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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,	No. 3:16-cv-00438-PK RECEIVER'S RESPONSE TO LIMITED OBJECTIONS TO RECEIVER'S MOTION FOR ORDERS: (1) SCHEDULING

RECEIVER'S RESPONSE TO LIMITED OBJECTIONS RE: ASSET SALE (CCM Capital Opportunities Fund, LP)

v.

AEQUITAS MANAGEMENT, LLC; AEQUITAS HOLDINGS, LLC; AEQUITAS COMMERCIAL FINANCE, LLC; AEQUITAS CAPITAL MANAGEMENT, INC.; AEQUITAS INVESTMENT MANAGEMENT, LLC; ROBERT J. JESENIK, BRIAN A. OLIVER; and N. SCOTT GILLIS,

Defendants.

HEARING TO APPROVE SALE OF ASSETS; (2) APPROVING CEDAR SPRINGS CAPITAL AS STALKING HORSE BIDDER; (3) APPROVING BREAK-UP FEE; (4) APPROVING BIDDING PROCEDURES; and (5) APPROVING THE SALE OF ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS
(CCM Capital Opportunities Fund, LP)

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Statutes

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On December 16, 2016, the Receiver filed its Motions for Orders: (1) Scheduling Hearing to Approve Purchase and Sale Agreement; (2) Approving Stalking Horse Bidder; (3) Approving Break-Up Fee; (4) Approving Bidding Procedures; and (5) Approving the Sale of Assets Free and Clear of All Liens, Claims, Encumbrances and Interests (CCM Capital Opportunities Fund, LP). [Dkt. #323.]

Three sets of parties filed objected by the January 18, 2017 deadline. Below, the Receiver responds to: (1) the limited objections of Weider Health & Fitness and Bruce Forman [Dkt. #344]; (2) the limited objections of Terrell Group Management [Dkt. #349]; and (3) the limited objections of Compass Partners Internal [Dkt. #350].

I. THE RECEIVER'S RESPONSE TO LIMITED OBJECTIONS OF WEIDER HEALTH & FITNESS'S AND BRUCE FORMAN'S

Weider Health & Fitness and Bruce Forman ("Weider," "Forman," and collectively "Weider/Forman") allege that they loaned $10.5 million to CarePayment Holdings, LLC ("CP Holdings"), secured by certain healthcare receivables (the "Receivables Assets"). The security agreements do not identify the Receivables Assets as collateral. Nonetheless, Weider/Forman now demand preferential treatment in conjunction with the judicial sale of CCM Capital Opportunities Fund, LP f/k/a Aequitas Capital Opportunity Fund, LP ("CCM")—specifically, that the Receiver immediately repay Weider/Forman or segregate sale proceeds for that purpose and pay interest at the rate of 25%, almost $250,000 per month, into a frozen account. (Weider/Forman Objections re: CCM Sale [Dkt. #344].) As leverage, Weider/Forman assert their "sole discretion" to veto a part of the sale relating to Receivables Assets and a supposed lien in the same. (*Id*. at 1.) But Weider/Forman have neither the facts nor the law to hold receivership assets hostage and seek leverage over $500 million of allegedly defrauded investors,

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whose losses they are seeking to, and might have previously, intentionally worsened.

First, even if Weider/Forman could assert liens in the Receivables Assets, this Court has the power to approve the sale of the Receivables Assets "free and clear" of those liens so long as the liens attach to the sale proceeds to the same extent, validity, and priority as they were attached to the Receivables Assets.

Second, the Weider/Forman claim is subject to a bona fide dispute and therefore the claim should not be paid when the Receivables Assets are sold. While the Receiver acknowledges that Weider/Forman is entitled to some protections if it has a bona fide claim while waiting for final resolution through litigation or agreement and then payment, the Receiver believes much of this claim is patently non-existent and therefore should not be entitled to segregation of Receiver assets to the detriment of the Receivership and innocent investors. The Receiver requests that this Court set a preliminary hearing within sixty (60) days to require Weider/Forman to provide evidence of the funds it advanced to CP Holdings, which is the basis of the claim that CP Holdings owes it $10.5 million (plus $2.5 million interest) and thereafter decide the amount of the proceeds from the sale of the Receivables Assets the Receiver should segregate. In particular, the Receiver has what he believes is conclusive proof that Weider/Forman *did not* pay to CP Holdings $6 million of the $10.5 million Weider/Forman allegedly loaned to CP Holdings. There is no loan, and thus no right to a security interest in CP Holdings assets, to the extent Weider/Forman did not provide consideration to CP Holdings.

Third, Weider/Forman have no contractual right to prevent the sale of the Receivables Assets at their "sole discretion." Weider/Forman misconstrues the contracts. The "sole discretion" provision addresses borrower CP Holdings' "material assets," rather than the Receivables Assets, which were owned by other entities. Moreover, such a consent provision is

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unenforceable here because it is void as against public policy and would frustrate the fundamental purposes of a receivership proceeding.

For these reasons and as further established below, this Court should reject the Weider/Forman objections and set a hearing on or about March 29, 2017, with an order for Weider/Forman to prove consideration provided to CP Holdings.

A. Material Facts

1. *Pertinent entities*

Weider/Forman's objections relate to two separate subsets of the receivership entities. The Receiver seeks approval to sell its interests in CCM, which entity's predominate value flows from its ownership of a controlling interest in CarePayment Technologies, Inc. ("CPYT"). (Receiver's Motion re: CCM Sale [Dkt. #323].)

Weider/Forman allege they loaned money to CP Holdings. CP Holdings has no ownership stake in CCM, or CPYT. (Receiver's Report (9/14/16) [Dkt. 246], Ex. A (entity diagram).) Conversely, CCM and CPYT have no ownership interest in CP Holdings or in any entity in which CP Holdings owns equity. (*Id.*) The general relationships between the various entities is illustrated as follows:

