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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v.	No. 3:16-cv-00438-PK RECEIVER'S MOTION TO SET RESERVE HEARING (Request For Oral Argument)

SCHWABE, WILLIAMSON & WYATT, P.C.
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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.

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TABLE OF CONTENTS

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LR 7-1 CERTIFICATION

Receiver Ronald Greenspan ("Receiver") certifies that, through respective counsel, he conferred with Weider Health & Fitness and Bruce Forman (collectively "Weider/Forman") but that the parties were unable to resolve the issues involved in this motion.

I. Introduction

Weider Health & Fitness and Bruce Forman (collectively "Weider/Forman") contend that, following the possible sale of certain health care receivables, the Receiver should be ordered to segregate a substantial portion of the sale proceeds—$10.5 million in principal plus attorney fees and interest accruing at the rate of 25%, which amounts to more than $250,000 per month. *Forman Decl. ISO Obj.* [Dkt. 345], ¶ 21. Three years is a reasonable estimate of the timeframe necessary to complete administration of the assets, forensic investigation and claims resolution process. During that time, Weider/Forman would have this Court escrow the entirety of the estimated net proceeds of asset sales by both CarePayment LLC ("CP LLC") and CP Funding I Trust ("CP FIT"), assets on which they have no lien and on account of a "loan" for which they provided insubstantial (far from "fair") consideration to the entity from which they seek repayment.

Weider/Forman's recent submission [Dkt. 373] should be rejected in its entirety. This Court has previously ordered that the parties are entitled to conduct discovery and present evidence to the Court during a preliminary hearing, in order to determine the amount of the reserve, if any. In substance, Weider/Forman's brief is an unfounded motion for reconsideration. Although their objections were previously denied, Weider/Forman threaten to again object to the sale of certain health care receivables unless "the Court orders adequate protection as discussed in [their] filing." *Id*. at p. 14, n. 7 (emphasis omitted).

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The particular protection Weider/Forman seek is reserve of the entirety of their claims, which they contend requires no hearing. *Id*. at 10. In the alternative, they propose a perfunctory hearing following limited discovery (engineered to avoid evidence counter to Weider/Forman's self-serving contention of good faith). They propose to eliminate from the Court's consideration issues that prompted the Receiver to request and the Court to order a reserve hearing. *Id.* at 18. For example, as noted above, Weider/Forman **do not** have a security interest in the subject health care receivables. Rather, the collateral for the loans at issue is CarePayment Holdings LLC's ("CP Holdings") equity interests in certain subsidiary companies. The subject health care receivables are assets of those subsidiaries. Despite false contentions to the contrary, Weider/Forman **did not** advance CP Holdings $6 million or provide that entity any consideration for issuing the corresponding promissory note. Further, neither of the entities which own the health care receivables signed a security interest encumbering its assets.

The Receiver and, by extension, the Court should not be forced to make premature decisions impacting the Receivership Entity's assets otherwise available for the Receiver to carry out his duties including, but certainly not limited to, effectively monetizing assets, paying ordinary operating expenses, conducting a thorough forensic investigation, continuing to cooperate with Federal and State authorities and developing an appropriate distribution plan. The danger of taking even tentative positions before completion of a thorough investigation is illustrated by Weider/Forman's repeated entreats for this Court to rely on expressly preliminary statements by the Receiver and counsel in Federal Rule of Evidence 408 settlement negotiations,

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regardless of the very facts and concerns that later emerged and led the Receiver to reassess Weider/Forman's claim.[1]

For their part, after Weider/Forman repudiated their agreement to settle their claim for $8.5 million without accrued or future interest, they have attempted to leverage a more favorable settlement—often trying to force the Receiver into a Hobson's choice between (a) risking the alleged incursion of interest amounting to more than $250,000 per month at the expense of innocent investors; and (b) resolving in their favor the Weider/Forman claim with incomplete information about what, if anything, Weider/Forman knew or should have known about the circumstances that ultimately led to the enforcement action brought by the U.S. Securities and Exchange Commission ("SEC").

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[1] Three times now, Weider/Forman have submitted inadmissible communications occurring in the context of settlement negotiations. *See Forman Decl. ISO Obj.* [Dkt. 345], ¶¶ 23-26 (discussing same); *Mandler Decl. ISO Obj.* [Dkt. 346], ¶¶ 8-10 (same); *Forman Supp. Decl. ISO Obj.* [Dkt. 356], ¶ 5 (noting he rejected the settlement in January 2017); *Forman Decl. ISO Mot. to Recons.* [Dkt. 375], Ex. A (memorializing Weider/Forman agreement to settle in October 2016). As this Court knows, settlement communications are inadmissible as evidence of "the validity or amount of a disputed claim" or even to impeach a witness by prior inconsistent statement or a contradiction. Fed. R. Evid. 408.

When Weider/Forman offered evidence of settlement negotiations in support of their objections, they argued that, at least ostensibly, they did so because (a) the Court was not being asked to make factual findings on their claim, and (b) according to Weider/Forman, the Receiver was not disputing the validity or amount of a claim, and instead only attempting to compromise an admittedly due debt. *Weider/Forman Obj.* [Dkt. 344], p. 10, n. 3.

This Court is the factfinder in relation to Weider/Forman's claims, rendering Weider/Forman's latest submission an improper and transparent attempt to bias the Court against the Receiver's position. Further, as Weider/Forman acknowledge, following a preliminary and partial investigation, the validity of their claimed lien and amount of their underlying claim are absolutely disputed.

Weider/Forman's continued reliance on repeated improper and unprofessional submissions of settlement communications merely reinforces that the actual facts are neither as clear nor helpful as Weider/Forman would have this Court believe.

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To ensure that the Receiver and this Court act with reasonably complete information in setting the amount, if any, of the reserve, the Receiver recommends the Court undertake the robust preliminary hearing that it previously ordered. No basis exists to alter the Court's prior determination of the scope of the reserve hearing. Accordingly, the Receiver respectfully requests that the Court grant all relief sought by way of this Motion.

II. Factual background

Starting in May 2011, Weider/Forman loaned money to Aequitas affiliated entities, and then participated with Aequitas management in purporting to shuffle that debt from the borrower, Aequitas Commercial Finance ("ACF"), to CSF Leverage I, LLC ("CSF Leverage I") and then to CP Holdings. *Foster Decl. ISO Resp. to Obj.* [Dkt. 354], at ¶ 10(a). As part of that shuffling, in October 2014, CP Holdings issued a promissory note to Weider for $6 million. *Id*. at ¶ 10(b). Together with Aequitas management, Weider/Forman purport to have "converted" the $6 million in pre-existing debt owed by ACF and then CSF Leverage I to debt allegedly owed by CP Holdings. *Weider/Forman Supp. ISO Obj.* [Dkt. 355], p. 4. Weider/Forman and ACF appear to have created this application of the term "converted debt" from whole cloth to describe their attempt to force the debt of an entity that received consideration onto an entity that received no consideration. Regardless, consistent with the authorities below, the law does not sanction an entity acquiring debt without fair consideration, particularly when it is insolvent or rendered insolvent by doing so.

