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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. AEQUITAS MANAGEMENT, LLC; AEQUITAS HOLDINGS, LLC; AEQUITAS COMMERCIAL FINANCE, INC.; AEQUITAS CAPITAL MANAGEMENT, INC.; AEQUITAS INVESTMENT MANAGEMENT, LLC; ROBERT J. JESENIK; BRIAN A. OLIVER; and N. SCOTT GILLIS, Defendants.	Case No. 3:16-CV-00438-PK **SECURED CREDITORS WEIDER HEALTH & FITNESS'S AND BRUCE FORMAN'S: (i) LIMITED OBJECTIONS TO RECEIVER'S MOTION FOR ORDER APPROVING THE SALE OF ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS AND (ii) REQUEST FOR ADEQUATE PROTECTION** **REQUEST FOR ORAL ARGUMENT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1 and Local Rule 7.1-1, Weider Health & Fitness certifies that it is a Nevada corporation, with no parent corporation or publicly-traded stock.

Dated: January 18, 2017 __________________________________

LOCAL RULE 7-1 CERTIFICATION

Pursuant to Local Rule 7-1(a), counsel for secured creditors Weider Health & Fitness and Bruce Forman certifies that good faith efforts were made, with counsel for the Receiver, to resolve the dispute at issue in this Limited Objection and Request for Adequate Protection, through an exchange of letters, e-mails, and telephone conferences in December 2016 and January 2017. The parties were not able to resolve this dispute without the assistance of the Court.

Dated: January 18, 2017 ______________________________

INTRODUCTION

The Receiver has proposed a sale of assets that: (i) violates binding contractual consent requirements; and (ii) ignores secured interests in CarePayment receivables. Receiver's Mot. for Orders ("Mot."), ECF No. 323; Am. & Restated Agreement of Purchase & Sale, ECF No. 324.

Weider Health & Fitness ("Weider") and Bruce Forman ("Forman") loaned $10.5 million to one of the Receivership Entities. Decl. of Bruce Forman in Support of Secured Creditors Weider & Forman's Objections to Receiver's Mot. ("Forman Decl.") Exs. A & I. These loans are, as the Receiver has put it, "**substantially over-collateralized and validly perfected**." Sept. 14, 2016 Receiver's Report at 52, 54, ECF No. 246. As first-priority, secured, over-collateralized creditors of a Receivership Entity, Weider and Forman are entitled to their principal, interest, and certain other fees and costs set forth in the applicable loan agreements. Yet the Receiver now seeks Court permission for a transaction that grants an exclusive right to purchase the receivables assets that comprise a key portion of the collateral for the Weider and Forman loans, "free and clear" of any interests, and without any protection for—or mention of—Weider's and Forman's first-priority, secured interests. This flies in the face of section 363, Congressional intent, and Supreme Court precedent.

The bigger problem for the Receiver is that the sale cannot proceed without Weider and Forman's consent, because the Weider and Forman loan agreements expressly forbid "any disposition of any material assets without the prior written consent of [Weider or Forman], which consent [Weider or Forman] may grant or withhold in the exercise of [their] sole discretion." Forman Decl. Ex. A ¶ 7(e), Ex. I ¶ 7(e). The proposed sale directly implicates that provision because the sale includes a binding, exclusive right to sell receivables that, again, comprise most of the value of the collateral for the Weider and Forman loans. Contract provisions like these are binding on receivers and the Court. Manufacturers' Fin. Co. v. McKey, 294 U.S. 442, 451 (1935) ("It seems to be conceded, or, if not, it must be, that in an action at law against the receivers the court would have been bound to enforce the contract under review strictly in accordance with its terms."); cf. Waterview Mgt. Co. v. F.D.I.C., 105 F.3d 696, 699 (D.C. Cir. 1997) (appointing receiver who could "simply vitiate the terms of existing assets, taking rights of value from private owners with no compensation in return, would raise serious constitutional issues").

That said, Weider and Forman do not wish to impede a sale that may ultimately benefit all parties impacted by the allegations here. Forman Decl. ¶¶ 23-24. They simply wish to avoid a scenario in which their contractual rights are derogated and their interests in millions of dollars of first-priority, secured debt are unprotected. Id. This is no idle concern. **In discussions, the Receiver has pointedly observed that cash generated by the sale of the receivables at issue could be used to fund the Receivership or for other Receivership purposes.** Id.; Decl. of John J. Mandler in Support of Secured Creditors Weider & Forman's Objections to Receiver's Mot. ("Mandler Decl.") ¶¶ 8-9. These statements, among others, have given Weider and Forman no choice but to object to the proposed sale to assert their contractual consent rights and seek the Court's protection. Forman Decl. ¶¶ 23-24. The statements also raise the concern that even a lien on the cash proceeds would not be sufficient to protect the interests of Weider and Forman.

The solution to the problem presented here is a Court order providing Weider and Forman adequate protection. That protection should take the form of an order: (i) that Weider's and Forman's liens attach to the net proceeds of the receivables sale and/or net proceeds from the liquidation of the receivables;(ii) that the Receiver promptly segregate the amount of Weider's and Forman's interests from the proceeds of the proposed sale—that is, $13,211,460 in principal loan balance and pre- and post-petition interest through January 18, 2017; and (iii) that the Receiver pay post-petition interest as it accrues on a monthly basis, or alternatively, continue to segregate post-petition interest as it accrues.

Weider and Forman seek only to protect what they are entitled to under valid and binding loan agreements. Accordingly, they will give their consent to the proposed sale on the condition that the Court order adequate protection in either of the following forms:

- Option 1: Order: (i) that Weider's and Forman's liens attach to the proceeds of either the sale of CarePayment Technologies, or alternatively, the purchaser's exercise of the exclusive option to sell CarePayment receivables, in the amount of $13,211,460 in principal and pre- and post-petition interest through January 18, 2017; (ii) that the Receiver segregate this sum from the proceeds of the proposed sale; and (iii) that the Receiver pay post-petition interest as it accrues on a monthly basis, or alternatively, continue to segregate post-petition interest as it accrues; or

- Option 2: Order that the Receiver pay Weider and Forman $13,211,460 to fully extinguish their interests (which would prevent further accrual of post-petition interest) from either the CarePayment Technologies sale, or alternatively, the purchaser's exercise of the exclusive option to sell CarePayment receivables.

FACTUAL BACKGROUND

I. The Parties

Weider is a family-owned Nevada corporation that manages the interests of the Weider family. Forman Decl. ¶ 2. Joe Weider pioneered the sport of bodybuilding and built several successful businesses promoting health and fitness, including Weider-branded magazines such as Shape and Muscle and Fitness, nutritional supplements (such as Airborne, Move Free, and MegaRed), and gym equipment. Id. Weider has sponsored and mentored athletes throughout the years, including Arnold Schwarzenegger. Id. Over time, most of the family businesses have been sold, and the Weider family office manages a diverse investment portfolio, including investments in private equity and secured, hard-money loans. Id. Bruce Forman is Weider's Executive Vice President. Id. ¶ 1. Weider and Forman loaned millions of dollars to CarePayment Holdings, LLC ("CarePayment Holdings") on a good faith, arm's-length basis well before CarePayment Holdings, and its subsidiaries and affiliates, became part of the receivership proceedings. Id. ¶ 3 & Exs. A-M.

In terms of structure, there are several CarePayment entities under the Aequitas umbrella. Sept. 14, 2016 Receiver's Report Ex. A. CarePayment Holdings owns 100% of both CarePayment, LLC and CP Funding I Holdings, LLC; CP Funding I Holdings, LLC, in turn, owns 100% of CP Funding I Trust ("CP Trust"). Id. Stated differently, CarePayment, LLC, CP Funding I Holdings, LLC, and CP Trust all "roll up" to CarePayment Holdings. Id. at 51. Separately, CarePayment Technologies, Inc. ("CarePayment Technologies") is majority-owned by CCM Capital Opportunities Fund, LP, formerly known as Aequitas Capital Opportunities Fund, LP ("CCM Capital Opportunities

Fund" or "Aequitas Capital Opportunities Fund").[1] Sept. 14, 2016 Receiver's Report at 23 & Ex. A; Am. & Restated Agreement of Purchase & Sale ¶ 1(pp). CarePayment Holdings, CarePayment, LLC, CP Funding I Holdings, LLC, and CCM Capital Opportunities Fund are part of the Receivership Estate; CP Trust and CarePayment Technologies are not part of the Receivership Estate. Order Appointing Receiver ¶ 1 & Exs. A & B, ECF No. 156.