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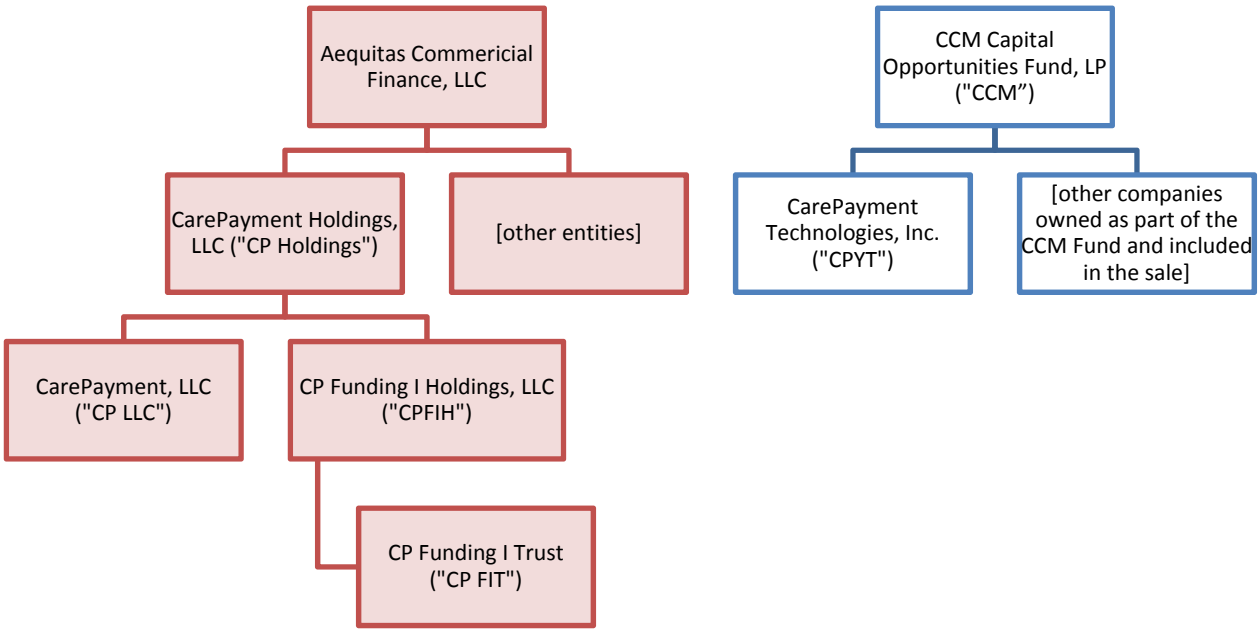

As the Receiver described in his September 14, 2016 report, CPYT currently works "with [CP LLC] and [CP FIT], providing, sales, program management, and servicing of healthcare receivable portfolios owned by [CP LLC] and [CP FIT]." (Receiver's Report 9/14/16 [Dkt. #246], p. 52.) Those healthcare receivable portfolios are the Receivables Assets in which Weider/Forman claim, incorrectly, to have a security interest in such Receivables Assets. (Foster Decl., ¶¶ 4, 5.)

2. ***Weider/Forman transactions***

Beginning in 2011, Weider/Forman engaged in multiple transactions with Aequitas affiliated entities, culminating in their alleged loans to CP Holdings. (Foster Decl., ¶ 10.) Starting in May 2011, Weider/Forman loaned money to Aequitas affiliated entities, and then participated with management in purporting to shuffle that debt from Aequitas Commercial Finance ("ACF") to CSF Leverage I, LLC ("CSF Leverage I"), and then to CP Holdings. (*Id*. at ¶ 10(a).)

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On October 3, 2014, Weider/Forman purport to have "converted" $6,000,000 of pre-existing debt previously owed by ACF and CSF Leverage I into $6,000,000 of alleged debt owed by CP Holdings. (Foster Decl., ¶ 10(b).) A careful reading of the documents purporting to effect such "conversion" and a detailed review of the accounts of CP Holdings reveals that CP Holdings did not receive any consideration for the alleged $6 million obligation. As evidenced by the Business Loan Agreement which purports to establish the transaction, the loan will be created when the "Lender shall disburse to Borrower [CP Holdings] one Advance in the aggregate principal amount of $6,000,000 ...." (Forman Decl. [Dkt. #345], Ex. F, ¶2(a).) Advance is defined in the Business Loan Agreement to mean "the disbursement of Loan funds made (or deemed made) to Borrower pursuant to the terms of this Agreement." (*Id*. at ¶ 14(b).) A review of the books and records shows that Weider/Forman never advanced the $6 million and no "deeming" of an advance can create a bone fide obligation. In other words, CP Holdings was purportedly burdened to repay to the detriment of its other investors and creditors $6 million it never received from Weider/Forman simply because Weider/Forman, together with the alleged perpetrators of the Ponzi-like scheme, "deemed" it so. (*Id*. at ¶ 10(b).)

In June 2015, when the Aequitas alleged Ponzi-like scheme was desperate for additional cash (and per the SEC, deeply insolvent), Weider/Forman agreed to provide $4.5 million of cash (the only cash the books and records show they provided to CP Holdings), but only if CP Holdings would agree to pay 17-percent interest (25-percent default interest). The defendants in the SEC action questioned Weider/Forman's high interest rate demand because they considered "CarePayment our lowest risk assets" and sought a reduction in the exorbitant interest rate demanded by Weider/Forman. (Foster Decl., ¶ 10(d).) It takes no stretch to infer that Weider/Forman knew or should have known that the Aequitas companies were in desperate

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need of cash. And Weider/Forman and the SEC defendants conjured a means to inject $4.5 million of that cash into the allegedly Ponzi-like scheme in a fashion that put repayment of the principal and interest at 17%-25% ahead of the hundreds of millions of dollars of investors who did not enjoy such a favored relationship.

On June 29, 2015, Weider/Forman entered into various agreements with CP Holdings which on their face indicate that CP Holdings owed them $10.5 million. (Forman Decl. [Dkt. #345], Exs. A, I.) Again, the Amended Business Loan Agreement states that Weider/Forman's loan is based on an "Initial Advance" of $6 million effective October 3, 2014, and a contemporaneous "Subsequent Advance" of $4 million (Forman Decl. [Dkt. #345], Ex. A, ¶ 2(a), with an additional advance of $500,000 by Bruce Forman (Forman Decl. [Dkt. #345], Ex. I, ¶ 2(a)). The "deemed advance" never resulted in a payment of consideration to CP Holdings. The CP Holdings records and books record a subsequent $4.5 million was received by CP Holdings from Weider/Forman, yet some portion of those funds were immediately diverted to other entities, without benefit to CP Holdings. (Foster Decl., ¶ 10(d).) Under the terms of the contracts, CP Holdings was to pay $10.5 million to Weider/Forman in 18 months at 17-percent interest (25-percent default interest). (Forman Decl. [Dkt. #345], Ex. B, ¶¶ 5, 6, 8.)[1] It is that purported obligation, and a purported security interest, that Weider/Forman claim is the basis to require the Receivership to segregate and impose a lien on at least $13 million of Receivership assets.

