive discovery from key individuals subject to the stay.

Moreover, while the Motion claims that the Parker Plaintiffs' malpractice claims "are independent of any investment made in Par Funding or its affiliates," Mot. at 3, that is patently false, as every claim depends on the investments made in Par Funding and its affiliates, and the conduct surrounding the relationship between Dean Vagnozzi, Par Funding, and Pauciulo and Eckert Seamans. The interconnectedness of the facts upon which the Parker Complaint relies means that any discovery in the Parker Action would clearly require discovery from the Receivership Entities and their "past or present officers, directors, managers, agents, etc." Such discovery, however, would be impossible to obtain because of the stay order. Eckert and Pauciulo

will be unable to obtain discovery significant to their defense, and they therefore would be significantly prejudiced if the Parker Action is allowed to proceed without the stay being lifted completely.

The last paragraph of the Facts section of the Motion underscores Movants' misunderstanding of the Receivership. They write that "[t]he funds available to satisfy any judgment in the Parker Action may not be seized by the Receiver because there is no attorney-client relationship between Eckert/Pauciulo and investors whose position is represented by the [R]eceiver." Mot. to Lift Litig. Stay at 3. The Receiver has assumed the position of not only investors, but the Receivership Entities, which may file claims against Pauciulo and Eckert Seamans to recover funds for investors whose interests the Receiver represents. The Motion also argues that "even if the subject funds were available to the Receiver (they are not), the funds, when collected, can be held in an attorney trust account or other secured account pending resolution of that issue." *Id.* But they maintain that the funds "will be more promptly distributed either to the parties to the Parker action, or otherwise (*if the Receiver articulates a proper basis for including the funds in the receivership estate*)." *Id.* Movants are putting the cart before the horse and assuming success on the underlying merits. Regardless, to allow this one piece of litigation to go forward, so that funds can go to the Movants *unless* the Receiver articulates a proper basis for including the funds in the Receivership Estate, is backwards. Such a scheme only benefits Movants. Moreover, the mere suggestion demonstrates that the Movants do not need the stay lifted to avoid irreparable harm, as apparently they would allow whatever funds they might recover in the Parker Action to sit in an escrow account until the Receiver could figure out whether the funds are part of the Receivership Estate. Indeed, the litigation stay should not be lifted to allow the Parker Action to go forward.

III. LEGAL STANDARD.

The Ninth Circuit set forth the standard for whether a court should lift a receivership stay 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*"). 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.

U.S. Small Bus. Admin. v. Smith, Stratton, Wise, Heher, & Brennan, LLP, CIV. A. 05-190, 2006 WL 237511, at *7 (E.D. Pa. Jan. 31, 2006). 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. Movants' Request to Lift the Litigation Injunction Should Be Denied.

The allegations in the Parker Complaint relate directly to their dealings with Receivership Entities subject to the stay and relate to the SEC Action. Moreover, 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). First, the interests of the Receiver in preserving the status quo outweigh the interests of Movants. This is a complicated case involving multiple parties and the Receiver is still marshalling and untangling assets.

Second, the fact that Movants are required to wait to litigate their 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).

"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 Movants who controlled certain entities which – although not part of the Receivership Estate – were a feature of the SEC Action. Movants should not be able to get the "first bite of the apple" ahead of the 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 alleged participants in the misconduct are seeking to lift the litigation stay to litigate the same issues. *Cf. Schwartzman*, 2013 WL 460218,

at *2 (denying movant's request to lift stay despite fact that he argued he was victim, not participant, in alleged Ponzi scheme).

2. *Movants' 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 weigh in favor of lifting the stay, Movants' legal malpractice claim lacks merit. As pled in their Answer in the Parker Action, Eckert Seamans and Pauciulo deny that they provided deficient legal services for several reasons, including that Movants did not engage Pauciulo and Eckert Seamans to conduct due diligence into Par Funding and Movants had their own exclusive relationship with Par Funding, Perry Abbonizio, Dean Vagnozzi, and other former directors and/or officers of Receivership Entities which allowed them to conduct their own due diligence. Beyond undermining their malpractice claims, the fact that they had meetings with Dean Vagnozzi, Par Funding and its former officers and directors outside of the presence of Pauciulo or Eckert Seamans underscores the need for discovery from all of the individuals involved in the SEC Action. Further, "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, the Parker Action plaintiffs' meritless legal malpractice claims do not tip the scale in favor of lifting the stay.

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

A stay will promote judicial economy because the allegations in the Parker Complaint will require discovery from (i) Dean Vagnozzi, (ii) Receivership Entities, including the ABFP-entities, Par Funding, and (iii) former directors and officers of those entities, such as Joe LaForte, and Perry Abbonizio, all of which are subject to the SEC stay. If discovery in the Parker 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 Parker 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 Non-Parties Mark Nardelli, Francis Cassidy, David Gollner and Christopher McMorrow's Motion to Lift the Litigation Stay seeking an Order to permit Movants to pursue their legal malpractice claim.

Dated: March 1, 2022

Respectfully submitted,

By: */s/ Melanie E. Damian*

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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 1st day of March, 2022, on all counsel or parties who have appeared in the above-styled action.

/s/ Melanie E. Damian
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