In terms of business platform, CarePayment, LLC is a healthcare financing company used by hospitals, health systems, physician groups, and ancillary service providers. Forman Decl. ¶ 3. CarePayment, LLC helps healthcare-provider clients reduce bad debt expense by improving collection yields on patient pay obligations (receivables), resulting in increased financial performance. Id. CarePayment, LLC enters into contracts with healthcare-provider clients to purchase receivables. Id. Many of these contracts remain in effect, despite the receivership, allowing CarePayment, LLC to generate a continuing stream of healthcare receivables. Id. CarePayment Technologies services the contracts and receivables, and in return, receives an origination fee and servicing fee for each receivable collected. Id.; see also Sept. 14, 2016 Receiver's Report at 51-55 (describing CarePayment platform).

CarePayment receivables provide a significant source of recurring revenue to the CarePayment entities. Sept. 14, 2016 Receiver's Report at 51. According to the Receiver, as of June 30, 2016, the receivables owned by CarePayment, LLC were worth $51.8 million, and the receivables owned by CP Trust were worth $24.4 million. Id. Again, both CarePayment, LLC and CP Trust are ultimately 100% owned by CarePayment Holdings, so CarePayment Holdings owns these $76.2 million of receivables. Id. (discussing "roll up"). Throughout the receivership, CarePayment, LLC has been able to preserve the value of the CarePayment platform by "originating new receivables in the ordinary course of its business." Id. at 52. The origination has occurred pursuant to the contracts, described above, between CarePayment, LLC and

[1] The Receiver's Motion refers to CarePayment Technologies, Inc. as "CarePayment." To avoid confusion, Weider and Forman use precise names, unless specified otherwise. Any occurrences of "CarePayment" here will be in reference to the CarePayment platform as a whole.

healthcare-provider clients. Id. The contracts are not only valuable assets of CarePayment, LLC, but they also form a large part of the value of CarePayment Technologies because of the servicing rights that CarePayment Technologies holds to service the receivables purchased by Carepayment, LLC, as well as the continuing stream of receivables that Carepayment Holdings and its subsidiaries purchase pursuant to those contracts. Id. at 52 (explaining that CarePayment Technologies is a "critical asset" of one of the Receivership Entities, and "integral to maximizing the recovery to a wide range of Aequitas investors").

II. The Weider And Forman Loans

In October 2014, over 17 months before the Securities and Exchange Commission ("SEC") filed the complaint against the Aequitas entities (Compl., ECF No. 1), Weider loaned $6 million to CarePayment Holdings. Forman Decl. Exs. E, F, G. The loan had a seven percent interest rate (with a 20 percent default rate); was due by October 31, 2015; and was secured by collateral. Id. Ex. E ¶¶ 2(b), 14(e), Ex. F ¶¶ 4-7, Ex. G ¶ 2. The collateral included, but was not limited to:

> (i) equity interests in CarePayment, LLC and so-called "Additional Interests," which include "any entity … owned by [CarePayment Holdings] for the purpose of purchasing receivables originated or acquired pursuant to the CarePayment program established by Aequitas Capital Management, Inc. and its affiliates or any successor program of such CarePayment program;"
>
> (ii) "all … agreements or other documents … relating to the Additional Interests, and all of [CarePayment Holdings'] rights, interests and benefits pursuant to such … agreements or other documents;"
>
> (iii) "[a]ll products and produce" of the collateral companies;
>
> (iv) "[a]ll accounts, general intangibles, instruments, rents, monies, payments and all other rights, arising out of a sale, lease or other disposition of any of the Collateral;" and
>
> (v) "[a]ll proceeds … from the sale … or other disposition of any of the property described in this Collateral section …, whether due to judgment, settlement or other process."

Id. Ex. G ¶ 2. The loan agreement granted Weider "a first priority Security Interest in the Collateral." Id. Ex. E ¶ 2(b) (emphasis added).

In June 2015, Weider increased its loan by $4 million to CarePayment Holdings, from $6 million to $10 million. Id. Exs. A, B, C. The new, combined loan had a 17 percent interest rate (with a 25 percent default rate); was due by December 31, 2016; and was—again—secured by collateral. Id. Ex. A ¶¶ 2(b), 14(f), Ex. B ¶¶ 4-8, Ex. C ¶ 2. The collateral was substantially the same—it included, but was not limited to:

> (i) equity interests in CarePayment, LLC, CarePayment Funding I Holdings, LLC (which owns CP Trust), and so-called "Additional Interests," which include "any entity … owned by [CarePayment Holdings] (directly or indirectly) for the purpose of purchasing Receivables Assets";
>
> (ii) "all … agreements or other documents … relating to the Additional Interests, and all of [CarePayment Holdings'] rights, interests and benefits pursuant to such … agreements or other documents;"
>
> (iii) "[a]ll products and produce" of the collateral companies;
>
> (iv) "[a]ll accounts, general intangibles, instruments, rents, monies, payments and all other rights, arising out of a sale, lease or other disposition of any of the Collateral;" and
>
> (v) "[a]ll proceeds … from the sale … or other disposition of any of the property described in this Collateral section …, whether due to judgment, settlement or other process."

Id. Ex. C ¶ 2. The loan agreement again granted Weider "a first priority Security Interest in the Collateral." Id. Ex. A ¶ 2(b) (emphasis added).

Put simply, Weider's loan is secured not only by equity interests in certain CarePayment companies, but also by rights and interests in these companies' agreements; products and produce of these companies; rights arising out of the sale of these companies and their products and produce; and proceeds from the sale or disposition of these companies and their products and produce. Id. This includes receivables, as the Receiver appears to acknowledge. Sept. 14, 2016 Receiver's Report at 51 (describing CarePayment, LLC and CP Trust receivables portfolios, and noting that parent company—CarePayment Holdings—is "encumbered by … secured debt from Weider and Forman").

In exchange for financing, CarePayment Holdings agreed not to "[m]ake any disposition of any material assets without the prior written consent of [Weider], which consent [Weider] may grant or withhold in the exercise of its sole discretion." Forman Decl. Ex. A ¶ 7(e). The loan agreement defines "receivables assets" as "the receivables originated or acquired pursuant to the CarePayment® program established by Aequitas Capital Management, Inc. and its affiliates or any successor program of such CarePayment® program." Id. Ex. A ¶ 14(p). As such, the Weider-CarePayment Holdings loan agreement prohibits the disposition of receivables owned by CarePayment Holdings and its subsidiaries and affiliates without Weider's consent. Id. Ex. A ¶¶ 7(e), 14(p).

In June 2015, when Weider increased its loan to CarePayment Holdings from $6 million to $10 million, Forman also loaned $500,000 to CarePayment Holdings. Id. Ex. I. The terms of the Forman-CarePayment Holdings loan are identical to the Weider-CarePayment Holdings loan. Id. Ex. I ¶¶ 2(b), 7(e), 14(g), 14(p), Ex. J ¶¶ 4-7, Ex. K ¶ 2. All of the same provisions concerning security interests, collateral, collateral dispositions, and receivables assets with respect to the Weider-CarePayment Holdings loan apply equally to the Forman-CarePayment Holdings loan. Id. The loans and ancillary documentation stand on equal footing in terms of priority and CarePayment Holdings' obligations. Id. Ex. A ¶ 12, Ex. I ¶ 12; Black's Law Dictionary, pari passu (10th ed. 2014) ("at an equal pace; without preference").[2]