[1] Hereinafter, Receiver cites to the 2015 Weider loan documents, which supplant the 2014 Weider loan documents. The material terms of the Forman loan are the same as the Weider loan documents, thus all references to the Weider/Forman loan documents refers to both.

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3. ***The Weider/Forman contracts do not include any security interest in or consent provision relating to the Receivables Assets.***

Weider/Forman's motion concerns the documents' provisions regarding collateral and consent. In June 2015, Weider/Forman entered into Security Agreements with CP Holdings. (*See* Forman Decl. [Dkt. #345], Exs. C, K (security agreements).) Consistent with the integrated Security Agreements, the Loan Agreements describe the principal collateral securing the loan as "the equity interests of [CP Holdings] in [CP LLC] … CP Leverage I, LLC, … and [CPFIH] …" and "agreements and other documents … evidencing or relating to such interests[.]" (Forman Decl. [Dkt. #345], Ex. A (loan agreement), ¶ 2(b).)[2] Weider/Forman additionally contracted for a security interest in "products and produce" of the equity collateral as well as any proceeds resulting from the disposition of the equity collateral. (Forman Decl. [Dkt. #345], Ex. C (security agreement), ¶ 2(w)-(y).) Nothing in the Security Agreements gives Weider/Forman a security interest in accounts receivable owned by the subsidiary companies in which

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[2] The Security Agreements more precisely identify that equity collateral as:

> (a) All the issued and outstanding *equity interests* (whether stock interests, membership interests … or otherwise) in CarePayment, LLC [CP LLC]… and CP Funding I Holdings, LLC [CPFIH] … (…. collectively the "Companies") …;
>
> (b) [A]ll certificates, instruments, agreements and other documents … evidencing or relating to *such interests* …;
>
> (c) [A]ll *additional equity interests* … in (i) any of the Companies …. or (ii) any entity hereinafter … owned by Borrower (directly or indirectly) for the purpose of purchasing Receivables Assets (the '*Additional Interests*');
>
> (d) [A]ll certificates, instruments, agreements or other documents evidencing or relating to the *Additional Interests* …;
>
> (e) [A]ll additional rights of Borrower to purchase *Additional Interests*.

(Forman Decl. [Dkt. #345], Ex. C (security agreement), ¶ 2 (emphasis added; formatting of paragraph modified for readability).)

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CP Holdings owned the shares which constitute the collateral. (*Id*. at ¶ 2 (security agreement).)

The Loan Agreements limit CP Holdings' contractual right to dispose of "material assets" in furtherance of its business interests:

> Borrower [CP Holdings] covenants and agrees with [Weider/Forman] that … Borrower shall not, without the prior written consent of [Weider/Forman] … [m]ake any disposition of any material asset without the prior written consent of [Weider/Forman], which consent [Weider/Forman] may grant or withhold in the exercise of [Weider/Forman's] sole discretion.

(Forman Decl. [Dkt. #345], Ex. A (loan agreement), ¶ 7(e).)

"Material asset" is not a defined term, but the Borrower's material assets necessarily excludes receivables owned by CP LLC or CP FIT because those entities are not the Borrower. "Borrower" is defined as CP Holdings, "the person named as Borrower on the first page of [the] Agreement[s]." (*Id*. at ¶ 8(d).) The agreement expressly recognizes that entities other than CP Holdings would hold receivables (*id*. at ¶ 14(o) (defining "Receivables Affiliates")), and that those entities would have distinct corporate existences from CP Holdings (*see, e.g.*, *id.* at ¶ 2(b) (referencing CP Holdings' ownership of equity in same)).

In sum, Weider/Forman contracted for security interests in the equity owned by CP Holdings in other companies *not* in accounts receivable owned by those other companies. Similarly, the consent provision in the loan agreement covers only the disposition of CP Holdings' "material assets." Neither agreement provides Weider/Forman any interest in or right to prevent the transfer of any Receivables Assets owned by CP LLC or CP FIT.

4. ***To maximize the value to the Receivership, the proposed sale of its interests in CCM includes an option to purchase Receivables Assets.***

As the Receiver reported in September 2016, the Receivership would benefit from bundling the sale of its interest in CCM/CPYT with a sale of the Receivables Assets:

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> … [T]he Receiver … [has] engaged CPYT in active discussions regarding the potential sale of … receivables owned by [CP LLC] and [CP FIT] … to a newly formed affiliate of CPYT. Such a sale would provide significant cash proceeds to the Receivership Entity (and, ultimately, to the investors) and would increase the value of CPYT by improving its marketability, also a benefit to the Receivership Entity and its investors. … To effectuate the acquisition of receivables and to stabilize its operations, CPYT will require a new health care receivables funding facility.

(Receiver's Report (9/14/16) [Dkt. 246], p. 53.)

The proposed sale of the Receiver's interest in CCM effectuates this plan. The current contract for sale disposes of all of the Receiver's beneficial interest in CPYT, as well as granting an option for CPYT or its affiliate to acquire the Receivables Assets owned by CP LLC and CP FIT. (Foster Decl., ¶¶ 4-5 (describing same).) The sale includes an option (as opposed to outright sale) of the Receivables Assets because CPYT's acquisition of the Receivables Assets requires a funding facility. CPYT and a potential funding source continue to make progress negotiating the terms of that credit facility, which would facilitate CPYT's acquisition of the Receivables Assets. (*Id*.)

Consistent with the Court's equitable powers in a judicial sale, the Receiver has moved this Court to approve the sales of these various assets "free and clear of all liens, claims, encumbrances and interests ('Liens')[.]" (Receiver's Motion re CCM Sale [Dkt. #323], pp. 4-5.) Such a sale would result in "all Liens as of the date of the closing of the Sale … [being] released as against the Property, and … attach[ing] to the proceeds of Sale to the same extent, validity, and priority as they attached to the Property." (*Id*. at 17.) The judicial sale accomplishes the goal of monetizing the Receivership's assets and protecting the parties with alleged liens by attaching those liens to the sale proceeds of the property to the extent against which they were previously attached. The Receivership and its investors and creditors benefit from the sale, but

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without detriment to the alleged secured creditors.

B. **Points and Authorities**

1. ***This Court should schedule a preliminary hearing in 60 days to require Weider/Forman to provide evidence of funds advanced to CP Holdings and to determine the amount of funds the Receiver should segregate from the sale of Receivables Assets to protect Weider/Forman's alleged claim, pending resolution of the claim in a conjunction with the estimated over $600 million of other claims.***[3]

a. This Court has the power to order the judicial sale of assets "free and clear" so long as any liens attach to the sale proceeds to the same extent, validity, and priority as they were attached to the assets sold.