The Receiver's investigation has disclosed that (a) Weider/Forman did not advance CP Holdings $6 million for the promissory note; (b) no Aequitas-affiliated entity or other party advanced CP Holdings $6 million or provided any consideration to CP Holdings to induce it to issue the promissory note to Weider/Forman; (c) no entity in which CP Holdings owned any

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interest (such as a subsidiary) received any consideration; and (d) at the time CP Holdings issued the $6 million promissory note and at all times thereafter, it was likely insolvent. The timing of the shuffling of this debt away from ACF to CSF Leverage I, and then from CSF Leverage I to CP Holdings, raises concerns for the Receiver based on many factors, not the least of which was the investigation then ongoing regarding Corinthian College and the resulting impaired value of the assets owned by ACF and CSF Leverage I. *Cf. SEC Compl*. [Dkt. 1], ¶ 1 ("[I]n May 2014, Corinthian Colleges …, whose receivables made up 75% of the receivables owned by ACF, defaulted on its obligations to ACF, exacerbating the significant cash flow shortages of ACF …."). The assets of CSF Leverage I were largely, if not entirely, comprised of Corinthian College receivables.

In June 2015, when the alleged Aequitas Ponzi-like scheme was desperate for additional cash and, per the SEC, deeply insolvent, Weider/Forman agreed with Aequitas management to provide $4.5 million of cash (the only cash that the books and records show they provided to CP Holdings). Weider/Forman lent the $4.5 million subject to onerous and uncompromising terms, which purported to put their recovery ahead of prior investments of over $300 million by innocent investors. Weider/Forman and Aequitas management orchestrated the transaction in a manner to cause those investors to suffer additional losses equal to the over $10.5 million priority purportedly granted to Weider/Forman as well as $250,000 monthly loss in the form of interest accruing to Weider/Forman. Weider/Forman conditioned the $4.5 million cash on CP Holdings agreeing to pay 17% interest (25% default interest) on not only the $4.5 million but on CP Holdings also paying such interest rate on the $6 million that had been lent years earlier to other Aequitas entities. *Foster Decl. ISO Receiver's Resp. to Obj.* [Dkt. 354], ¶¶ 9-10. They also sought and obtained a purported lien on all CP Holdings' assets, **which do not include the**

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health care receivables, to secure the $4.5 million and the $6 million previously lent to entities other than CP Holdings—which lien, if enforced, would necessarily subordinate (and generally wipe out) the interests of all of the other allegedly defrauded investors in CP Holdings.

On June 29, 2015, Weider/Forman entered into various agreements with CP Holdings which on their face indicate that CP Holdings owed Weider/Forman a cumulative $10.5 million, secured by collateral. *Forman Decl. ISO Obj.* [Dkt. 345], Exs. A, I.[2] 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 CP Funding I Holdings [CP FIH] …" and "agreements and other documents … evidencing or relating to such interests[.]" *Forman Decl.* [Dkt. 345], Ex. A (loan agreement), ¶ 2(b). With greater precision, the Security Agreements say the same.[3] Nothing in the Security Agreements, however, afford Weider/Forman a security

[2] The Receiver cites the Weider 2015 agreements. The Forman 2015 agreements are materially the same.

[3] 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*.

(*continued on next page*)

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interest in accounts receivable owned by CP LLC or CP FIT. Weider /Forman's collateral is limited to **equity interests in** the subsidiary companies owned by CP Holdings, not the accounts receivable owned by those subsidiaries, which accounts receivable are the assets the Receiver is selling and the proceeds of which Weider/Forman now seek to impose a lien. There is no evidence that either of the entities that own the assets ever signed a security agreement (or any other document) in favor of Weider Forman *See Forman Decl. ISO Obj.* [Dkt. 345], Ex. C (security agreement issued by CP Holdings).

III. Procedural history

On March 10, 2016, the SEC filed an action in the United States District Court, District of Oregon, Portland Division (the "Court"), against certain individuals and companies. *SEC Compl.* [Dkt. 1]. The SEC alleges that, following the failure of the investment in Corinthian College receivables in May 2014, Robert Jesenik, Brian Oliver, and N. Scott Gills ("Individual Defendants") transformed various entities they controlled into a Ponzi-like scheme. *Id.* at ¶¶ 3 and 56. The SEC further alleges that, as of December 31, 2015, there were at least 1,500 separate investors in ACF notes. *Id.* at ¶ 23.

This Court appointed Ronald F. Greenspan as Receiver for the Receivership Entity. *Order Appointing Receiver* [Dkt. 156]. It did so 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).

Forman Decl. ISO Obj. [Dkt. 345], Ex. C (security agreement), ¶ 2 (emphasis added; formatting of paragraph modified for readability). 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. ISO Obj.* [Dkt. 345], Ex. C (security agreement), ¶ 2(w)-(y). Tellingly, there is no mention in the Exhibits to the Forman Declaration, or elsewhere, of a lien on the health care receivables.

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To that end, the Receiver is responsible for liquidating the Receivership Entity's property. *See, e.g.*, *Order Appointing Receiver* [Dkt. 156], ¶ 26 (with Court approval, the Receiver is authorized to sell, transfer, or dispose of Receivership Entity assets "free and clear of any liens, claims or encumbrances, with such liens, claims or encumbrances attaching to the proceeds").

Pursuant to the authority granted by this Court, the Receiver has worked to liquidate assets. On December 16, 2016, the Receiver filed 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].

Weider/Forman were among the parties that filed "limited objections" [Dkt. 344]. Weider/Forman alleged that they loaned $10.5 million directly to CarePayment Holdings, LLC ("CP Holdings"), allegedly secured by certain healthcare receivables (the "Receivables Assets"). *Id*. at 5-6; *Forman Decl. ISO Obj.* [Dkt. 345], ¶ 3. Furthermore, Weider/Forman demanded preferential treatment in conjunction with the intended sale of the Receiver's equity interests in CCM Capital Opportunities Fund, LP and the health care receivables owned by CP LLC and CP FIT—specifically, that the Receiver immediately repay Weider/Forman or segregate sale proceeds for that purpose, including the monthly payment of interest at a compounded rate of 25% per annum. *Weider/Forman Obj.* [Dkt. 344]. As additional leverage, Weider/Forman asserted that they held the "sole discretion" to veto the sale provisions related to the buyers option to purchase the Receivables Assets and a supposed lien in the same. *Id.* at 1. While Weider/Forman's "sole discretion" argument was baseless, they conditioned their consent to the

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purchase option on Receivables Assets on "their interests [being] adequately protected." *Id.* at 21.