[2] The parties appear to have been able to resolve, without Court intervention, a separate contractual problem with the proposed sale—a problem involving a subordination agreement. In February 2016, CarePayment Technologies loaned $700,000 to CarePayment Holdings. Forman Decl. Ex. M. That same month, Weider and Forman consented to allow CarePayment Holdings to repay the $700,000 loan to CarePayment Technologies before repaying the $10.5 million Weider and Forman loans, provided that repayment to CarePayment Technologies occurred by the close of business on March 2, 2016 out of the proceeds of an intended financing of the CarePayment Holdings purchase of additional receivables. Id. at 2. Weider and Forman agreed to this "limited, one-time waiver" to allow CarePayment Holdings to secure purchase financing. Id. at 1 & ¶ 5. The subordination agreement provided that, if CarePayment Holdings did not repay the loan to CarePayment Technologies by March 2, 2016, "the consent that [Weider and

Weider and Forman validly perfected their security interests by, among other actions, filing UCC-1 financing statements in the appropriate financing statement records, as the Receiver has acknowledged. Mandler Decl. ¶ 6; Forman Decl. ¶ 4. The Receiver has acknowledged that "the Weider / Forman Loans appear to be substantially over-collateralized and validly perfected." Sept. 14, 2016 Receiver's Report at 54. In fact, the Receiver has provided financial information demonstrating that as of December 20, 2016, their loans were over-collateralized by 2.4 times the original principal amount owed to them, which would mean that there are sufficient funds to repay Weider and Forman principal and interest for a period of at least eight years. Forman Decl. ¶ 26. Weider and Forman are the only secured creditors of CarePayment Holdings. Id.

III. The Receiver's Motion To Approve The Sale "Free And Clear" Of Weider's And Forman's Interests Without Providing Adequate Protection For Them

On December 16, 2016, the Receiver filed a motion for an order approving the sale of assets and associated transactions "free and clear" of interests. Mot. at 4 & ¶¶ 28, 30. The proposed sale disposes of receivables that secure the Weider and Forman loans without consent from, adequate protection for, or even mention of Weider's and Forman's interests.

Although the Receiver has not disclosed the terms of the New Program Agreements (see Am. & Restated Agreement of Purchase & Sale Ex. 7, which is redacted), the Receiver confirmed during meet-and-confer discussions that the proposed sale includes granting the purchaser an "exclusive right" and "option" to purchase consumer receivables owned by CarePayment Holdings and its subsidiaries. Decl. of Matthew Donald Umhofer in Support of

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Forman] provided … [would] terminate automatically and [would] be of no further force or effect," and the $700,000 loan would "be subordinate in each and every respect to the [$10.5 million loans]." Id. at 2. CarePayment Holdings never closed on the additional purchase financing and did not repay CarePayment Technologies by March 2, 2016. Mot. ¶ 26 (noting balance as of the Motion). The Receiver indicated during meet-and-confer discussions that, despite its representations in the Motion regarding an intent to seek permission to repay the $700,000 loan (see Mot. ¶ 26), it no longer intends to pay off the CarePayment Technologies loan from the proceeds of the sale. Based on this representation, Weider and Forman have not raised objections concerning the subordination agreement, but reserve all rights to make such objections if necessary.

Secured Creditors Weider & Forman's Objections to Receiver's Mot. ("Umhofer Decl.") ¶¶ 2-3 & Ex. A. This was foreshadowed in the Receiver's last report, which mentioned a "potential sale of approximately $76 million receivables owned by [CarePayment, LLC] and [CP Trust]." Sept. 14, 2016 Receiver's Report at 53. It is worth repeating that the Receiver has admitted CarePayment Holdings is "encumbered by . . . approximately $10.5 million of secured debt from Weider and Forman" that "appear[s] to be … validly perfected." Sept. 14, 2016 Receiver's Report at 52, 54.

Receivables portfolios owned by CarePayment, LLC and CP Trust are material assets that secure the Weider and Forman loans, and they may not be transferred without Weider's and Forman's consent. Forman Decl. Ex. A ¶¶ 2(b), 7(e), 14(f), 14(p), Ex. C ¶ 2, Ex. I ¶¶ 2(b), 7(e), 14(g), 14(p), Ex. K ¶ 2; Sept. 14, 2016 Receiver's Report at 51 (describing CarePayment, LLC and CP Funding I Trust receivables portfolios, and noting that CarePayment Holdings is "encumbered by … secured debt from Weider and Forman").

The sale—which includes the exclusive right to purchase receivables—triggers the Weider and Forman loan agreements' consent provisions and disposes of the receivables that comprise a key part of the security for the Weider and Forman loans, but does not mention the Weider and Forman interests once or provide any protection for them whatsoever. See generally Mot.; Receiver's Decl., ECF No. 324; Am. & Restated Agreement of Purchase & Sale; Proposed Order, ECF No. 325. This is problematic because any future exercise of the exclusive option will be conducted after the proposed "free and clear" sale and likely deemed to be "in the ordinary course of business," meaning that it would not be subject to Court approval, and Weider and Forman might not have another opportunity to raise these objections. Order Appointing Receiver ¶ 26; 11 U.S.C. § 363(c); Forman Decl. ¶¶ 22-25.

IV. The Receiver's Statements Concerning Proceeds Of Receivables[3]

During conversations with Mr. Forman that preceded the motion at issue, the Receiver made a statement that raised serious concerns for Weider and Forman. Mandler Decl. ¶¶ 8-9; Forman Decl. ¶¶ 23-24. That statement—confirmed by both Mr. Forman and attorney John J. Mandler—was that if Weider and Forman "did not agree to a substantial discount in repayment of their loans, he could use the proceeds of any sale of collateral to fund the Receivership and for other Receivership-purposes." Mandler Decl. ¶¶ 8-9; Forman Decl. ¶¶ 23-24. It is this statement that left Weider and Forman with no choice but to file this objection, as the statement indicated that

[3] The Receiver has taken the position that Weider and Forman may not disclose to the Court, or rely upon, critically relevant statements made by the Receiver during meet-and-confer discussions, arguing that under Rule 408 of the Federal Rules of Evidence, "[a]ll prior negotiations, whether verbal or written that you put into the objection must be removed." Umhofer Decl. ¶ 5. This, however, is not what Rule 408 says. Bankcard Am., Inc. v. Universal Bancard Sys., Inc., 203 F.3d 477, 484 (7th Cir. 2000) ("Rule 408 is not an absolute ban on all evidence regarding settlement negotiations."). In fact, Rule 408 renders inadmissible an offer to compromise or statements made during compromise negotiations only when they are offered to "prove or disprove the validity or amount of a disputed claim" or impeach. Fed. R. Evid. 408(a). By its terms, Rule 408—like the rest of the Rules of Evidence—governs the question of trial admissibility, which is not in play in this objection. Grant Mfg. & Alloying, Inc. v. Recycle is Good, LLC, 2011 WL 6015663, at *3 (E.D. Pa. 2011) ("Rule 408 is a rule of evidence that does not generally govern pleadings.").

In a passage particularly relevant here, the advisory committee notes to Rule 408 say that "[t]he policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum"—which appears to be precisely what the Receiver was doing here when he made some of the statements at issue. Regardless, Rule 408 expressly provides that the Court "may admit this evidence for another purpose." RSL Holding Co., Inc. v. Dresser Indus., Inc., 1991 WL 277637, at *3 (N.D. Ill. 1991) ("Rule 408 only applies when statements made during settlement negotiations are used to prove liability. But the allegations in this case are not offered for the purpose of demonstrating that the plaintiffs' claim or defense is invalid."); accord Fed. R. Evid. 408(b). Weider and Forman are not offering any statement by the Receiver during negotiations for the purpose of "prov[ing] or disprov[ing] the validity or amount of a disputed claim"—indeed, the loan documents and the Receiver's own report to this Court amply establish the validity and amount of the claim. Instead, Weider and Forman are using the statement to explain why adequate protection is particularly necessary under these unique circumstances here. This is precisely the kind of "other purpose" contemplated by Rule 408(b). Objectwave Corp. v. Authentix Network, Inc., 2001 WL 204768, at *2 (N.D. Ill. 2001) ("Rule 408 forbids the introduction of settlement offers to prove or disprove liability; however, it explicitly permits the introduction of such offers for other purposes…. The letter is clearly relevant to and probative of Plaintiff's claim that irreparable harm will occur absent injunctive relief.") (citations omitted).