Even if Weider/Forman could assert liens in the Receivables Assets, this Court has the power to approve the sale of the Receivables Assets "free and clear" of those liens so long as the liens attach to the sale proceeds to the same extent, validity, and priority as they were attached to the Receivables Assets. That power is memorialized in this Court's order appointing the Receiver, which states that "with Court approval," "[t]he assets of the Receivership Entity … 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 [Dkt. # 156], ¶ 26.)

Invoking their claimed security interests in the Receivables Assets, Weider/Forman dispute that this Court has the power to approve such a sale. But they misapprehend both the scope of this Court's power and the nature of a judicial sale.

The Ninth Circuit has held that, for purposes of an equitable receivership, a district court with the right to custody of an asset has the power to order its sale:

[3] The preliminary hearing is not intended to resolve the extent, validity, and priority of the alleged claim. All parties retain any other claims or defenses they have as to the avoidance or allowance of the claim.

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> The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction. … [A] court of equity having custody and control of property *has power to order a sale of the same in its discretion*. … [A] receiver's sales do not even purport to convey "legal" title, but rather "good," equitable title enforced by an injunction against suit. … When a court of equity orders property in its custody to be sold, the court itself as vendor confirms the title in the purchaser. ... A court of equity acts by a process of injunction against the owner and … protects the purchaser against interference and assures him a quiet title and quiet enjoyment.

SEC v. American Capital Invs., 98 F.3d 1133, 1144 (9th Cir. 1996) (emphasis added; quotation marks and authority omitted). The sale "free and clear" thus benefits both the Receivership and the purchaser.

It has long been the law that "the removal of alleged liens or incumbrances [*sic*] upon property, … and the administration and distribution of trust funds, are subjects over which courts of equity have general jurisdiction." *Mellen v. Moline Malleable Iron Works*, 131 U.S. 352, 367 (1889). Upon the closing of the sale, the liens attach to the sales proceeds to the same extent, validity, and priority as existed as of the date of the receivership. *See, e.g.*, *Regions Bank v. Egyptian Concrete Co.*, No. 4:09-CV-1260 CAS, 2009 U.S. Dist. LEXIS 111381 (E.D. Mo. Dec. 1, 2009) (following *American Capital Invs.*, 98 F.3d 1133, and *Mellen*, 131 U.S. 352, to order transfer of property free and clear of liens, with existing liens "attach[ing] to the sale proceeds").[4] Without this power and reassurance from the Court to the purchaser, the value of receivership assets would be significantly diminished, if saleable at all.

[4] To be clear, Receiver acknowledges that the sale free and clear of liens does not abrogate the validity or priority of the lien. *See, e.g.*, *Marshall v. New York*, 254 U.S. 380, 385 (1920) (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"); *Ticonic Nat. Bank v. Sprague*, 303 U.S. 406, 412 (1938) ("to 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").

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b. This Court should order Weider/Forman to provide evidence of the funds advanced to CP Holdings as consideration for the alleged $10.5 million loan and collateral.

The Receiver requests that this Court set a preliminary hearing within approximately 60 days to determine the amount of funds from the sale of the Receivables Assets that the Receiver should segregate in relation to Weider/Forman's claimed liens because the existence of that obligation is disputed.[5] As noted, the Receiver has reason to believe that Weider/Forman *did not* advance $6 million of the $10.5 million Weider/Forman claim they loaned to and received payment from CP Holdings. (Foster Decl., ¶ 10.) If they did not loan the money they cannot claim a security interest in that amount. At the proposed preliminary hearing, the Receiver requests that this Court require Weider/Forman to provide proof they paid $10.5 million to CP Holdings as consideration for the alleged $10.5 million loan and collateral lien. The preliminary hearing is limited in scope—it will not address the allowance or treatment of Weider/Forman's claim, that needs to wait until for the claim process and distribution plan—but is necessary to address the appropriate amount of net proceeds, if any, from the sale of the Receivables Assets that the Receiver will be required to segregate.

Further, at the proposed preliminary hearing, this Court can address whether CP Holdings put up the Receivables Assets as collateral for the alleged $10.5 million loan. Weider/Forman's objections ignore the actual provisions of the Security Agreements by addressing "agreements," "products," and "produce" while conflating the principal collateral, CP Holdings' equity interests in CP LLC and CP FIH, with the assets owned by the subsidiary

[5] The Receivables Assets are subject to undisputed senior debt which will be paid if and when CPYT exercises the option. The Receiver agrees to hold the amount of these net proceeds which the Court determines is necessary to properly protect Weider/Forman's claims after the completion of the preliminary hearing.

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companies themselves. (Weider/Forman Objections re: CCM Sale [Dkt. #344], p. 6 (citing generally to Security Agreement, paragraph 2).) This is incorrect. In specifying collateral, the security agreement only ever uses the word "agreement" to describe documents "evidencing or relating to" *equity*. (Forman Decl. [Dkt. #345], Ex. C (security agreement), ¶ 2(b), (d).) Similarly, "product" and "produce" appear in only a single subparagraph—specifically "all products and produce *of any of the property* described in this Collateral section." (Id. at ¶ 2(w) (emphasis added).) The "property" described as collateral is *principally equity* in CP LLC and CPFIH; it is not *the Receivables Assets* owned by those separate entities. (Id. at ¶ 2(a)-(e).) Weider/Forman's interpretation cannot be squared with the Security Agreements' omission of Receivables Assets as specified collateral, even though the term is defined. (See id. at ¶ 2(a)(c)(ii) (the only use of the term "Receivables Assets" is to describe the assets owned by entities whose *equity interests* are owned by CP Holdings were being provided as collateral); Forman Decl. [Dkt. #345], Ex. A (loan agreement), ¶ 14(p) (defining term).)