In response to Weider/Forman's objections, the Receiver presented both evidence and governing authorities preventing Weider/Forman from holding receivership assets hostage [Dkt. 353]. In particular, the Receiver noted that Weider/Forman's loan documents falsely state they advanced $10.5 million to CP Holdings and that the security agreements afford security in only CP Holdings' equity interests in its subsidiaries, *not* the Receivables Assets or any other assets owned by those subsidiaries. *Id.* at 4-8. Further, the Receiver raised the issue of whether some or all of the transfers to Weider/Forman are voidable based on the absence of fair consideration. *Id.* at 12-14, 25-26. Finally, the Receiver established that Weider/Forman did not have the "sole discretion" to dictate to the Receiver or this Court the terms of the sale of the Receivables Assets.[4]

During the January CCM sale hearing, Weider/Forman argued that the Court should require the Receiver to either (a) segregate the entirety of Weider/Forman's purported claim (including an additional $250,000 per month in default interest) without a hearing; or (b) prematurely undertake a complete hearing of their claim. *Jan. 20, 2017 Hearing Tr.* [Dkt. 364], pp. 27-28. In support of their argument, Weider/Forman referenced judicial efficiency:

> From a judicial efficiency perspective, Your Honor, there's no question that a hearing to resolve the question of how much a reserve is going to overlap substantially, if not completely, with a hearing about whether the claim is valid. And so the notion of

[4] As the Receiver advised the Court, Weider/Forman's "sole discretion" argument misconstrues the pertinent contractual provisions and, regardless, if construed to constrain the Court's authority to dispose of assets in a receivership, would be void as opposed to public policy and unenforceable in a receivership proceeding. *Resp. to Obj.* [Dkt. 353], pp. 14-22.

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> having one hearing where the Court hears a ton of evidence about the amount that's owed to our client, but not continuing forward and just resolving at that time the ultimate claim issue just doesn't make sense.

Id. This Court readily dispensed with Weider/Forman's self-serving judicial efficiency entreat:

> Well, I can take notice of the fact that we had the hearing on the issue of reserve and all the testimony that came in when we get the claim stage, and the little extra you think might be necessary to establish your claim if we're there, and that won't be—you know, we wouldn't do it all over again. I'd have all the testimony that was submitted on the first go-around on the reserve beforehand. If it resolves the claim issues, when claims are timely, I'd be happy to not have a hearing at that time any further on your claim in this case.

Id. at 28.

Dissatisfied with this Court's ruling to proceed with a robust preliminary hearing without conclusively determining the amount of Weider/Forman's allowable claim, Weider/Forman's counsel issued a challenge:

> I can file tomorrow a motion for intervention and a complaint in intervention and get the Court focused on the declaratory relief issue, which would hopefully take us right into the merits of our claim.

Id. The Court also readily dispensed with Weider/Forman's challenge or threat:

> Well, I would likely stay the declaratory relief on your claim until all the claims are properly before me. I mean, I'm not inclined to take—I don't care what you file, but I'm not inclined to take one claimant here and advance their claim to judicial consideration while everybody is sitting in the background waiting for their turn.

Id. at 28-29.

The Receiver argued that Weider/Forman are "not entitled to … basically jump in front of the injunction that's in place" and have their claims determined prematurely. *Id*. at 25. It simply is not their right to "dictate when this Court and when the Receiver ultimately determines

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the amount of the claim," particularly when the Receiver is "not anywhere close to [conducting] the claims process." *Id.* at 26. The Receiver sought a preliminary hearing to address the numerous issues that will affect the "amount of the reserve[.]" *Id.*

Throughout the hearing, the Court referenced three issues to be resolved before such a preliminary hearing is held. First, the Court would need to decide the scope of any hearing—whether it would be a full litigation of the claim versus a preliminary hearing to determine the amount of any reserve. Second, what form would the hearing take—whether live testimony or "in the form of summary judgment with declarations[.]" *Id.* at 21. Finally, the Court would need to determine the scope and type of discovery necessary to address whether Weider/Forman is entitled to a reserve and, if so, in what amount. On the second and third issues, the Court asked the parties to confer. *Id*. at 29.

On the first issue, as noted above, the Court rejected Weider/Forman's "either/or" approach of a full hearing or segregation of the full amount of the alleged claim, plus monthly default interest. Instead, upon the Receiver's request, the Court ordered that it would conduct a preliminary hearing to address "whether [Weider/Forman are] entitled to have a reserve at all and what the amount should be." *Id.* at 30 (correcting Weider/Forman as to scope). *See also id.* at 27 (the "real question" is "what reserve … or if there's any reserve"); *id.* at 29 ("So, let's have the hearing on your entitlement" to protection). The Court clearly recognized that, in deciding issues relating to the amount of any reserve, it could also be addressing "the claim issues," such that, when those claims issues are later fully litigated, it may not be necessary to "have a hearing at that time any further on [Weider/Forman's] claims in this case." *Id.* at 28. The Court could do more than make preliminary findings on the validity and amount of Weider/Forman's lien; it could address issues affecting the value of their claim.

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In addition to ordering the preliminary hearing on whether Weider/Forman would be ultimately entitled to a reserve and, if so, in what amount, the Court overruled objections to the CCM sale. *See id.* at 34-35 (deeming Weider/Forman's arguments "an objection or request as to the distribution of the proceeds of the sale," but "to the extent that it's intended as an objection to the sale, it's hereby overruled."); *Order re: CCM Sale* [Dkt. 362], p. 6 ("All objections to the Motion that have not been withdrawn, waived, settled, or expressly reserved pursuant to the terms of this Order are overruled.").

As directed by the Court, the Receiver attempted to confer with Weider/Forman. During the conferral process with Receiver's counsel, Weider/Forman again proposed to severely restrict the issues that would be heard at the preliminary hearing. *Umhofer Decl. ISO Mot. to Recons.* [Dkt. 374], Ex. 1 (correspondence). For example, Weider/Forman take the position that the Court should only hear evidence relating to (1) the collateral securing the promissory notes; (2) perfection; and (3) the amount of the security interest. *Id.* at 2 (letter, page 1). They ignored the Court's comments and ruling that evidence presented at the preliminary hearing could result in findings that obviate the entirety of a reserve for Weider/Forman's claim because there is no legally enforceable claim in the amount of $10.5 million. Weider/Forman pressed for a response to their written proposal within two business days.[5] *Id.* at 4 (letter, page 3).