Weider and Forman—despite being secured, over-collateralized creditors—could be left with nothing in the event their collateral is sold and converted, which is precisely what the proposed sale contemplates by granting an "exclusive right" to sell that collateral. Forman Decl. ¶¶ 23-24.

ARGUMENT

The Receiver has failed to obtain the consent of Weider and Forman as required under their loan agreements, which are binding on the Receivership. And the Receiver has not satisfied the statutory criteria that would justify a sale "free and clear" of all interests, let alone Weider's and Forman's interests. The Court's order appointing the Receiver provides the same protection for creditors as the Bankruptcy Code and cannot be read to bypass the requisite statutory criteria.

Based on the Receiver's statements, Weider and Forman have genuine and well-founded concerns about their ability to collect on their over-secured debt. Nevertheless, Weider and Forman will consent to the proposed sale as long as their interests are adequately protected.

The principle of "adequate protection" is a critical one here. As discussed in detail below, the Bankruptcy Code—to which courts look for guidance in the receivership context—specifically provides safeguards for property interests sold by a trustee (here, a receiver). 11 U.S.C. § 363(e). Indeed, section 363(e) mandates that the Court "provide adequate protection of such interest" whenever a sale is contemplated. This is precisely what Weider and Forman seek here.

I. The Loan Agreements Prohibit The Sale Unless Weider And Forman Consent

The Weider and Forman loan agreements are unambiguous in requiring Weider's and Forman's consent prior to the sale of CarePayment Holdings' and its subsidiaries' material assets. Both agreements provide that:

> Borrower shall not … [m]ake any disposition of any material assets without the prior written consent of Lender, which consent Lender may grant or withhold in the exercise of its sole discretion.

Forman Decl. Ex. A ¶ 7(e), Ex. I ¶ 7(e). Both agreements define "receivables assets" as "the receivables originated or acquired pursuant to the CarePayment® program established by Aequitas Capital Management, Inc. and its affiliates or any successor program of such

CarePayment® program." Id. Ex. A ¶ 14(p), Ex. I ¶ 14(p).

There is no question that the proposed sale contemplates the disposition of material assets covered by the loan agreements. In its last report, the Receiver informed the Court of its intent to sell material assets of CarePayment Holdings' subsidiaries CarePayment, LLC and CP Trust. Sept. 14, 2016 Receiver's Report at 53. The Receiver confirmed in meet-and-confer discussions that the proposed sale includes granting the purchaser an exclusive option to purchase CarePayment, LLC and CP Trust receivables portfolios. Umhofer Decl. ¶¶ 2-3 & Ex. A. And the proposed sale requires the execution of "New Program Agreements" concerning CarePayment, LLC and CP Trust receivables portfolios. Am. & Restated Agreement of Purchase & Sale ¶¶ 1(pp), 8(q), 9(v). The proposed sale, then, triggers the Weider and Forman loan agreements' consent provisions. Forman Decl. Ex. A ¶ 7(e), Ex. I ¶ 7(e).[4]

Those consent provisions, like all contractual provisions, are binding on the Receiver. McKey, 294 U.S. at 451 ("It seems to be conceded, or, if not, it must be, that in an action at law against the receivers the court would have been bound to enforce the contract under review strictly in accordance with its terms."); Hedges v. Dixon County, 150 U.S. 182, 189 (1893) ("It is too well settled to need citation of authorities that a court of equity, in the absence of fraud, accident, or mistake, cannot change the terms of a contract."). A receiver cannot ignore the terms of pre-receivership contracts, even when they appear "harsh or oppressive or unreasonable," because "[l]egal rights are as safe in chancery as they are in a court of law[.]" McKey, 294 U.S. at 448–49.

When a pre-receivership contract prohibits a party from taking a specified action, it prohibits the party's receiver from taking that action. John T. Callahan & Sons, Inc. v. Dykeman Elec. Co., Inc., 266 F. Supp. 2d 208, 219 (D. Mass. 2003) (where company's subcontract prohibited assignment of the contract without written consent of the other party, the company

[4] The Receiver has suggested that the proposed sale agreement relates only to CarePayment Technologies' equity, and not CarePayment Holdings' or its affiliates' receivables directly. Forman Decl. ¶ 25. As discussed above, this is simply incorrect based on the known terms of the proposed sale itself, and as reflected in the meet-and-confer correspondence.

"and therefore the receiver by operation of law[,] did not have the power to assign the subcontract … without [the other party's] written consent"); S.E.C. v. Mgt. Sols., Inc., 2013 WL 594738, at *4 (D. Utah Feb. 15, 2013) ("this Court must respect contract rights"); Coy v. Title Guarantee & Trust Co., 198 F. 275, 280 (D. Or. 1912) ("The receiver may not impair, by any act on his part, any valid contract, subsisting at the time of his appointment, which fixes the obligations and determines the rights of the respective parties[.]"). Indeed, **to hold that a federal court could appoint a receiver and "simply vitiate the terms of existing assets, taking rights of value from private owners with no compensation in return, would raise serious constitutional issues."** Waterview Mgt., 105 F.3d at 699 (emphasis added).

In the face of this compelling case authority, the Receiver does not dispute the validity of the Weider and Forman loan agreements, but insists that a receiver can simply ignore or vitiate contract provisions that it does not like under its "broad powers and wide discretion." Umhofer Decl. ¶ 3. The Receiver has suggested in meet-and-confer discussions that three cases support this extraordinary proposition, but none gives the Receiver the authority he claims.

One of the Receiver's cases, United States v. Ariz. Fuels Corp., involved the wholly different scenario of a creditor that had already been paid, trying to keep money that belonged to the receivership estate and had been distributed by the receiver without court approval. 739 F.2d 455, 458 (9th Cir. 1984). The court held that the creditor could not "unilaterally" retain the money to settle past debts. Id. That narrow holding has no bearing here, as Weider and Forman do not seek to retain receivership money distributed without court approval. The other two cases held that a court has jurisdiction to dispose of receivership property in which others might have an interest after proper notice and an opportunity to be heard (at which time, interested parties can presumably assert their positions); these cases did not give receivers carte blanche to ignore contracts. S.E.C. v. Am. Capital Invs., Inc., 98 F.3d 1133, 1143-44 (9th Cir. 1996), abrogated on other grounds by Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998); S.E.C. v. Schooler, 2016 WL 3031824, at *8 (S.D. Cal. May 25, 2016). Had they done so, they would have contravened controlling precedent establishing that court-appointed receivers must honor contracts. McKey, 294 U.S. at 451; Hedges, 150 U.S. at 189.

Indeed, the Ninth Circuit rejected an argument similar to that raised by the Receiver in an analogous context: it held that, although Congress granted the FDIC broad receivership powers, it did not allow "the FDIC to breach contracts at will" and, when acting as a receiver, the FDIC may only escape contract obligations "through the prescribed mechanism" (meaning the parameters of the Financial Institutions Reform, Recovery and Enforcement Act of 1989). Sharpe v. F.D.I.C., 126 F.3d 1147, 1154 (9th Cir. 1997). Moreover, the Receiver's interpretation would improperly read the limited exception for executory contracts out of the Bankruptcy Code: if a receiver is never bound by contracts, then Congress would not have needed to enact 11 U.S.C. § 365, which does allow a receiver to either assume or reject executory contracts under certain parameters. Cf. United States v. Andrews, 600 F.3d 1167, 1173 (9th Cir. 2010) ("[I]t is a 'longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous[.]'") (citations omitted). Lastly, there remains the constitutional problem of a court-appointed receiver abrogating a party's rights without just compensation. Cf. Waterview Mgt., 105 F.3d at 699.

Nothing in the Receiver's proffered case authority overcomes the well-established and widely accepted proposition that receivers cannot disregard pre-receivership contracts—even those that contain provisions that inconvenience the receiver. Both this result and the adequate-protection remedy sought by Weider and Forman are fully consistent with the Bankruptcy Code, which both the Receiver and the Court have acknowledged provide substantial guidance in the Receivership context. Indeed, a closer examination of relevant provisions of the Bankruptcy Code demonstrates that the remedy sought by Weider and Forman here is required by law.