A preliminary hearing to address the amount of the reserve is important because Weider/Forman is requesting that $13 million of the sale proceeds from the Receivables Assets be segregated (if and when the receivables purchase option is exercised) and the further payment by the Receiver of over $250,000 per month to Weider/Forman or into the reserve account. This is a very material sum and the establishment of an improper reserve could detrimentally affect the operation and liquidity of the Receivership and the Receiver's ability to maximize asset values and recoveries for all investors. The preliminary hearing would not be a litigation of Weider/Forman's claims, which would be handled through the to-be established claims process applicable to all claimants, or their treatment under the as yet developed distribution plan, all of which is premature. But what is ripe is whether (i) Weider/Forman can present evidence that in

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fact they funded all $10.5 million to CP Holdings and (ii) the Receiver (and Weider/Forman) can present evidence regarding the likely lack of priority of the remaining $4.5 million (or all $10.5 million). The preliminary hearing would establish whether there is sufficient evidence to warrant the segregation of funds, payment of monthly interest, and attachment of a priority lien to some amount of the net proceeds of the sale of the Receivables Assets. This process poses no prejudice to Weider/Forman as the exercise of the option and the sale of the Receivables Assets is not expected for at least 60 days.[6]

The Receiver requests a hearing in approximately 60 days, and discovery before then, that would allow the Court to assess the amount of funds the Receiver should segregate from the eventual sale of the Receivables Assets in relation to Weider/Forman's claimed liens.

2. ***Weider/Forman have no contractual right to exercise their "sole discretion" to prevent the judicial sale of the Receivables Assets.***

Weider/Forman cannot use their "sole discretion" to dictate whether the Receivables Assets are subject to judicial sale. (Weider/Forman Objections re: CCM Sale [Dkt. #344], p. 1 (claiming same).) As established below, the consent provision does not apply to the Receivables Assets. Regardless, no contractual provision—even one "cleverly insidious" in its design—can restrict the Receiver's or this Court's equitable remedies and powers. If given the meaning claimed by Weider/Forman, the consent provision is void as against public policy. And even if not void, this Court need not enforce contractual provisions that, if interpreted as Weider/Forman demand, would impair the fundamental purposes of a receivership proceeding.

[6] The receiver would agree to provide the court and Weider/Forman at least 10-day's advance notice if the option is exercised sooner so a hearing could be scheduled if not already undertaken.

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a. The consent provision in Weider/Forman Loan Agreements does not cover the Receivables Assets, which are not owned by CP Holdings.

As set forth above, the consent provision in Weider/Forman's Loan Agreement does not apply to the Receivables Assets, which are not owned by the Borrower, CP Holdings. (*See supra* Section I.A.3.) Although they contend the issue is "unambiguous," Weider/Forman fail to provide any reason—colorable or not—to conclude that a provision restricting *CP Holdings'* disposition of material assets somehow restricts *other entities*. (Weider/Forman Objections re: CCM Sale [Dkt. #344], p. 11 (arguing same).) As noted above, the Loan Agreements recognize that Receivables Assets will be owned by entities other than CP Holdings, but the consent provision only applies to assets to be sold by the Borrower, CP Holdings. (*See supra* Section I.A.3.) The consent provision applies to "material assets" owned by CP Holdings, not those owned by other entities.

This Court should reject Weider/Forman's argument that they have consent rights in relation to the Receivables Assets under their loan documents.

b. The consent provision is void as opposed to public policy if, as Weider/Forman assert, the parties intended Weider/Forman to dictate to this Court the relief it can provide.

Weider/Forman proclaim that the consent provision allows them to dictate to this Court the preferential treatment they should obtain because, according to Weider/Forman, "all contractual provisions … are binding on the Receiver" and this Court. (Weider/Forman Objections re: CCM Sale [Dkt. #334], p. 12.) Weider/Forman's absolute rule unravels because there is, it follows, no limit to the preferential treatment a party could obtain in a receivership or bankruptcy proceeding. If such were the case, creditors, not the Receiver or the Court would determine whether and how assets could be sold, as well as unfairly dictate the distribution of

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those proceeds to the detriment of and at the expense of investors and other parties. If the rule were absolute as Weider/Forman argues then there would be no point to receivership proceedings. To extremes, a creditor withholding particularly important consent might demand stays be lifted, investor's claims be waived, or otherwise leverage their consent into an equitable proceeding providing inequitable relief. Such dangers are particularly acute where, as here, alleged proprietors of a Ponzi-like scheme supposedly contracted away to a creditor the investors' rights to equitable relief.

Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.), 671 F.3d 1011, 1026 (9th Cir. 2012), illustrates that "astute creditors" cannot leverage a borrower's financial distress into waivers of equitable relief. There, the plaintiff claimed that the debtor waived certain protections afforded by the Bankruptcy Code in a prepetition contract. The Ninth Circuit rejected the claim, stressing that:

> [I]t is against public policy for a debtor to waive the prepetition protection of the Bankruptcy Code. *This prohibition of prepetition waiver has to be the law; otherwise, astute creditors would routinely require their debtors to waive*. … Though the Settlement Agreement here does not specifically mention bankruptcy, other courts have said that prepetition waivers of bankruptcy benefits generally are unenforceable.

Id. (emphasis added; citations and quotation marks omitted). The court further reasoned that, if the plaintiff's argument were accepted, the plaintiff could have "thwart[ed] confirmation of the plan," the intended ends of a bankruptcy proceeding. *Id*. *See also In re Pease*, 195 B.R. 431, 434-35 (Bankr. D. Neb. 1996) ("[A]ny attempt by a creditor in a private pre-bankruptcy agreement to opt out of the collective consequences of a debtor's future bankruptcy filing is generally unenforceable.").

The same is true for a receivership proceeding. If, as Weider/Forman contend, they may

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in their "sole discretion" prevent this Court from ordering the judicial sale of receivership assets (Weider/Forman Objections re: CCM Sale [Dkt. #344], p. 1), such a provision is void as against public policy. A creditor violates public policy when it demands provisions purporting to restrict the borrower's access to relief in bankruptcy or receivership proceedings—even if the creditor is "cleverly insidious" and attempts to disguise the provision. *In re Bay Club Partners-472, LLC*, 2014 Bankr. LEXIS 2051, *11-12 (Bankr. D. Or. May 6, 2014) (Dunn, J.) (so stating in relation to creditor that demanded provision precluding bankruptcy or receivership relief appear in operating agreement instead of the loan documents).

It is this Court—not Weider/Forman or any other creditor—that may exercise its "broad powers and wide discretion to determine the appropriate relief in an equity receivership." *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 606 (9th Cir. 1978). Regardless of the assets to which the consent provision in the Weider/Forman Loan Agreements relates, Weider/Forman's argument that it remains enforceable post-receivership renders the provision void as against public policy. It matters not that the provision is silent as to receivership proceedings. If Weider/Forman intended that consent provision to apply even now, all they prove is that they are "cleverly insidious."

c. Even if not void, the consent provision would be unenforceable if it purports to impair the fundamental purpose of the receivership proceeding.