With Weider/Forman impermissibly attempting to narrow the scope of the hearing in contravention of the Court's order, the parties were unable to make progress toward agreement on the form of the hearing and related discovery. *Cf. Umhofer Decl. ISO Mot. to Recons.*

[5] Ultimately, owing to the press of other matters in combination with the inclement weather, the Receiver's counsel responded in six business days. *Umhofer Decl. ISO Mot. to Recons.* [Dkt. 374], Exs. 2 and 3 (e-mails advising Weider/Forman of unavoidable delays).

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[Dkt. 374], Ex. 5 (the Receiver "remain[s] prepared to discuss the timing of the hearing and an appropriate discovery plan"). Weider/Forman evidently believe that extrinsic evidence will be admissible regarding the definition of "collateral," but reject the notion that anything beyond document discovery is reasonably calculated to lead to the discovery of admissible evidence. *Mot. for Recon.* [Dkt. 373], p. 21. They propose a short written discovery period (30 days), condensed briefing schedule (35 days) which affords them two briefs to the Receiver's single brief, and no evidentiary hearing. *Id.* at 21.

For the reasons set forth below, this Court should reject Weider/Forman's attempts to reduce the previously-ordered scope of the preliminary hearing. In light of that scope, Weider/Forman's proposal for extremely limited discovery and oral argument as opposed to an evidentiary hearing are inadequate.

IV. This Court should disregard Weider/Forman's brief, which amounts to a motion for reconsideration of this Court's prior order authorizing a robust reserve hearing.

This Court should deny Weider/Forman's "Statement on Proposed Procedure," which is essentially a motion for reconsideration. *See* Fed. R. Civ. P. 7(b) ("A request for a court order must be made by motion."). As explained above, this Court ordered a preliminary hearing and declined to limit it in the manner again sought by Weider/Forman.

To the extent that motions for reconsideration are cognizable in this district,[6] such a motion warrants this Court's consideration only "'if the district court (1) is presented with newly

[6] A district court obviously has inherent power to rescind, reconsider, or modify an interlocutory order. *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001) ("A district court's power to rescind, reconsider, or modify an interlocutory order is derived from the common law, not from the Federal Rules of Civil Procedure."). Because Weider/Forman made no showing of any circumstances warranting such a motion, this Court need not address the more academic issue of whether such powers may only be invoked by

(*continued on next page*)

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discovered evidence, (2) committed clear error or the decision was manifestly unjust, or (3) if there is an intervening change in controlling law.'" *Emery v. Premo*, No. 6:14-cv-00285-SI, 2015 U.S. Dist. LEXIS 118897, *1-2 (D. Or. Sept. 8, 2015) (Simon, J.) (quoting *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

Here, Weider/Forman have not undertaken any showing that reconsideration is warranted. They do not suggest that they have discovered any new evidence since this Court's January 20, 2017 hearing. Nor can they demonstrate that this Court committed a "clear error of law" when it ordered the preliminary hearing with the understanding that certain issues presented at that hearing could affect the value of Weider/Forman's eventual claim. Finally, Weider/Forman do not point to any intervening change in law.

Weider/Forman "merely repeat arguments that have already been considered and rejected by this Court," which cannot support reconsideration. *Olson v. MBO Partners, Inc.*, No. 3:15-cv-2216-HZ, 2016 U.S. Dist. LEXIS 145970, *7 (D. Or. Oct. 20, 2016) (Hernández, J.) (denying motion for reconsideration on the same basis). They simply take a "second bite at the apple" which, if Weider/Forman's claim for attorney fees is credited, was at the expense of hundreds of investors. This Court should deny Weider/Forman's motion for reconsideration.

V. This Court should hear issues raised by the Receiver relating to Weider/Forman's lien and underlying claim, as those issues affect the amount of reserve the Receiver should hold, if any, pending the final claims process.

In responding to Weider/Forman's limited objections, the Receiver raised three issues relating to Weider/Forman's lien and underlying claim. First, Weider/Forman have no lien on the Receivables Assets. Second, Weider/Forman failed to provide any consideration, let alone

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the Court of its own accord or whether parties may invite the use of such powers by motion. *Cf.* Multnomah County Supplemental Local Rules 5.045 (mandating such a distinction).

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"fair consideration," for at least $6 million of the debt undertaken by CP Holdings at near usurious rates. Failure of consideration renders a debt legally invalid and therefore no lien can lie nor reserve be required. Finally, the underlying alleged Ponzi-like scheme renders the transfers (the purported granting of a lien and payments on the purported note) on which they seek recovery voidable and, if voided, no debt and no lien can lie. Discovery by the Receiver may disclose facts that require the Receiver to add other claims or defenses for presentation at the preliminary reserve hearing.

A. Weider/Forman do not have a perfected lien on the Receivables Assets.

At the preliminary hearing, this Court must address whether the CP LLC and CP FIT Receivables Assets are collateral for the alleged $10.5 million loan to CP Holdings, for without such a lien there is no basis for granting Weider/Forman a "substitute lien" on the "proceeds." In asserting a lien over proceeds from the sale of the Receivable Assets, Weider/Forman provide no evidence whatsoever that such a lien exists. Moreover, they ignore the actual provisions of the Security Agreements. CP Holdings offered as collateral what it held, namely **its equity interests** in subsidiary companies. As noted, the Agreements describe the collateral 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. ISO Obj.* [Dkt. 345], Ex. A (loan agreement), ¶ 2(b). *See also Forman Decl. ISO Obj.* [Dkt. 345], Ex. C (security agreement), ¶ 2 (describing same with more specificity). Notably, CP LLC and CP FIT, the only entities which own the health care receivables being sold, did not execute any security (or other) documents in favor of Weider/Forman.