II. The Proposed Sale Illegally Subordinates The Interests Of First-Priority, Secured Creditors

The proposed distribution of sale proceeds illegally subordinates the interests of first-priority, secured creditors. "[A] receiver appointed by a federal court takes property subject to all liens, priorities, or privileges existing or accruing under the laws of the state." Marshall v. New York, 254 U.S. 380, 385 (1920). "[C]ourts sitting in equity are not allowed to disregard the law in its entirety," and "[t]he rights of secured creditors to their security interests are among those protected by law." S.E.C. v. Mgt. Sols., Inc., 2013 WL 594738, at *3 (D. Utah Feb. 15, 2013). The appointment of a receiver does not destroy the priority interest of a secured creditor. Ticonic Nat'l Bank v. Sprague, 303 U.S. 406, 412 (1938) (explaining that rights of secured creditors are superior to rights of unsecured creditors and not subject to the "principle of equality of distribution" in receivership); S.E.C. v. Madison Real Est. Group, LLC, 647 F. Supp. 2d 1271, 1277 (D. Utah 2009) ("[T]he Interveners' priority interest remains intact despite the Receivership."). "[T]o the extent that one debt is secured and another is not there is manifestly an inequality of rights between the secured and unsecured creditors, which cannot be affected by the principle of equality of distribution." Ticonic Nat. Bank, 303 U.S. at 412. As such, a court lacks authority to approve a sale that does not honor the priority interests of secured creditors. Madison Real Est. Group, LLC, 647 F. Supp. 2d at 1277 (recognizing receiver's "broad powers," but denying motion to approve sale that would place buyers' interests above those of secured creditors); Mgt. Sols., Inc., 2013 WL 594738, at *4 ("[T]his Court must respect contract rights, the status of secured creditors, and secured creditors' rights to their interests in collateral."); In re Real Prop. Located at Redacted Jupiter Drive, 2007 WL 7652297, at *3 (D. Utah Sept. 4, 2007) ("Although a court administering an equity receivership has discretion in the distribution of the assets, the general rule is that a court should respect lien priorities created under state law.").

The Weider and Forman loan agreements are governed by New York law and subject to the New York Uniform Commercial Code. Forman Decl. Ex. A ¶ 13(e), Ex. C ¶ 10, Ex. I ¶ 13(e), Ex. K ¶ 10. Under New York law, secured creditors have priority over unsecured creditors. N.Y. U.C.C. Law § 8-511(a) (secured creditors have priority over other creditors); Matter of Liquidation of Union Indem. Ins. Co. of N.Y., 216 A.D.2d 48, 49 (N.Y. App. Div. 1995) (secured creditors have priority over general creditors); Chrysler Credit Corp. v. Simchuk, 258 A.D.2d 349, 350 (N.Y. App. Div. 1999) ("[S]ecured creditor[] had a superior interest …

[and] was entitled to the satisfaction of its lien prior to municipal defendants' satisfaction of its judgment[.]"). Thus, the Court cannot approve a sale, like the one proposed, which simply ignores Weider's and Forman's first-priority, secured interests in the receivables.

To the extent the Receiver may argue that the Court can legally disregard Weider's and Forman's priority liens, and instead order them to partake in a pro rata distribution of assets because there are allegations of a Ponzi scheme, this argument must fail. Again, courts cannot disregard priority liens. Ticonic Nat'l Bank, 303 U.S. at 412. For this reason, courts routinely hold that priority secured creditors must be paid before unsecured creditors (the investors) in cases involving alleged Ponzi schemes. In re Real Prop. Located at Redacted Jupiter Drive, 2007 WL 7652297, at *4 (rejecting argument that lien priorities can be disregarded in receiverships following allegations of Ponzi scheme); S.E.C. v. Detroit Memorial Partners, 2016 WL 6595942, at *11 (N.D. Ga. Nov. 8, 2016) (in case involving Ponzi scheme allegations, requiring receiver to pay priority secured creditor before distributing any amounts to unsecured creditors); S.E.C. v. Ferona, 2008 WL 4964675, at *3 (D. Colo. Nov. 18, 2008) (in case involving Ponzi scheme allegations, recognizing secured creditor's priority lien was not subject to pro rata distribution).

III. The Proposed Sale Does Not Benefit Weider And Forman, Secured Creditors Of The Receivership Estate

The proposed sale does not benefit Weider and Forman, in violation of the Receiver's duties. A receiver is an officer of the court whose primary purpose is "to promote orderly and efficient administration of the estate by the district court for the benefit of creditors." S.E.C. v. Hardy, 803 F.2d 1034, 1038 (9th Cir. 1986). A receiver's actions must be taken to benefit "all parties" having an interest in the estate, not just the plaintiff or defendant. Booth v. Clark, 58 U.S. 322, 331 (1854); N. Am. Broad., LLC v. United States, 306 Fed. App'x 371, 373 (9th Cir. 2008). Here, the Receiver represents that "[t]he Sale is in the best interests of the Receivership Entity['s] … creditors[.]" Mot. ¶ 39. Yet the Receiver makes no mention whatsoever of Weider and Forman, their valid and perfected first-priority, secured interests in the receivables and the entities that hold them, or that the proposed sale violates the terms of the Weider and Forman loan agreements. See generally Mot. There can be no question that the proposed sale (without adequate protection) is not in the best interests of all creditors—at minimum, the interests of first-priority, secured creditors Weider and Forman.

IV. There Is No Authority That Would Allow A Sale "Free And Clear" Of Weider's And Forman's Interests

Neither the Bankruptcy Code nor this Court's order appointing a receiver allows the Receiver to sell receivables "free and clear" of Weider's and Forman's interests in them.

A. The Bankruptcy Code Prohibits A Sale "Free and Clear" Of All Interests Because The Statutory Prerequisites Have Not Been Satisfied

The Receiver lacks authority to sell CarePayment Holdings' and its affiliates' receivables "free and clear" of all interests because the requisite statutory criteria are not met. Courts have applied 11 U.S.C. § 363(f) outside of the bankruptcy context to allow a receiver to sell assets "free and clear" of all interests. See, e.g., S.E.C. v. Capital Cove Bancorp LLC, 2015 WL 9701154, at *4-8 (C.D. Cal. Oct. 13, 2015) (applying bankruptcy law in the context of an SEC receivership involving a Ponzi scheme); Pennant Mgt., Inc. v. First Farmers Fin., LLC, 2015 WL 4511337, at *6 (N.D. Ill. July 24, 2015) (holding court had authority to allow receiver to sell property free and clear of liens, but only after hearing to allow interest-holders an opportunity to object and request attachments to sale proceeds). In this vein, the Receiver relies on section 363 as authority for the proposed sale. Mot. ¶ 30.

Section 363(f) provides that, after notice and a hearing, a bankruptcy trustee may sell property free and clear of any interest "only" in one of five circumstances:

> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or

> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). The trustee bears the burden of establishing that one of these conditions exists. In re Duncan, 406 B.R. 904, 910 (Bankr. D. Mont. 2009).

In summary, section 363(f) essentially provides that, "[i]f a secured creditor is not to be paid in full from a sale,"—which is indisputably the case here, because the proposed sale makes no mention whatsoever of Weider and Forman—"[the secured creditor] may consent to the sale by the trustee, or if there is a bona fide dispute as to the lien the trustee may sell the collateral over his objection." In re Takeout Taxi Holdings, Inc., 307 B.R. 525, 534 (Bankr. E.D. Va. 2004). Section 363(f) does not "enable a trustee to sell the collateral over the objection of the secured creditor for an amount insufficient to pay the secured creditor in full … when there is no bona fide dispute." Id. "This is the balance Congress reached between the secured creditor and the trustee." Id.

Here, the Receiver has not borne its burden in establishing that section 363(f) justifies a sale "free and clear" of all interests here.

1. No Other Law Permits The Proposed Sale "Free And Clear"

Section 363(f)(1) does not provide the requisite authority to allow a sale "free and clear" of all interests because no applicable non-bankruptcy law permits such a sale. At a minimum, the Receiver has identified none. As set forth above, the proposed sale violates contractual obligations, illegally subordinates priority interests, and is not in the interest of all creditors.