In a receivership, the district court exercises its broad power and wide discretion to protect "the receivership res" and "defrauded investors," *SEC v. Wing*, 599 F.3d 1189, 1197 (10th Cir. 2010), and promote the "orderly and efficient administration of the estate …[,]" *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). In receivership proceedings, a district court need not enforce contract provisions—such as deferring to parties' contractual right to control the

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disposition of property—when doing so would impair a fundamental purpose of the receivership proceeding.

For example, in *United States v. Arizona Fuels Corp.*, 739 F.2d 455 (9th Cir. 1984), Arizona Fuels entered into a contract requiring it to make advance payments to obtain fuel deliveries from Tenneco Oil Co., and allowing Tenneco to apply any excess from the advance payment to any past deficiencies. After Arizona Fuels was placed in receivership, Tenneco attempted to apply excess pre-receivership advances to pre-receivership deficiencies, as it was contractually permitted to do. In relation to Tenneco's claimed contractual rights to keep the funds, the Ninth Circuit held:

> The appointment order authorized the Receiver to hold, protect and preserve, manage and control the monies and properties of Arizona Fuels, but not to pay creditors' claims without court approval. *The latter limitation is crucial to the purpose and function of receiverships*, which suspend all creditors' claims, contractual or otherwise, pending judicial determination of assets, liabilities, and claimants' priorities. Notwithstanding Tenneco's actual possession of Arizona Fuels' funds, *Tenneco lost its right, contractual or otherwise*, to unilaterally settle past debts on June 9. After that date, the balance of the advance payment and any oil delivered against that credit were receivership property.

Id. at 458 (emphasis added; record citation omitted).

Similarly, in *SEC v. American Capital Investments, Inc.*, 98 F.3d 1133, 1137, 1144 (9th Cir. 1996), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), the district court authorized the sale of receivership assets owned through two limited partnerships over objections of partners. Even though the partnership agreement caused the partnerships to dissolve upon the appointment of a receiver and therefore stripped the receiver of the contractual right to dispose of the property, the Ninth Circuit upheld the sale because the receiver was entitled to "complete control" over the properties, which encompassed the power to

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sell the assets. *Id*.

A receivership that cannot dispose of receivership property—which theoretically could all be subject to "sole discretion" provisions similar to those in the Weider/Forman Loan Agreements—would have no power to protect receivership property, investors, or creditors, or to administer the estate in any meaningful fashion. So-called prisoner's dilemmas would abound, to the detriment of all.

Recently, the Southern District of California relied on its broad equitable power in a receivership proceeding to reject objections by investors who had pre-receivership contractual rights to withhold consent to the transfer of property. In *SEC v. Schooler*, No. 3:12-cv-2164-GPC-JMA, 2016 U.S. Dist. LEXIS 69354 (S.D. Cal. May 25, 2016), the SEC undertook an enforcement action against defendants for defrauding investors in the sale of general partnership units and the defendants' entities were placed into receivership. The general partnerships had been organized into co-tenancies, in which between two and eleven general partnership units would own undeveloped real estate selected and purchased by the defendants.

> Most co-tenancy agreements required that a*ll decisions about a real property be made by unanimous consent* of all co-tenant [general partnerships]. This structure and unanimity requirement made it *effectively impossible for any single investor or [general partnerships] to exercise any power over the [general partnership's] main asset—land*.
>
> In addition, the [general partnerships] were financially intertwined with [defendant] in a number of ways. … *[Defendant] bought and retained an equity, albeit non-voting, interest* in every [general partnership]. …

Id. at *4 (emphasis added).

When the receiver moved for court approval for "an orderly sale of general partnership … properties[,]" *id*. at *10-11, two groups of investors (each comprised of more than 100

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individuals) intervened to oppose the receiver's motion, *id*. at *11 & n.1, and more wrote to oppose the receiver's plan, *id*. at *18. The Court was unswayed by the absence of consent.

In response to the investors' argument that the court lacked authority to dispose of the property, *id*. at *19-20, the district court, relying on *American Capital Investments* among other authority, observed that it had "'well-established' powers of sale … and … 'wide discretion' … [to] fashion[] relief." *Id*. at *24 (internal citations omitted). Similarly, the Court rejected investor proposals to have their general partnerships exit the partnership while maintaining control of their properties instead of having their properties sold by the receiver because it would be "both unequitable and impracticable to allow the [general partnerships] to exit the receivership." *Id*. at *35. That is, even though the *defendants'* rights to dispose of assets were contractually limited by the need to obtain unanimous general partner consent and it was possible that all general partners with voting interests in certain properties could have preferred a different course of action, *the court* was entitled to reject the investor's objections and authorize the receiver to sell assets in which the receivership entities held interests.

Weider/Forman's arguments to the contrary are unavailing. They cite only a single case pertaining to contractual consent, and even that relates to personal performance. (Weider/Forman Objections re: CCM Sale [Dkt. #344], pp. 12-13.) Their extra-jurisdictional case, *John T. Callahan & Sons, Inc. v. Dykeman Elec. Co., Inc.*, 266 F. Supp. 2d 208 (D. Mass. 2003), relates to a state court proceeding in which the state court receiver sold receivership assets and purported to sell the remaining unperformed portion of the sub-contract electrical work, despite a non-assignability clause. *Id*. at 219-20. The Court upheld the sale of assets, but declined to force the general contract to accept the performance of the remainder of the sub-contract. This result is consistent with the general rule in a receivership that a contract with a

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"personal character"—that is, one involving the "skill, science, or peculiar qualifications" of the original contracting party—is not assignable. *See Meyer v. Washington Times Co.*, 76 F.2d 988, 990 (D.C. Cir. 1935) (internal quotation marks and citations omitted; receiver's sale of contract was valid because of the original contract lacked a "personal character"). But *Callahan* does nothing to undercut Ninth Circuit authority recognizing that a district court overseeing a receivership proceeding has the power to possess and order the judicial sale of receivership property notwithstanding the objections of those who, outside the circumstances of an equitable receivership, may have contractual rights to prevent the sale.

