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Attorneys for Secured Creditors WEIDER HEALTH & FITNESS and BRUCE FORMAN

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

SUPPLEMENTAL BRIEF IN SUPPORT OF 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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INTRODUCTION

The Receiver has responded to a reasonable request for adequate protection with a raft of outright misstatements, unsupported claims, and tortured legal contentions. Despite all this, the Receiver has made several critical concessions that powerfully support the limited relief sought by secured creditors Weider Health & Fitness ("Weider") and Bruce Forman ("Forman"). Specifically, the Receiver:

- Acknowledges that as secured, over-collateralized creditors, Weider and Forman are entitled to have their liens attach to the proceeds of the sale of CarePayment receivables.
- Neither disputes nor addresses its threat to deprive Weider and Forman of their collateral by using the proceeds of CarePayment for other purposes—the basis for Weider and Forman's request for additional protections.
- Raises a bogus claim that Weider and Forman failed to fund loans and participated in a fraudulent conveyance—without support and in spite of documents that clearly demonstrate the contrary.

Prior to this objection, the Receiver reported to the Court that Weider and Forman were secured, over-collateralized creditors with validly perfected liens, worthy of a substantial payout of Receivership funds. Days after extending a substantial settlement offer, consented to by the SEC and investment committee, the Receiver takes the position that Weider and Forman are bad actors who are owed nothing. Suppl. Decl. of Bruce Forman in Supp. of Weider & Forman's Limited Objections ("Forman Suppl. Decl."). Following the filing of Weider and Forman's objections, the Receiver has taken a different position and launched a series of serious but meritless accusations aimed at bringing Weider and Forman back in line. This retaliatory conduct underscores the need for adequate protection, and Weider and Forman respectfully request that the Court condition any sale on the terms set forth in Weider's and Forman's objections.

ARGUMENT

I. The Consent Provisions Apply to the Proposed Sale and Are Binding

The Receiver falters at the threshold with its assertion that the consent provisions in the Weider/Forman loan agreements do not apply to the proposed sale of CarePayment receivables. The provision states clearly that CarePayment Holdings "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). The

The Receiver claims that only CarePayment Holdings is bound by this provision. But that argument ignores the fact that the agreements include a definition of assets of CarePayment Holdings— "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). The receivables are, then, assets that are subject to the consent agreements.

But even if that weren't the case, the Receiver itself has admitted that the receivables constitute assets and value belonging to CarePayment Holdings. In its September Report to this Court, the Receiver represented to this court that the two entities that own the receivables—CarePayment LLC and CP FIT—"roll up to [CarePayment] Holdings," and that CarePayment Holdings "directly owns 100% of CPLLC [CarePayment LLC] and, indirectly, 100% of CPFIT." (September Report, at 52.) Indeed, in that same report, the Receiver stated that "CPH…through its subsidiaries (CPLLC and CPFIT), holds consumer medical receivables with a face value of $76.2 million as of June 30, 2016." Id. at 58. It is clear, then, that the receivables and the entities that own them are "material assets" of CarePayment Holdings that are subject to the consent provisions of the Weider and Forman loans.

The same representations deflate the Receiver's declaration that Weider and Forman have no security interest in the CarePayment receivables. The Receiver's September Report specifically states that Weider and Forman are "substantially over-collateralized." (September

Report, at 54.) The Receiver made that representation because Weider's and Forman's collateral consists of membership interest in the entities that own the receivables—indeed, the receivables are the value in those entities. (Id. at 52.) There is, then, no meaningful distinction between the Weider and Forman loans being collateralized by membership interest in entities that hold the receivables or being collateralized by the receivables themselves. Either way, Weider and Forman hold collateral and perfected liens that are directly tied to the receivables.

The authorities cited in the Receiver's brief are anticipated and addressed in Weider's and Forman's objections. Simply put, Supreme Court case authority establishes that the Receiver is bound by the Weider and Forman contracts—and the Receiver makes no attempt to address that authority. The parade of horribles posited by the Receiver—that a party might prevent a sale and thereby frustrate the Receiver's or Court's ability to administer a receivership and sell assets—aren't at issue here, as Weider and Forman aren't trying to prevent a sale and are simply seeking adequate protection in the context of the sale.