Weider/Forman's position, set forth in their prior pleadings, is based on a strained construction of the governing documents executed by CP Holdings. *Compare Weider/Forman*

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Obj. [Dkt. 344], p. 6 (ignoring 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 companies themselves) *with Resp. to Obj.* [Dkt. 353], pp. 12-13 (rebutting argument). Weider/Forman ignore these deficiencies in their recent submission. *See generally Weider/Forman Mot. for Recons.* [Dkt. 373] (failing to quote or discuss any material term of the security agreements). Nevertheless, Weider/Forman persist with their unsupported contention—actually a complete *non sequitur*—that a lien on CP Holdings' ownership interest in its subsidiaries creates a perfected, security interest in the subsidiaries' assets. *See id.* at p. 2 ("The [CCM] sale included the exclusive right to purchase [the Receivables Assets] owned by the subsidiary companies, which means that the Receiver's sale disposed of some of the collateral securing the Weider and Forman loans." (Record citation omitted)). Weider/Forman have yet to offer any authority for that position. None exists as it is black letter law that without a security interest granted by the owner of an asset, and without an asset described in a UCC-1 or in which possession is taken, a perfected security interest cannot exist in such asset. *See* N.Y. U.C.C. § 9-108(b) (a valid description of collateral must at a minimum make "the identity of the collateral is objectively determinable"); N.Y. U.C.C. § 9-203(b)(3) (a security interest is not enforceable against the debtor as to accounts receivable unless either (i) an authenticated security instrument adequately describes the collateral; or (ii) the collateral is in the possession or control of the secured party); *Ultimore, Inc. v. Bucala (In re Bucala)*, 464 B.R. 626, 632 (Bankr. S.D.N.Y. 2012) ("The purpose of filing a financing statement is 'to put third parties on notice that the secured party who has filed it may have a perfected security interest in the collateral described.'" (Quoting *In re Numeric Corp.*, 485 F.2d 1328, 1331-1332 (1st Cir. 1973)).

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Nevertheless, Weider/Forman appear to agree that this Court can and should address whether they have a perfected security interest in the Receivables Assets. *See, e.g.*, *Mot. for Recons*. [Dkt. 373], p. 20 (acknowledging that the Court should decide "[w]hether Weider and Forman have an interest in proceeds from the sale of [the Receivables Assets] that are part of the sale option"). If the Court does not find that CP LLC and CP FIT granted a perfected security interest in the health care receivables, there is no basis for the Court to grant a "substitute lien" in the proceeds of the sale of such assets.

B. Under New York law, Weider/Forman did not provide "fair consideration" for the "transfer" of $10.5 million in promissory notes containing near-usurious rates.

Some or all of the transfers to Weider/Forman are voidable as a result of CP Holdings not receiving fair consideration for the transfers and the purported "good faith" of Weider/Forman is of no legal effect. The Receiver possesses fraudulent transfer claims involving the Receivership Entity's assets. *See Highland Capital Mgmt. LP v. Chesapeake Energy Corp. (In re Seven Seas Petroleum, Inc.)*, 522 F.3d 575, 589 n.9 (5th Cir. 2008) ("[a] typical fraudulent transfer claim is perhaps the paradigmatic example of a claim that is 'general' to all creditors" and may be brought "by the trustee, for the benefit of all creditors.").

Applying New York law as specified in the Loan Agreements,[7] a transfer is voidable as constructive fraud if it is made without "fair consideration," and one of three conditions is met:

[7] The Receiver does not hereby concede that New York law is applicable. 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.

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- the transferor is insolvent or will be rendered insolvent by the transfer in question, N.Y. Debt. & Cred. Law § 273;[8]

- the transferor is engaged in or is about to engage in a business transaction for which its remaining property constitutes unreasonably small capital, N.Y. Debt. & Cred. Law § 274;[9] or

- the transferor believes that it will incur debt beyond its ability to pay, N.Y. Debt. & Cred. Law § 275.[10]

"Fair consideration" has three elements: "(1) … the recipient of the debtor's property[] must either (a) convey property in exchange or (b) discharge an antecedent debt in exchange; and (2) such exchange must be a 'fair equivalent' of the property received; and (3) such exchange must be 'in good faith.'" *In re Sharp Intern. Corp.*, 403 F.3d 43, 53-54 (2d Cir. 2005). Because the elements are stated in the conjunctive, a claimant, in this case the Receiver, may prevail by proving that a single element is missing (e.g., "fair equivalency") and need not prove other

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[8] N.Y. Debt. & Cred. Law section 273 states that

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

[9] N.Y. Debt. & Cred. Law section 274 states:

> Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

[10] N.Y. Debt. & Cred. Law section 275 states:

> Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

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elements (e.g., the absence of good faith). *See, e.g.*, *Schneider v. Barnard*, 508 B.R. 533, 550 n.17 (E.D.N.Y. 2014) (because the debtors did not receive fair consideration for transfers, the transferee's good faith is immaterial).

Weider/Forman argue that they provided consideration for CP Holdings' initial $6 million promissory note by releasing another entity from an equivalent note. *See Mot. for Recons.* [Dkt. 373], p. 18 ("Weider's discharge of CSF Leverage I's debt in exchange for the new [CP] Holdings note is consideration."). However, Weider/Forman misapprehend the issue of "fair consideration" in relation to a voidable transfer. The Second Circuit has recognized that, under New York law, fair consideration is generally lacking when the consideration is given to a third party:

> [W]hen a debtor transfers its property but the transferee gives the consideration to a third party, the debtor ordinarily will not have received fair consideration in exchange for its property. … [T]he fact that the consideration initially goes to third parties may be disregarded to the extent that the debtor indirectly receives a benefit from the entire transaction.

HBE Leasing Corp. v. Frank, 48 F.3d 623, 638 (2d Cir. 1995). Such indirect benefits, including as provided for corporate affiliates, will be examined on a case-by-case basis. However, "courts have long recognized that transfers made to benefit third parties are clearly not made for a fair consideration, and, similarly, that a conveyance by a corporation for the benefit of an affiliate [should not] be regarded as given for fair consideration as to the creditors of the conveying corporations." *See Rubin v. Manufacturers Hanover Trust Co.,* 661 F.2d 979, 991 (2d Cir. 1981) (internal quotation marks and authority omitted).

As carefully set forth above, Weider/Forman initially loaned $6 million to ACF and later participated with Aequitas management in purporting to shuffle that debt to CSF Leverage I, and

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then again purporting to shuffle it to CP Holdings years later. *Foster Decl. ISO Resp. to Obj.* [Dkt. 354], ¶ 10(a). As part of that shuffling, in October 2014, CP Holdings issued a promissory note to Weider in the amount of $6 million. *Id*. at ¶ 10(b). In saddling CP Holdings with the debt originating with ACF, Weider/Forman and Aequitas management certainly did not give CP Holdings "fair consideration" (or any actual consideration). As noted above, it appears that Weider/Forman were trying to manufacturer an obligor not impacted by the accelerating investigation of Corinthian Colleges. With the absence of fair consideration to CP Holdings, the $6 million promissory note is unenforceable, the resulting lien on its assets does not lie, and Weider/Forman certainly do not have a valid claim to the proceeds of the sale of Receivables Assets by the subsidiaries of CP Holdings, CP LLC and CP FIT.