2. Weider And Forman Have Not Consented To The Sale

Section 363(f)(2) does not provide the requisite authority to allow a sale "free and clear" of all interests. "The consent required is consent to a sale free of liens or interests, not merely consent to the sale of assets," and "[a] creditor's express refusal to consent ordinarily precludes a sale under § 363(f)(2)." In re E. Airport Dev., LLC, 443 B.R. 823, 831 (Bankr. App. 9th Cir. 2011) (citations omitted). Weider and Forman have not consented. The absence of their consent not only deprives the Receiver of a statutory basis to proceed with the sale, but prohibits the sale outright under the terms of the Weider and Forman loan agreements, as discussed above.

3. The Receiver Has Not Demonstrated The Receivables Will Be Sold At A Price Greater Than The Value Of All Liens Against The Property

Section 363(f)(3) does not provide the requisite authority to allow a sale "free and clear" of all interests. Section 363(f)(3) involves a two-part determination: (1) are the interests "liens" and (2) does the sale price exceed the total of all liens. In re Taylor, 198 B.R. 142, 160 (Bankr. D.S.C. 1996). This section "envisions a secured lender being paid in full, preferably at closing, if the collateral is sold," and "recognizes the bargained-for position of the secured lender and balances his right to dispose of the collateral for his benefit pursuant to the terms of the negotiated security agreement and the right of the trustee to dispose of the collateral for the benefit of all creditors of the estate[.]" In re Takeout Taxi, 307 B.R. at 533 (emphasis added).

Although the Receiver has represented to the Court that Weider and Forman are over-collateralized, the Receiver has not provided the Court or the parties with sufficient information to conclude that section 363(f)(3) applies because the Receiver did not account for all liens against the receivables, let alone identify their value. A lien is "a charge against or interest in property to secure payment of a debt or performance of an obligation," which generally falls into one of three categories: "judicial liens, security interests, and statutory liens." Bankruptcy Reform Act, S. Rep. 95-989, 25 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5811. A "security interest" is a "lien created by an agreement." 11 U.S.C. § 101(51). The Weider and Forman interests were created by agreement to secure payment of debt. Forman Decl. Ex. A ¶¶ 2(b), 14(f), Ex. C ¶ 2, Ex. I ¶¶ 2(b), 14(g), Ex. K. ¶ 2. As such, Weider's and Forman's interests are liens; indeed, the loan agreements refer to Weider's and Forman's interests as liens. Id. Ex. A ¶ 4(a) ("Borrower shall do all things necessary to preserve and keep in full force and effect the perfection and first lien priority of the Security Interest granted to Lender, provided that Lender has taken all actions necessary to perfect such first lien priority.") (emphasis added); id. Ex. I ¶ 4(a) (same).[5]

Despite their lien status, the Receiver did not list Weider's and Forman's interests as liens against the property. Mot. ¶ 29. Nor did the Receiver provide any information to determine whether the sale price exceeds the aggregate value of all liens against the property. Mot. ¶ 29; Receiver's Decl. ¶ 16. Therefore, the Receiver has not demonstrated that section 363(f)(3) provides the requisite basis for the proposed sale.

4. Weider's And Forman's Interests Are Not "In Bona Fide Dispute"

Section 363(f)(4) does not provide the requisite authority to allow a sale "free and clear" of all interests. The Bankruptcy Code does not define "bona fide dispute," but courts interpret it to mean the existence of "'a factual or legal dispute as to the validity of the asserted interest.'" In re NJ Affordable Homes Corp., 2006 WL 2128624, at *10 (Bankr. D.N.J. June 29, 2006) (quoting In re Taylor, 198 B.R. at 162). "The purpose of § 363(f)(4) is to permit property of the estate to be sold free and clear of interests that are disputed by the representative of the estate so that liquidation of the estate's assets need not be delayed while such disputes are being litigated." In re Clark, 266 B.R. 163, 171 (Bankr. 9th Cir. 2001). Here, the Receiver admits that Weider's and Forman's interests are "validly perfected." Sept. 14, 2016 Receiver's Report at 54.

5. The Receiver Has Not Identified Any Authority Requiring Weider And Forman To Accept Less Than The Value Of Their Interests

Section 363(f)(5) does not provide the requisite authority to allow a sale "free and clear" of all interests. Section 363(f)(5) plays "a relatively small" and "narrow" role in the "free and clear"

[5] The Weider and Forman interests would also be considered statutory liens under New York law, but this excludes them from the definition of statutory liens under the Bankruptcy Code. Compare N.Y. U.C.C. Law § 9-308(e) ("Perfection of a security interest in a right to payment or performance also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right."), with 11 U.S.C. § 101(53) (defining statutory lien as arising "solely" by statute, and excluding security interests and judicial liens). Should the Receiver argue that Weider's and Forman's interests are not liens at all, then section 363(f)(3) is simply inapplicable. 11 U.S.C. § 363(f)(3) (requiring interest to be a "lien"); In re Taylor, 198 B.R. at 160 (section 363(f)(3) was unavailable where leases were not liens).

sale of assets, and its scope is not "expansive or all-encompassing." In re PW, LLC, 391 B.R. 25, 43 (Bankr. 9th Cir. 2008). Its meaning "is anything but plain," but in the Ninth Circuit, the Receiver must show the existence of "a legal and equitable proceeding in which the nondebtor could be compelled to take less than the value of the claim secured by the interest." Id. at 42, 45-46 (collecting cases). Here, the Receiver has identified no such proceeding. See generally Mot.

B. The Court's Order Appointing A Receiver Does Not, By Itself, Provide The Requisite Authority For A Sale "Free And Clear" Of All Interests

Bereft of any statutory basis to seek a sale "free and clear," the Receiver suggests that the Court's order appointing the Receiver, standing alone, entitles the Receiver to sell the receivables "free and clear" of all interests. See also Mot. ¶ 28 (citing Court's order as authority for a sale "free and clear" of any interests). To the extent the Receiver maintains this position, the argument must fail because the Court's order does not (and cannot) provide Weider and Forman less protection than the Bankruptcy Code.

Section 363(b)(1) allows a trustee, after notice and a hearing, to enter into certain transactions "other than in the ordinary course of business." 11 U.S.C. § 363(b)(1). Section 363(f) sets forth the conditions for a sale "free and clear of any interest[s]." 11 U.S.C. § 363(f). And Section 363(e) requires the Court to prohibit or condition a sale "as is necessary to provide adequate protection" for interests. 11 U.S.C. § 363(e).

This Court's order tracks all three sections:

> The Receiver may sell real estate or assets outside of the ordinary course of business, or abandon material assets, only with Court approval after reasonable notice under the circumstances and an opportunity for interested parties to be heard. The assets of the Receivership Entity, with Court approval, may be sold, transferred or disposed, free and clear of any liens, claims or encumbrances, with such liens, claims or encumbrances attaching to the proceeds.

Order Appointing Receiver ¶ 156, ECF No. 156 (emphasis added). The Court's order provides the same procedures and protections as the Bankruptcy Code; nothing more, nothing less.

Any other interpretation of the Court's order would run afoul of the Fifth Amendment's constitutional prohibition against Government takings without just compensation. "Section

363(f) is a powerful right" that "permits a trustee to maximize the recovery from an asset without being unduly entangled at an early stage of the proceedings in controversies concerning the existence, validity and priority of liens and other interests in the property sought to be sold," but it "is not without its limitations or without protections for lienholders and others holding interests in the property." In re Takeout Taxi, 307 B.R. at 528 (emphasis added). Among these are the carefully crafted requirements of section 363(f) itself, and 363(e)'s adequate protection requirement rooted in the Fifth Amendment. Bankruptcy Reform Act, S. Rep. No. 95-989, at 49, 56 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5835, 5842. An interpretation of this Court's order allowing the Receiver to bypass these protections would violate basic notions of constitutional due process. Cf. In re Takeout Taxi, 307 B.R. at 532 ("Constitutional due process is not simply satisfied by properly placing a piece of paper in the hands of the respondent.").

V. Weider's And Forman's First-Priority, Secured Interests Are Not Subject To Equitable Subordination

During meet-and-confer discussions, the Receiver suggested that Weider's and Forman's interests may be subject to equitable subordination. This argument is wholly without merit.