Likewise, Weider/Forman cannot avoid *Arizona Fuels Corp.*, *American Capital Investment*, and *Schooler* by directing this Court to *Sharpe v. F.D.I.C.*, 126 F.3d 1147, 1154 (9th Cir. 1997), which Weider/Forman suggests limits this Court's powers in relation to pre-receivership contracts. (Weider/Forman Objections re: CCM Sale [Dkt. #344], p. 14.) There, the Federal Deposit Insurance Corporation ("FDIC"), acting as statutory receiver under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1811 *et seq.*, breached its contractual obligation by refusing to honor two pre-receivership cashier's checks issued to the plaintiffs pursuant to a settlement agreement. The material issue was whether the FDIC exceeded its *statutory* authority when it attempted to "escape the obligations of contracts," which it may only do through the statutorily "prescribed mechanism" for "disaffirm[ing] or repudiat[ing] any contract it deems burdensome …." *Id*. at 1155. The court held that the FDIC did not comply with prescribed mechanism and nothing in *Sharpe* purports to limit the power of this Court in relation to a non-FIRREA receivership proceeding.

In sum, the Ninth Circuit recognizes that a district court overseeing a receivership proceeding has "complete control" over receivership assets and may take possession or transfer

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title even over the objections of those who would otherwise have contractual rights to intervene. This Court should reject Weider/Forman's attempt to interfere with this Court's "complete control" over receivership assets.

* * * * *

For the reasons stated above—the "sole discretion" provision does not apply to the Receivables Assets, and is regardless, void and unenforceable here—Weider/Forman cannot withhold consent as a means of leveraging preferential treatment, obtaining immediate payment or otherwise block the CCM Sale.

3. ***Weider/Forman cannot block the sale of the Receivables Assets because, at a minimum, their claimed liens are subject to bona fide disputes.***

a. Even Weider/Forman acknowledge that this Court can pass title "free and clear" if a bona fide dispute exists.

Weider/Forman seem to contend that this Court lacks equitable powers in a receivership proceeding beyond those possessed by a court sitting in a bankruptcy proceeding. (Weider/Forman Objections re: CCM Sale [Dkt. #344], p. 17 (arguing that sale prohibited by Bankruptcy Code).) Weider/Forman further contend that because they, as lienholders, could purportedly prevent the Receivables Assets from being sold "free and clear" in a bankruptcy proceeding under 11 U.S.C. section 363(f),[7] they may do so here. (*Id*. at 17-21.)

While the Receiver contends that this Court has equitable powers beyond those described in the Bankruptcy Code, this Court need not reach that issue to reject Weider/Forman's argument under the 11 U.S.C. section 363(f). In particular, such a sale is proper because a "bona fide dispute" exists as to Weider/Forman's liens. 11 U.S.C. § 363(f)(4).

[7] The Receiver disputes that Weider/Forman could prevent a sale free and clear if this were a bankruptcy proceeding.

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The application of these rules in relation to allegations of a Ponzi-like scheme was recently demonstrated in the receivership proceeding, *SEC v. Capital Cove Bancorp LLC*, No. SACV 15-980-JLS (JCx), 2015 U.S. Dist. LEXIS 174856 (C.D. Cal. Oct. 13, 2015). There, two sets of creditors to a Ponzi-like scheme objected to the sale of certain receivership assets "free and clear" (with liens attaching to the proceeds) because the creditors held senior liens over certain properties but would not be paid immediately from the proceeds. *Id*. at *9. The court's local rules dictated that the district court apply the Bankruptcy Code in receivership proceedings to the extent practicable. *Id*. at *13-14. Quoting 11 U.S.C. section 363(f) of the Bankruptcy Code, the court recognized that a bankruptcy estate's trustee may sell property "free and clear of any interest in such property of an entity" if, among other possibilities, "such interest is in a bona fide dispute[.]" *Id*. at *14. In that context, the issue confronting a court is not how it will ultimately resolve the dispute, but merely whether, on some objective basis, the court concludes that a meritorious, conflict exists. *Id*. at *15-16. Such a dispute arose there because of the Uniform Voidable Transfer Act ("UVTA"), which renders transactions voidable as to a creditor if the transfer was made to hinder, delay, or defraud any creditor of the debtor. *Id*. at *16 (discussing Cal. Civ. Code § 3439.04(a)).

As the court recognized:

> "The purpose of [the UVTA] is to permit the receiver to collect those assets that can actually be located and recovered in the wake of a Ponzi scheme, and to ratably distribute those assets among all participants, including the many investors who lost everything." *Donell v. Kowell*, 533 F.3d 762, 779 (9th Cir. 2008). Moreover, the "mere existence of a Ponzi scheme, which could be established by circumstantial evidence, has been found to fulfill the requirement of actual intent on the part of the debtor." *In re Agric. Research and Tech. Grp.*, 916 F.2d 528, 536 (9th Cir. 1990). *See also In re Cohen*, 199 B.R. 709, 717 (B.A.P. 9th Cir. 1996) ("Proof

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> of a Ponzi scheme is sufficient to establish the Ponzi operator's actual intent to hinder, delay, or defraud ….").

Id. at *16-17 (footnote omitted). The court found that the receiver could seek to void the liens under the UVTA because the record demonstrated a "sufficient, objective basis to support the existence of a Ponzi scheme furthered by the disputed liens." *Id*. at *18-19 (discussing investor misrepresentations about the priority of debt, commingling of funds, and payment of earlier investors and operating costs with new investor money).

Further, in relation to a "good faith defense" under the UVTA, the creditors bore the burden of proof and:

> "One lacks the good faith that is essential to the [UVTA] if possessed of enough knowledge of the actual facts to induce a reasonable person to inquire further about the transaction." *In re Cohen*, 199 B.R. at 719. "Such inquiry notice suffices on the rationale that some facts suggest the presence of others to which a transferee may not safely turn a blind eye." *Id.* Courts therefore "look to what the [creditor] objectively 'knew or should have known' in questions of good faith, rather than examining what the [creditor] actually knew from a subjective standpoint." *In re Agric. Research*, 916 F.2d at 535-36.

Id. at *19. The district court found that bona fide disputes existed as to the two creditors because, as to one, it knew of the borrower's default on some loans and was aware of the SEC investigation before entering into several transactions, *id*. at *20, and, as to the other creditor, its knowledge that cash flow problems delayed transactions was sufficient to "'induce a reasonable person to inquire further about the transaction.'" *Id*. at *22-23 (quoting *In re Cohen*, 199 B.R. at 719). Because the two creditors' liens were in bona fide dispute, the district court authorized the sale "free and clear" of existing liens, with any pre-existing liens attaching instead to the sale proceeds. *Id*. at *26.

Likewise—and as further addressed in the following section—at a minimum, a genuine

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dispute exists as to the voidability of Weider/Forman's claimed liens and potential claw-back of prior payments. Consequently, Weider/Forman cannot prevent the sale of the Receivables Assets "free and clear" and, at most, their disputed lien attaches to some portion of the sale proceeds.

b. A bona fide dispute exists as to whether the alleged Weider/Forman loans are voidable because of the alleged underlying Ponzi-like scheme.