In relation to claims under N.Y. Debt. & Cred. Law sections 273, 274, and 275, the issue of the transferee's good faith (or lack thereof) can only void a transfer; it cannot preserve an otherwise voidable transfer. If the transferee (here, Weider/Forman) failed to act in "good faith," the transfer was *per se* made without "fair consideration." *See In re Sharp Intern. Corp.*, 403 F.3d at 53-54 (recognizing that "fair consideration" has three elements, including "good faith"). Even the transferee's good faith does not entitle the transferee to retain the transfer of any assets for which they did not give fair consideration. *See, e.g.*, *Schneider*, 508 B.R. at 550 n.17 (because the debtors did not receive fair consideration, the transferee's good faith is immaterial).

Here, evidence presently known to the Receiver indicates that Weider/Forman obtained their ultimate position—$10.5 million in promissory notes with interest set at 17% (25% default interest)—without providing "fair consideration" to CP Holdings. As noted above, there is no evidence that Weider/Forman provided $6 million to CP Holdings and CP Holdings never received such moneys from any corporate affiliate or other entity as a result of issuing the

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$6 million promissory note to Weider. Not only was ACF allegedly being operated as part of a Ponzi-like scheme,[11] but the Receiver anticipates presenting evidence at the hearing that CP Holdings was, at the time of issuing the $6 million promissory note: (a) insolvent as a result of issuing the note, N.Y. Debt. & Cred. Law § 273; (b) engaged in or about to engage in a business transaction for which its remaining property constituted unreasonably small capital, N.Y. Debt. & Cred. Law § 274; and/or (c) CP Holdings knew or should have known that it was incurring debt beyond its ability to pay, N.Y. Debt. & Cred. Law § 275. As noted, if proven, the transfers are voidable in whole or part as constructively fraudulent without regard to Weider/Forman's asserted "good faith" in taking a $6 million and later $10.5 million of promissory notes paying 17% interest (25% default interest).

Moreover, facts presently known to the Receiver suggest that Weider/Forman may not have acted in good faith in relation to one or more transfers and the entire $10.5 million liability (and hence the security interest) would be voidable. While comprehensive discovery has yet to be undertaken regarding Weider/Forman's claim that they acted in good faith, the absence of "good faith" would mean that transfers were, by definition, not made for "fair consideration." In

[11] With a claim to void a transfer because "fair consideration" was absent, the existence of a Ponzi-type scheme establishes each of the three alternatives regarding the financial condition of the transferor (here CP Holdings). Ponzi schemes are, by definition, insolvent. *Ivey v. Swofford (In re Whitley)*, 463 B.R. 775, 784 (Bankr. M.D.N.C. 2012). *See also, e.g.*, *Picard v. Madoff (In re Bernard L. Madoff Inv. Sec. LLC)*, 458 B.R. 87, 110 n.15 (Bankr. S.D.N.Y. 2011) (entity was "insolvent at the time of the Constructive Fraudulent Transfers given that Ponzi schemes are, by definition, at all times insolvent"); *Daly v. Deptula (In re Carrozzella & Richardson)*, 286 B.R. 480, 486 (D. Conn. 2002) (collecting cases). Moreover, the evidence resulting from discovery may prove that Weider/Forman were active facilitators of the scheme alleged by the SEC, as they caused their debt and security interest to shuffle from entity to entity to entity and Weider/Forman intended to be repaid from proceeds of investments made by earlier innocent investors whose interests they leap over by virtue of the purported obligation by CP Holdings and the purported granting of a security interest.

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conjunction with information about the financial condition of CP Holdings (or other entities with debts to Weider/Forman), the absence of "good faith" would render the transfers voidable under N.Y. Debt. & Cred. Law sections 273, 274, and 275. The Receiver cannot ignore that discovery may reveal actual fraud when Weider/Forman were motivated to shuffle their debt from ACF to CSF Leverage I out of concerns regarding ACF's financial condition and later to shuffle it again, this time from CSF Leverage I to CP Holdings (without fair consideration flowing to CP Holdings) out of concerns regarding the Corinthian Colleges governmental investigation. Further, the Receiver anticipates presenting evidence that a significant portion of the $4.5 million that Weider/Forman did pay to CP Holdings was promptly diverted away from CP Holdings without CP Holdings receiving adequate consideration in exchange and Weider/Forman might have had reason to anticipate or have participated in such transfer. As such, whatever "benefits" might in the abstract be argued to attach to money borrowed at 17% interest (25% default interest), none appeared intended to materialize to the entity from which Weider/Forman are now seeking to collect. This and other evidence will establish that CP Holdings received inadequate consideration for at least $6 million, and probably the entirety of, the high interest rate promissory notes that Weider/Forman and Aequitas management secretly placed ahead of over $300 million of existing investors' money.

Contrary to the contentions in Weider/Forman's motion for reconsideration, this Court should consider evidence relating to whether CP Holdings received fair consideration for issuing first $6 million, and later $10.5 million, in promissory notes, all at rates of interest which inherently raise red flags of fraud.

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C. Under New York law, the transfers to Weider/Forman are voidable because they were made to "hinder, delay, or defraud either present or future creditors."

Under New York law, a transfer is voidable if it is made to "hinder, delay, or defraud either present or future creditors." N.Y. Debt. & Cred. Law § 276. As with transfers that are voidable because "fair consideration" was not provided, the material issue is the intent of the transferor. *See Schneider*, 508 B.R. at 546-47 (discussing same); *See also Gowan v. Patriot Group, LLC (In re Dreier LLP)*, 452 B.R. 391, 435 (Bankr. S.D.N.Y. 2011) ("the Trustee need not plead the transferee's fraudulent intent under [N.Y. Debt. & Cred. Law] § 276. All that is relevant at the motion to dismiss stage is that the Trustee has adequately plead the transferor's actual fraudulent intent"). In this case, the transferor is CP Holdings and the intent has been extensively pled by the SEC in its complaint alleging a Ponzi-like scheme by the Aequitas entities.