After notice and a hearing, a court may, "under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest." 11 U.S.C. § 510(c)(1). To subordinate a claim, the court must find: "'(1) that the claimant engaged in some type of inequitable conduct, (2) that the misconduct injured creditors or conferred unfair advantage on the claimant, and (3) that subordination would not be inconsistent with the Bankruptcy Code.'" In re First Alliance Mortgage Co., 471 F.3d 977, 1006 (9th Cir. 2006) (citations omitted). "Where non-insider, non-fiduciary claims are involved, as is the case here, the level of pleading and proof is elevated: gross and egregious conduct will be required before a court will equitably subordinate a claim." Id. "Although equitable subordination can apply to an ordinary creditor, the circumstances are 'few and far between.'" Id. (citations omitted).

During meet-and-confer discussions, the Receiver suggested equitable subordination might be appropriate because the Weider and Forman loans have a 17 percent interest rate and 25 percent default-rate, thereby raising potential "red flags" about CarePayment Holdings' solvency at the time of lending. Yet "subordination requires some showing of suspicious, inequitable conduct beyond mere initial undercapitalization of the enterprise," and making a loan to even an insolvent corporation "is insufficient to require subordination of claims." In re Filtercorp, Inc., 163 F.3d 570, 583 (9th Cir. 1998). CarePayment Holdings is also, of course, far from insolvent. Sept. 14, 2016 Receiver's Report at 52, 54. The Receiver also suggested that equitable subordination might be appropriate because certain Aequitas-related entities have been accused of civil fraud, but these allegations were not raised until March 10, 2016 (Compl.)—over 17 months after Weider extended its initial $6 million loan, and also well after the subsequent Weider and Forman loans. The fact that the claims of junior creditors might not be paid in full is insufficient to justify equitable subordination; rather, it "follows inevitably from [the] status of junior creditor[s]." In re Universal Farming Indus., 873 F.2d 1334, 1337 (9th Cir. 1989). There is simply no conduct on the part of Weider and Forman, let alone gross and egregious conduct, that could justify equitable subordination here. It is also worth noting that the Receiver has advocated and "received strong support" for a proposed $8.5 million settlement to satisfy Weider's and Forman's interests—a feat that would be inconsistent with any basis for equitable subordination. Sept. 14, 2016 Receiver's Report at 54.

VI. The Sale Should Be Conditioned On The Receiver's Repayment Of The Weider And Forman Loans From The Sale's Proceeds

Even if the Receiver can satisfy the criteria for a "free and clear" sale, the Bankruptcy Code requires adequate protection of Weider and Forman's interests. The Bankruptcy Code provides that:

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit

> or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

11 U.S.C. § 363(e) (emphasis added). It further provides that adequate protection may be provided by: (1) requiring a cash payment or periodic payments to the extent the sale "results in a decrease in the value of [an] entity's interest in such property;" (2) providing a replacement lien to the extent a sale "results in a decrease in the value of [an] entity's interest in such property;" or (3) granting other relief that allows the entity to realize "the indubitable equivalent of [the] entity's interest in such property." 11 U.S.C. § 361.

"Most often, adequate protection in connection with a sale free and clear of other interests will be to have those interests attach to the proceeds of the sale." Bankruptcy Reform Act, S. Rep. No. 95-989, at 56 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5842. For example, in Capital Cove, the court approved a receiver's proposed sale under section 363(f) specifically because—under the terms of the proposed order—all liens would attach to the proceeds of the sale. 2015 WL 9701154, at *8. Even then, the court would only approve a sale price sufficient to cover the aggregate value of all existing liens, except for properties where the liens were "in a bona fide dispute." Id. Moreover, requiring interest payments on a loan "is normally appropriate" for over-secured claims. In re El Patio, Ltd., 6 B.R. 518, 523 (Bankr. C.D. Cal. 1980).

The requirement for adequate protection is rooted in the Fifth Amendment. Bankruptcy Reform Act, S. Rep. No. 95-989, at 49 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5835 (citing Wright v. Union Central Life Inc. Co., 311 U.S. 273 (1940), and Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)). It evidences Congress' explicit intent to safeguard "the rights of secured creditors, throughout the proceedings, to the extent of the value of the property." Wright, 311 U.S. at 278.

There can be no question that Weider and Forman are first-priority, secured creditors, or that their loans are secured by CarePayment receivables. Forman Decl. Ex. A ¶¶ 2(b), 14(f), Ex. B ¶¶ 4-8, Ex. C ¶ 2, Ex. I ¶¶ 2(b), 14(g), Ex. J ¶¶ 4-7, Ex. K ¶ 2; Umhofer Decl. Ex. ¶¶ 2-3 & Ex. A; Sept. 14, 2016 Receiver's Report at 51-52. Again, the Receiver himself reported that

CarePayment Holdings "is encumbered by … approximately $10.5 million of secured debt from Weider and Forman." Sept. 14, 2016 Receiver's Report at 52 (emphasis added). He further reported that "the Weider / Forman Loans appear to be substantially over-collateralized and validly perfected." Id. at 54.

The proposed sale, however, provides no protection for Weider's and Forman's first-priority, secured interests. In fact, neither Weider's nor Forman's interests are mentioned in the Receiver's moving papers at all. See generally Mot.; Receiver's Decl.; Am. & Restated Agreement of Purchase & Sale; Proposed Order. The Receiver asks this Court to approve the sale, "free and clear" of all liens, without any priorities attaching to the proceeds of the sale (except—inexplicably—repayment of the subordinate CarePayment Technologies loan, which the Receiver now represents will not occur as previously described). Mot. ¶¶ 2(a)-(b), 26, 28, 30; Receiver's Decl. ¶¶ 15-16; Umhofer Decl. ¶¶ 2-3 & Ex. A. This flies in the face of section 363, Congressional intent, Supreme Court precedent, and basic notions of equity.

The simplest solution is to condition the sale on the provision of adequate protection. In this case, the facts warrant more than merely holding that Weider's and Forman's liens attach to the net proceeds of the receivables sale. As discussed above, in trying to convince Weider and Forman to accept less money than they are entitled to, the Receiver has explicitly stated that the proceeds of the sale of the receivables could be used "to fund the Receivership and for other Receivership-purposes." Mandler Decl. ¶ 8; Forman Decl. ¶ 23. This statement raises the concern that even a lien on the cash proceeds would not be sufficient to protect the interests of Weider and Forman. Accordingly, the Court should order adequate protection in either of the following forms:

- Option 1: Order: (i) that Weider's and Forman's liens attach to either the proceeds of the sale of CarePayment Technologies, or alternatively, the purchaser's exercise of the exclusive option to sell CarePayment receivables, in the amount of $13,211,460 in principal and pre- and post-petition interest through January 18, 2017; (ii) that the Receiver segregate this sum from the proceeds of the proposed sale; and (iii) that the Receiver pay post-petition interest as it accrues on a monthly basis, or alternatively, continue to segregate post-petition interest as it accrues; or

- Option 2: Order that the Receiver pay Weider and Forman $13,211,460 to fully extinguish their interests (which would prevent further accrual of post-petition interest) from either the CarePayment Technologies sale, or alternatively, the purchaser's exercise of the exclusive option to sell CarePayment receivables.

VII. To Date, CarePayment Holdings Owes Weider And Forman In Principal And Interest

Adequate assurances are necessary to protect Weider's and Forman's interests in $13,211,460 in principal and pre- and post-petition interest that has accrued to date, post-petition interest that continues to accrue, and reasonable attorneys' fees, as set forth below.

Principal. CarePayment Holdings owes $10.5 million in original principal repayments. The loan agreements did not require CarePayment Holdings to repay principal during the note term, which expired on December 31, 2016. Forman Decl. Ex. B ¶¶ 6, 7(b), Ex. J ¶¶ 5, 6(b). On December 31, 2016, all outstanding principal became due. Id. Ex. B ¶7(c), Ex. J ¶ 6(c). CarePayment Holdings has not repaid any principal. Id. ¶ 16. Therefore, CarePayment owes $10.5 million in original principal repayments. Sept. 14, 2016 Receiver's Report at 52.