II. The Receiver Makes No Attempt to Bear Its Burden of Demonstrating a Bona Fide Dispute

The Receiver utterly fails to carry its burden of demonstrating that an exception under Section 363(f) permits a sale "free and clear." In re Duncan, 406 B.R. 904, 910 (Bankr. D. Mont. 2009). The sole exception the Receiver invokes is the "bona fide dispute" exception. But the Receiver does nothing to meet his burden of producing evidence of a bona fide dispute. Instead, the Receiver resorts to vague statements about "having reason to believe that Weider and Forman did not advance $6 million of the $10.5 million" and having "discovered information about Weider/Forman amongst other insiders and creditors." (Receiver's Resp., at 26.) But the Receiver fails to provide this Court with that information or the basis of his "reason to believe" such things, and in doing so, deprives itself of the evidence it needs to bear its burden of demonstrating a bona fide dispute.

Even more problematic is that documents the Receiver has in his possession disprove the Receiver's claims of a bona fide dispute. The Receiver's bona fide dispute assertions rest on a

claim that Weider and Forman did not actually give CarePayment Holdings the money they claim to have loaned to CarePayment Holdings. But this assertion betrays a fundamental misunderstanding of the CarePayment Holdings loan, as evidenced by contemporaneous documents. Simply put, prior to extending the loan to CarePayment Holdings, Weider and Forman lent a larger sum of $12 million to another Aequitas entity, CSF Leverage I. Forman Suppl. Decl. ¶ 2. While the $12 million loan was approaching maturity, Weider and Forman reached a new agreement under which $6 million of the $12 million Weider and Forman loaned to CSF Leverage I would, in lieu of immediate repayment, be loaned to CarePayment Holdings and the remaining $6 million would be repaid. This was expressly laid out in both a letter agreement and the loan documents surrounding the Carepayment Loan. Forman Suppl. Decl. ¶¶ 3-4. The letter agreements stated:

- "Lender [Weider] extended to Borrrower [CSF Leveraged] a loan in the original principal amount of $12,000,000."
- "Lender will convert $6 million in the principal amount of the [CSF Leverage I] Loan into a new loan extended to CarePayment Holdings, LLC, as guaranteed initially by ACF."

Id.

These agreements resulted in a new loan to CarePayment Holdings, under which the parties agreed that the money originally loaned to CSF Leverage I would convert to CarePayment Holdings, and that Weider and Forman would then take collateral in the form of CarePayment receivables. The CarePayment Holdings loan agreements specifically referenced this arrangement, which states that the "Lender will shall disburse to Borrower one Advance in the aggregate principal amount of $6,000,000" and that "the Advance is to be made through a conversion of a portion of the outstanding principal amount of the CSF Leverage I Loan." Forman Suppl. Decl. Ex. B, at p.1.

The Receiver's contention, then, that the CarePayment Holdings loan is invalid because Weider and Forman did not wire money to CarePayment Holdings ignores the clear language in

the loan agreements that the $6 million dollars for CarePayment Holdings would come from CSF Leverage I, which originally received $12 million from Weider and Forman, in lieu of immediate repayment. The wire records reflecting these transfers—as well as the subsequent transfer of $4.5 million from Weider/Forman to CarePayment Holdings for a total of $10.5 million in loan funds—are attached here. Forman Suppl. Decl. Ex. A.

This evidence—and the lack of evidence supporting the Receiver's assertions—puts this case on much different footing than SEC v. Capital Cove Bancorp LLC, cited heavily by the Receiver in his brief. There, as the Receiver concedes, the Court had a "record [that demonstrated] a 'sufficient, objective basis to support the existence of a Ponzi scheme furthered by the disputed liens.'" Receiver's Resp., at 24. But here, the Receiver has completely failed to provide the Court with that kind of record, or any evidence that would suggest that the liens at issue here furthered any scheme whatsoever. Capital Cove simply cannot bear the weight the Receiver places on it. It stands for the proposition that the Court needs a record to establish a bona fide dispute, and here, the record demonstrates that there can be no dispute on the grounds cited by the Receiver.

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CONCLUSION

The undisputed facts are that Weider and Forman are secured, over-collateralized creditors with validly perfected liens who seek only adequate protection. In light of the Receiver's recent threats to use the proceeds of the receivables sale in a manner that could deprive Weider and Forman of their collateral, the additional protections sought by Weider and Forman are necessary and warranted.

Dated: January 20, 2016

Respectfully submitted by,

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