"[T]he existence of a Ponzi scheme establishes that transfers were made with the intent to hinder, delay and defraud creditors." *Picard v. Merkin (In re Bernard L. Madoff Inv. Sec., LLC)*, 440 B.R. 243, 255, 257 (Bankr. S.D.N.Y. 2010). *See also, e.g.*, *Silverman v. Meister Seelig & Fein, LLC (In re Agape World, Inc.)*, 467 B.R. 556, 570 (Bankr. E.D.N.Y. 2012). As one court explained:

> Because "[t]he investor pool is a limited resource and will eventually run dry," the Ponzi scheme operator "must know all along, from the very nature of his activities, that investors at the end of the line will lose their money." Accordingly, when a Ponzi entity transfers funds out of the Ponzi scheme, "only one inference is possible—namely, that the debtors had the intent to hinder, delay or defraud creditors."

Schneider, 508 B.R. at 542 (internal authority omitted).

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The good faith of transferees is a limited affirmative defense; "good faith" prevents the voiding of a transaction *to the extent that the transferee provided "fair consideration."* *Gowan*, 452 B.R. at 435. As addressed above, there is considerable dispute as to the purported good faith of Weider/Forman. The granting of a security interest, which necessarily would give Weider/Forman a distribution ahead of all other investors, is a clear manifestation of an intent to hinder, delay or defraud recovery by the other $300 million of innocent investors, not one of whom authorized or consented to their lien.

Here, the Receiver anticipates presenting evidence that the transfers involving Weider/Forman were made, at least in part, to "hinder, delay, or defraud either present or future creditors," N.Y. Debt. & Cred. Law § 276, including in relation to other entities affiliated with ACF. Not only did CP Holdings fail to receive fair consideration for issuing the $6 million promissory note, much of the $4.5 million that Weider/Forman did provide CP Holdings was transferred out of that entity without CP Holdings receiving consideration, again consistent with the transfers being made to "hinder, delay, or defraud either present or future creditors." N.Y. Debt. & Cred. Law § 276.

If the Receiver makes a showing under N.Y. Debt. & Cred. Law section 276 involving Weider/Forman, they may elect to present evidence they contend supports a finding of "good faith" and "fair consideration" in an effort to secure segregation of amounts equaling their purported "fair consideration." But even such a showing would not entitle them to recover interest. *Cf. Gowan v. Westford Asset Mgmt. (In re Dreier LLP)*, 462 B.R. 474, 485, 488 (Bankr. S.D.N.Y. 2011) (plaintiff stated cognizable claim for the recovery of "Excess Payments" consisting of "interest, origination fees and other charges" in part because "the Ponzi scheme

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participant does not provide any value to the debtor in exchange for the fictitious profits it receives.").[12]

Contrary to Weider/Forman's contentions in their motion for reconsideration, this Court should consider evidence relating to whether Weider/Forman were part of a scheme by CP Holdings or ACF and its affiliates to "hinder, delay, or defraud either present or future creditors." N.Y. Debt. & Cred. Law § 276. That said, the Receiver reserves the right to withdraw this issue from consideration during the preliminary hearing if (i) it appears that such consideration is premature in relation to the ongoing investigation of the claims or (ii) if the Court determines that the lack of a security interest in the health care receivables or lack of adequate consideration for the loan obligation are determinative as to the issue of establishing a reserve in the proceeds.

VI. Contrary to Weider/Forman's contentions, the scope and content of the reserve hearing in this receivership action are not dictated by the Bankruptcy Code.

Weider/Forman seem conflicted about whether their "limited objections" carried the threat to hijack the CCM sale. On the one hand, Weider/Forman express "alarm[]" that the Court-appointed Receiver understood Weider/Forman to be attempting to "'hold this Receivership and its assets hostage so they can step ahead of all other investors.'" *Mot. for Recons.* [Dkt. 373], pp. 7-8 (quoting the Receiver's report). On the other hand, Weider/Forman contend that by virtue of their "consent" to the sale, they are entitled to (a) be immediately repaid

[12] Even beyond disgorgement, if this Court ultimately concludes that Weider/Forman knew or had reason to know that investors were being defrauded, Weider/Forman will owe the Receiver's reasonable attorney fees. N.Y. Debt. & Cred. Law § 276-a (fees available when "conveyance is found to have been made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors"). Also, nothing in this Motion should be deemed to waive the Receiver's rights, based on further discovery, to pursue disgorgement of moneys paid to Weider/Forman by Receivership Entities prior to the appointment of the Receiver and/or seek recovery from Weider/Forman for aiding and abetting the alleged Ponzi-like scheme.

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from sale proceeds; or (b) receive adequate protection in the precise form and manner dictated by the Bankruptcy Code. *Id.* *See also id.* at 2 (arguing that they consented in exchange for "adequate protection … as required by 11 U.S.C. § 363(e) and the Court's order appointing the Receiver"); *id*. at 3 (noting their limited objections conditioned their consent on "'the Court order[ing] adequate protection'"); *id*. at 14, n. 7 (suggesting that Weider/Forman may object (again) to the sale of the Receivables Assets unless the "Court orders adequate protection as … required by 11 U.S.C. § 363(e)").

Not only can Weider/Forman not have it both ways on their "consent,"[13] this Court is not—to borrow Weider/Forman's phrase—"cabined by the adequate protection requirement"

[13] Indeed, Weider/Forman seem to argue both sides of several facts and, in the process, wrongly impugn the Receiver's integrity. For example, in early January, Weider/Forman refused to honor their October 2016 agreement to resolve their claims. *Compare Forman Decl. ISO Mot. to Recons.* [Dkt. 375], Ex. A (memorializing Weider/Forman agreement to settle in October 2016) *with Forman Supp. Decl. ISO Obj.* [Dkt. 356], ¶ 5 (noting that he rejected settlement on or about January 9, 2017). In hindsight, that was fortuitous. The Receiver's further investigation revealed that some or all of Weider/Forman's claims appeared invalid and left the Receiver unwilling to resolve their claims on the prior terms.

On January 20, 2017, Weider/Forman's counsel reiterated that "[w]e rejected their settlement offer[.]" *Jan. 20, 2017 Hearing Tr.* [Dkt. 364], p. 32. On January 31, 2017, the Receiver informed the Court that "counsel for Weider/Forman advised the Receiver that his clients no longer intended to participate in the settlement and would be objecting to the asset sale." *Report* [Dkt. 365], p. 38.