As in *Capital Cove Bancorp LLC*, 2015 U.S. Dist. LEXIS 174856, at a minimum, a bona fide dispute exists as to whether the alleged Weider/Forman loans are voidable. Applying New York law as specified in the Loan Agreements,[8] (Forman Decl. [Dkt. #345], Ex. A, ¶ 13(e)), a transfer is voidable if it is made to "hinder, delay, or defraud either present or future creditors." NY CLS Dr & Cr § 276. As in California, a Ponzi-type scheme establishes the intent element. *Picard v Estate of Chais (In re Bernard L. Madoff Inv. Sec. LLC)*, 445 B.R. 206, 221 (Bankr. S.D.N.Y. 2011) ("fraudulent intent on the part of BLMIS, the transferor, has been established by virtue of the Ponzi scheme presumption"). And as with the creditors in *Capital Cove Bancorp LLC*, 2015 U.S. Dist. LEXIS 174856, Weider/Forman would be entitled to present a "good faith" defense. *Messer v Wei Chu (In re Xiang Yong Gao)*, 560 B.R. 50, n.15 (Bankr. E.D.N.Y. 2016).

A bona fide dispute exists as to whether Weider/Forman's alleged loans (to the extent they gave consideration) are voidable. As in *Capital Cove Bancorp LLC*, 2015 U.S. Dist. LEXIS

[8] The Receiver does not hereby waive any future positions regarding the applicable law. Rather, the Receiver believes that the analysis is materially unchanged regardless of whether this Court applies the laws of New York, Oregon (the locus of the alleged Ponzi-like scheme), or Delaware (the State in which CP Holdings was organized). Each state establishes similar bases for voiding transactions. *See, e.g.*, ORS 95.230 (transfer voidable if made with "actual intent to hinder, delay, or defraud any creditor"); 6 Del. Code § 1304 (same). Similarly, each state recognizes similar defenses of good faith. *See, e.g.*, ORS 95.270 (transfer not voidable against a creditor that took in "good faith and for a reasonably equivalent value"); 6 Del. Code § 1308 (same). Consequently, the Receiver does not here undertake a choice of law analysis.

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174856, the transactions at issue were evidently made during an alleged Ponzi scheme, creating a presumption of voidability, *see In re Bernard L. Madoff Inv. Sec. LLC*, 445 B.R. at 221. Further, even without a full investigation of claims and causes of actions available to the Receivership, the Receiver has discovered information about Weider/Forman amongst other insiders and creditors, and their dealings with management, that raise significant concerns not necessarily apparent from the face of the transactional documents. (Foster Decl., ¶¶8-10.)

After the Receiver undertakes further investigation, the Receiver anticipates making a comprehensive assessment and recommendation to the Court regarding the extent, validity and priority of Weider/Forman's loan and relationship with Aequitas entities. (Foster Decl., ¶ 11.) Since there is a bone fide dispute regarding their claim, at that point, and only at that point, can the Court determine whether their claim should be allowed, the amount thereof, whether it is secured or unsecured and its treatment under the distribution plan—just as the court will do with every other contested and unsettled claim.[9]

C. **Conclusion**

This Court should deny Weider/Forman's objections, approve the sale of the Property and the Receivables Assets free and clear of liens, claims, and interests, with the Court scheduling a further hearing on or about March 29, 2017, to determine the amount of net proceeds from the sale of the Receivables Assets, if any, which the Receiver will hold pending the future adjudication and final resolution of the Weider/Forman claim at the appropriate time in this Receivership proceeding.

[9] The Receiver also believes it likely has claims against Weider/Forman for millions of dollars of principal interest paid to them by CP Holdings and other Receivership Entities prior to the Receivership on account of loans for which no consideration was provided. The Receiver reserves all rights to assert and pursue the claw back of these prior payments.

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II. THE RECEIVER'S RESPONSE TO THE LIMITED OBJECTION OF TERRELL GROUP MANAGEMENT

The Receiver had previously advised Terrell Group Management ("TGM") that he would agree to certain terms of the order approving sale, which appear as numbers 1 through 3 of TGM's Limited Objection [Dkt. #349]. Those terms are consistent with the terms agreed to with ASFG, resulting in ASFG striking a motion to lift the stay [Dkt. #235].

The Receiver does not agree to the final term proposed by TGM—specifically:

> (4) "TGM reserves its right to seek at any time an order of distribution from the Court on proper notice and opportunity to be heard."

The Order Appointing Receiver enjoins any action which would dissipate or otherwise diminish the value of any Receivership Property by enforcing claims against any Receivership Property or attempting to enforce any security agreement. [Dkt. #156, p. 8, ¶ 17C.] The Receiver is still in the first stage of the four-stage process of administering the estate—stabilizing and monetizing assets. His formal investigation into claims and causes of action has not yet started. He has begun developing a claims process which will ultimately be submitted for the Court's review and approval. Allowing TGM to effectively disrupt the Receiver's orderly administration of the estate, by granting one party the opportunity to seek a premature order of distribution contrary to the terms of the Order Appointing Receiver, could well open the door to similar efforts by many investors and creditors. The Receiver and his professional team would be forced to respond to each such motion while in the midst of other significant efforts such as asset monetization and investigation. TGM's objection 4 should be denied.

III. THE RECEIVER'S RESPONSE TO THE LIMITED OBJECTION OF COMPASS PARTNERS INTERNATIONAL

The Limited Objection filed by Compass Partners International ("Compass") [Dkt. #350]

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should be denied. Compass failed to submit a Qualified Alternative Bid by the Bid Deadline. The January 11 and 18 letters express nothing more than a wholly-contingent and non-enforceable interest on the part of Compass. The assets were marketed before the Receiver was appointed and have been marketed by the Receiver since his appointment. Many parties have expressed interest in purchasing the assets. Cedar Springs Capital very well might forego the transaction if the sale process is extended beyond the current contractual deadline, jeopardizing the Receivership Entity ever receiving the $52 million cash CSC is obligated to pay for CCM and the follow-on sale of the $70 million receivables portfolio. The Compass "indicative offer" is wholly contingent upon completion of due diligence and raising the necessary acquisition funds. The Receiver strongly urged Compass to make a non-contingent offer in accordance with the Bid Procedures and it did not do so. This Court should deny Compass's objections.

Dated this 19th day of January, 2016.

Respectfully submitted,

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