Pre-Petition Interest. CarePayment Holdings owes $226,590 in pre-petition interest and additional principal. Pre-petition interest, also known as matured interest, is part of a claim and "accorded the same priority status as the underlying liability[.]" Matter of Larson, 862 F.2d 112, 119 (7th Cir. 1988) (collecting cases); see also 11 U.S.C. § 502(b)(2) (defining claim to exclude unmatured interest); In re Egbo, 551 B.R. 869, 875 (D. Or. 2016) (holding bankruptcy court abused discretion in failing to find pre-petition interest nondischargeable debt). As such, "pre-petition interest that has matured under applicable state law … is allowed under [11 U.S.C.] § 502 as part of the underlying secured claim." In re Shree Mahalaxmi, Inc., 505 B.R. 794, 799 (Bankr. W.D. Tex. 2014). Under New York law, "prepetition interest that is due under an enforceable agreement will generally be allowed[.]" In re S. Side H., LLC, 451 B.R. 248, 264 (Bankr. E.D.N.Y. 2011).

Here, the loan agreements require CarePayment Holdings to pay all outstanding interest, on a monthly basis, at a rate of "17% per annum calculated on the basis of a 360-day year and actual days elapsed," absent an event of default. Forman Decl. Ex. B ¶¶ 6, 7(a), Ex. J ¶¶ 5, 6(a). The loan agreements also provide that unpaid monthly interest becomes part of the principal and accrues interest. Id. Calculated at the 17 percent interest rate, CarePayment Holdings owes $226,590 in unpaid interest and additional principal through March 15, 2016, the day before CarePayment Holdings became part of the Receivership. Id. ¶ 20; Interim Order Appointing Receiver, ECF No. 30.

Post-Petition Interest. As of this filing, CarePayment Holdings owes $2,484,870 in post-petition interest and additional principal. The Bankruptcy Code generally does not allow post-petition interest, but there is a notable exception for over-secured claims. 11 U.S.C. § 506(b); In re Beltway One Dev. Group, LLC, 547 B.R. 819, 826 (Bankr. App. 9th Cir. 2016). An over-secured claim is one where the value of the collateral exceeds the value of the creditor's secured claim. In re Plymouth H. Health Care Ctr., 2005 WL 2589201, at *4 (Bankr. E.D. Pa. Mar. 15, 2005) (quoting 4 Collier on Bankruptcy ¶ 506.04[1] at 506–102 (15th ed. 2004)). An over-secured creditor is entitled to post-petition interest as part of its priority claim, "at least to the extent it is oversecured." In re Beltway One Dev. Group, LLC, 547 B.R. at 826; accord Rake v. Wade, 508 U.S. 464, 471 (1993); In re Kord Enters. II, 139 F.3d 684, 687 (9th Cir. 1998). Less than three months ago, the Ninth Circuit clarified that the rate of post-petition interest is governed by state law and, ultimately, the parties' loan agreement, which may require a higher post-default interest rate. In re New Investments, Inc., 840 F.3d 1137, 1140 (9th Cir. 2016) (overruling In re Entz-White Lumber & Supply, Inc., 850 F.2d 1338 (9th Cir. 1988), and holding that nonbankruptcy law (i.e., state law) "allow[ed] for a higher interest rate upon default when provided for in the loan agreement"). Unlike fees and costs, post-petition interest is not subject to a reasonableness limitation. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989); Matter of 268 Ltd., 789 F.2d 674, 676 (9th Cir. 1986).

Here, the exception for over-secured creditors applies and requires post-petition interest to be included as part of Weider's and Forman's first-priority claim because the loans are "substantially over-collateralized." Sept. 14, 2016 Receiver's Report at 54. The loan agreements provide that, in the event of default (which includes the appointment of a receiver), "the rate of interest on this Note shall be increased to 25% per annum (the 'Default Rate')." Forman Decl. Ex. A ¶ 9(f), Ex. B ¶ 8(b), Ex. I ¶ 9(f), Ex. ¶ 7(b). "New York usury laws do not apply to defaulted obligations," Urb. Communicators PCS Ltd. Partn. v. Gabriel Capital, L.P., 394 B.R. 325, 341 (S.D.N.Y. 2008), and—even if they did—under New York law, loan agreements aggregating $2,500,000 or more may properly allow for post-default interest of 25 percent, see N.Y. Gen. Oblig. Law § 5-501(1) & (6) (providing that the 16 percent cap on interest in N.Y. Banking Law § 14-a(1) does not apply to loans aggregating $2,500,000 or more); N.Y. Penal Law § 190.40 (providing that the highest interest rate allowed by law is 25 percent per annum); N.Y. Penal Law § 190.42 (same); Emery v. Fishmarket Inn of Granite Springs, Inc., 173 A.D.2d 765, 766 (N.Y. App. Div. 1991) (enforcing contractual agreement for higher post-default interest rate up to 25 percent). Calculated at a 25 percent interest rate, CarePayment Holdings currently owes $2,484,870 in post-petition interest and additional principal since the event of default (i.e., from March 16, 2016 through January 18, 2017). Id. ¶ 18.

Post-petition interest continues to accrue. Rake, 508 U.S. at 468 ("[T]he interest allowed by § 506(b) will accrue until payment of the secured claim or until the effective date of the plan.").[6] To provide adequate protection for Weider's and Forman's interests, the Receiver should be required to either pay or segregate this interest on a monthly basis, as it accrues.

Attorneys' Fees. CarePayment Holdings owes attorneys' fees. An over-secured creditor is entitled to "'reasonable fees, costs, or charges provided for under the agreement under which

[6] Weider and Forman acknowledge that, although the loan agreements provide for a five percent late fee in the event of default (Forman Decl. Ex. B ¶ 8, Ex. J ¶ 7), "[t]he decisional law is uniform that oversecured creditors may receive payment of either default interest or late charges, but not both," In re 785 Partners LLC, 470 B.R. 126, 137 (Bankr. S.D.N.Y. 2012) (collecting cases) (citations omitted).

such claim arose.'" Ron Pair Enters., 489 U.S. at 24 (quoting 11 U.S.C. § 506(b)). This includes attorneys' fees when they are reasonable and provided for by the parties' agreement. In re Hoopai, 581 F.3d 1090, 1098 (9th Cir. 2009); In re Kord Enters. II, 139 F.3d 684, 689 (9th Cir. 1998). Here, the loan agreements expressly provide for attorneys' fees. Forman Decl. Ex. A ¶ 8 (incorporating Unlimited Unconditional Guarantee agreements), Ex. I ¶ 8 (same), Ex. H ¶ 17 ("The Undersigned hereby agrees to pay all costs and expenses, including attorneys' fees, arising out of or with respect to the validity, enforcement or preservation of the Indebtedness and the Obligations or any collateral of the Guaranty."), Ex. L ¶ 17 (same). Weider and Forman are still in the process of enforcing and preserving their rights, and therefore incurring attorneys' fees. Id. ¶ 19. Weider and Forman respectfully reserve the right to present briefing and argument regarding the reasonableness of attorneys' fees at the appropriate Court-ordered time, and to request that the Court attach Weider's and Forman's right to attorney's fees to the sale of assets.

CONCLUSION

For these reasons, Weider and Forman respectfully request that the Court condition the sale on the provision of adequate protection for Weider's and Forman's interests, in either of the following forms:

- Option 1: Order: (i) that Weider's and Forman's liens attach to the proceeds of the either the sale of CarePayment Technologies, or alternatively, the purchaser's exercise of the exclusive option to sell CarePayment receivables, in the amount of $13,211,460 in principal and pre- and post-petition interest through January 18, 2017; (ii) that the Receiver segregate this sum from the proceeds of the proposed sale; and (iii) that the Receiver pay post-petition interest as it accrues on a monthly basis, or alternatively, continue to segregate post-petition interest as it accrues; or

- Option 2: Order that the Receiver pay Weider and Forman $13,211,460 to fully extinguish their interests (which would prevent further accrual of post-petition interest) from either the CarePayment Technologies sale, or alternatively, the purchaser's exercise of the exclusive option to sell CarePayment receivables.

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Respectfully submitted by,

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