But now, Weider/Forman suggest that the report was untrue, expressing "alarm," and "question[ing] whether the Receiver is acting in the interests of *all* creditors." *Mot. for Recons.* [Dkt. 373], p. 7 (emphasis in original). In their retelling of the events, however, Weider/Forman omit any reference to having rejected settlement. Instead, they quote selectively from their mid-January correspondence that, in truth, attempted to revive the (thankfully) failed agreement, but with a new term to "make[] full payment to [Weider/Forman] immediately due upon [C]ourt approval of the settlement." *Umhofer Decl. ISO Mot. to Recons.* [Dkt. 374], Ex. 4 (correspondence). By omitting these key facts and selectively quoting their correspondence purporting to "accept the reduced amount of $8.5 million," Weider/Forman falsely imply that (a) Weider/Forman had not previously repudiated their agreement to settle the claim; (b) that an offer to resolve the claim on prior terms was then open; and (c) that they added no new terms in

(*continued on next page*)

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established by Bankruptcy Code and applicable to proceedings thereunder. *Mot. for Recons*. [Dkt. 373], p. 11 (seeking same).

This Court's powers derive from equity, not statute. In a receivership, the district court exercises its broad power and wide discretion to protect "the receivership res" and "defrauded investors," *Wing*, 599 F.3d at 1197, and promote the "orderly and efficient administration of the estate …[,]" *Hardy*, 803 F.2d at 1038. 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: "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." *SEC v. American Capital Invs.*, 98 F.3d 1133, 1144 (9th Cir. 1996) (quotation marks and authority omitted). To be sure, upon the closing of the sale, any lien attaches 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 v. Moline Malleable Iron Works*, 131 U.S. 352 (1889), to order transfer of property free and clear of liens, with existing liens "attach[ing] to the sale proceeds").

Receiverships are somewhat unusual and the Receiver acknowledges that the Bankruptcy Code may in some instances prove a useful analogy for the Court's evaluation of some issues. However, the Receiver has not agreed and this Court has not ordered that the preliminary reserve hearing track precisely bankruptcy law.

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relation to their prior agreement to settlement their claim. None of these implications are accurate.

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No doubt, this Court is entitled by principles of equity to ensure that Weider/Forman receive any protection **actually due**. But no statute (including those in the Bankruptcy Code) establishes the particular nature of that protection nor the scope of the proceeding by which this Court elects to protect them. This Court is entitled to use its discretion to ensure that the scope of the preliminary reserve hearing is not constrained to the point that Weider/Forman can put the Receiver to the Hobson's choice between (a) risking the alleged incursion of interest amounting to more than $250,000 per month at the expense of innocent investors; and (b) resolving the Weider/Forman claim early (and in their favor) with incomplete information about the validity of the debt and what, if anything, Weider/Forman knew or should have known about investors being defrauded.

VII. Discovery and hearing procedure

The Receiver proposes that the parties be allowed to undertake discovery relating to the factual and legal issues identified in its response to Weider/Forman's limited objections and this Motion or on any issue that affects the amount the Receiver should reserve for the claim, if any. Weider/Forman suggest that, in the absence of a formal complaint, the parties will undertake a "fishing expedition" on discovery. *Mot. for Recons.* [Dkt. 373], pp. 5-6 & n. 4. The Receiver's response to Weider/Forman's limited objections and this Motion include information regarding the Receiver's claims and the basis therefore constituting more than sufficient notice to Weider/Forman. *See SEC v. American Capital Invs.*, 98 F.3d 1133, 1146 (9th Cir. 1996) ("For the claims of nonparties to property claimed by receivers, summary proceedings satisfy due process so long as there is adequate notice and opportunity to be heard."); *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 459 (9th Cir. 1984) (similar). Moreover, the SEC has supplied significant details about the alleged Ponzi-like scheme in its Complaint [Dkt. 1].

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Indeed, this Court recognized that the Complaint adequately plead such claims [Dkt. 356]. Likewise, Weider/Forman have suggested that they will defend their transfers, at least to the extent they purportedly provided "fair consideration," by asserting their "good faith." Such defenses can only be appropriately addressed following adequate discovery.

To be clear, the Receiver proposes the parties engage in thorough discovery relating to any claim or defense that affects the amount of the reserve the Receiver should hold, if any. Moreover, the Receiver already possesses the authority to undertake the discovery proposed in advance of the preliminary hearing. *Order Appointing Receiver* [Dkt. 156], ¶¶6H and 28 (the Receiver is authorized and empowered to "issue subpoenas for documents and testimony consistent with the Federal Rules of Civil Procedure concerning any subject matter within the powers and duties granted by this Order.").

The Receiver anticipates that Weider/Forman will undertake discovery with the same diligence and speed with which they have advanced their interests in briefing. The Receiver further proposes that the parties be limited to five depositions each absent further leave of the Court. For example, the Receiver intends to depose Mr. Forman, including in his capacity with Weider, and in his individual capacity as a lender to CP Holdings. Depositions taken in furtherance of the preliminary hearing should be without prejudice to the respective parties' rights to further depositions of those witnesses or others in any eventual full litigation of Weider/Forman's claims.

The Receiver anticipates that the preliminary reserve hearing will take two days, with time to be split equally between the parties.

Consistent with this Court's prior order regarding the preliminary review hearing, the Receiver proposes the following schedule:

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EVENT	DEADLINE/DATE
Written discovery	Concluded 60 days following the Court's order setting the evidentiary hearing
Depositions (limit of 5 per party absent further authority of the Court)	Concluded 45 days following the close of written discovery
Submittal of prehearing statements of the parties (limit of 25 pages)	21 days prior to the evidentiary hearing
Submittal of witness and exhibit lists	21 days prior to the evidentiary hearing
Hearing	2-day hearing at the convenience of the Court

VIII. Conclusion

According to Weider/Forman, their claims are accruing more than $250,000 in default interest each month, at the expense of other creditors and allegedly defrauded investors. The Receiver and this Court have a joint interest in preserving the Receivership Estate for the benefit of all investors and creditors, which necessitates access by the Receiver to the proceeds of its asset sales unless there is both a valid debt and valid, perfected security interest in such assets. Those interests are not well served by the limited discovery and perfunctory hearing that Weider/Forman again seek despite this Court's earlier contrary ruling. Weider/Forman are seeking to impound what is likely to be well over $20 million of liquidity without a reasonable basis. This Court should deny Weider/Forman's proposal in its entirety. The Receiver should remain permitted to pursue discovery and utilize the preliminary hearing to address to what extent, if any, Weider/Forman are entitled to a reserve, which may include issues that would obviate some or all of Weider/Forman's eventual claim since, without a claim, a valid lien cannot lie. That scope of the hearing, which was previously ordered by the Court, ensures that the Receiver and, by extension, the Court have sufficient information to assess the risks

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associated with leaving Weider/Forman's claim uncompromised until the conclusion of the claims process. There is no basis in law or equity to circumscribe discovery and the preliminary hearing in the manner sought by Weider/Forman.

Dated this 13th day of March, 2017.

Respectfully submitted,

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