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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 REPLY IN SUPPORT OF MOTION TO SET RESERVE HEARING

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.

(Request For Oral Argument)

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This Court ordered a preliminary hearing on the amount, if any, of proceeds from the eventual sale of certain healthcare receivables (the "Receivables Assets") to be set aside for the possible payment of the claims of Weider Health & Fitness and Bruce Forman (collectively "Weider/Forman"). In doing so, the Court recognized that it may find facts that obviate later fact-finding on Weider/Forman's claims. *Jan. 20, 2017 Hearing Tr.* [Dkt. 364], p. 28. In its motion [Dkt. 383], the Receiver recommended that this Court disregard Weider/Forman's recent filing [Dkt. 373], which was functionally a motion for reconsideration, and instead continue to order a fact-finding hearing on what, if any, amount should be set aside as a result of Weider/Forman's replacement lien theory.

Weider/Forman appear intent on defrauding this Court. Recently identified email communication clearly establishes that they specifically requested and were denied a security interest in the Receivables Assets. In fact, there is not a scintilla of evidence that the entities that own the Receivables Assets, CarePayment, LLC ("CP LLC") and CP Funding I Trust ("CP FIT"), ever incurred an obligation or signed any security agreement encumbering the assets. Weider/Forman cannot change that fact through sloppy attribution. They repeatedly speak of "Aequitas" borrowing money and "Aequitas" pledging assets—but there is no entity named "Aequitas." Particular entities borrowed money from Weider/Forman and particular entities pledged assets as security. Not only did CarePayment Holdings, LLC ("CP Holdings") not borrow $6 million from Weider/Forman when issuing a $6 million promissory note, but the owners of the Receivables Assets, CP LLC and CP FIT, never executed any security agreement (and even the security agreement signed by CP Holdings did not purport to encumber the Receivables Assets).

Moreover, if this Court provides Weider/Forman the perfunctory hearing and massive

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set-aside they seek, this Court will so restrict the relevant entities that they could well lack the resources necessary to adequately investigate and challenge even Weider/Forman's false claims. Granting Weider/Forman the relief they demand would prevent the Receiver from using virtually any of the net proceeds from a $60+ million sale (net of approximately $38 million third-party debt), which proceeds are the ***only*** source of funds for both CP LLC and CP FIT.

It is telling that virtually every one of the other roughly 1,200 investors have similar security in equity (shareholder) interests in various Receivership entities, which in turn own tangible assets. Yet not one of those more than a thousand investors (many of whom have joined in the Receiver's motion) has sought or even contended to have a "replacement lien" on the proceeds of a sale of such underlying assets. That is not because they are "nice" or "charitable" but rather because a lien on equity interests does not give the lienholder any interest in the assets owned and sold by such entity. If Weider/Forman were given a reserve upon the disposition of such underlying assets, hundreds of similar investors would likely flood the Court with copy-cat claims that, collectively, could prevent the Receiver from using any Receivership Entity asset. A reserve benefiting Weider/Forman, in any amount, would be without legal justification as well as extremely detrimental to the estate and, by extension, the shared interests of hundreds of innocent investors and creditors.

Weider/Forman's response echoes the earlier motion for reconsideration, even including their unfounded attacks upon the Receiver's integrity. As before, they prod this Court into a thicket of bankruptcy procedure. However, as even Weider/Forman eventually concede, "the Bankruptcy Code is not binding in this SEC receivership[.]" *Weider/Forman Resp.* [Dkt. 391], p. 18. And when Weider/Forman further retreat to due process as the source of their objections, they tacitly concede that the Receiver's motion is entrusted to this Court's discretion. *Id.* at 19-

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20. The Fifth Amendment does not mandate any specific procedural bifurcation, let alone that which Weider/Forman seek: reserve of their entire claim now, with all fact-finding relating to the merits of the claim reserved until a later plenary proceeding. *See, e.g.*, *SEC v. Wencke*, 783 F.2d 829, 838 (9th Cir. 1986) (no requirement of "a formal complaint, answer, and summonses" before district court may order third party to disgorge proceeds of securities fraud).

As addressed in greater detail below, it remains in the best interests of innocent investors and creditors for this Court, to the extent practicable, to immediately test Weider/Forman's claim seeking $13 million plus interest allegedly accruing at more than $250,000 per month. This Court has the equitable power to do so before ordering a reserve, since such reserve is only required if Weider/Forman have a security interest in the assets sold—the Receivables Assets—which is not the case. Weider/Forman provide no basis for this Court to prejudge what it may find at such a hearing. The Receiver is ***not*** going to use this hearing to litigate and prove the SEC's alleged Ponzi-like scheme, which (while sufficient) is not necessary to establish a voidable conveyance or to disprove Weider/Forman's claimed security interest. Instead, two days is sufficient for this Court to hear evidence that (a) the security instruments executed by CP Holdings in favor of Weider/Forman cannot legally grant a security interest in the Receivables Assets owned by CP LLC and CP FIT; (b) $6 million of the funds lent by Weider/Forman were not lent to CP Holdings and, therefore, cannot support a repayment obligation by the insolvent CP Holdings or a security interest; and (c) the balance of the asserted obligation is a voidable conveyance and, therefore, it too cannot support a security interest. Reaching any one of these inevitable conclusions means Weider/Forman have no security interest in the Receivables Assets and, therefore, are not entitled to a replacement lien in the proceeds of such asset sale.

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I. Weider/Forman appear intent on defrauding this Court regarding the scope of the security agreements.

It appears that Weider/Forman gambled that they could convince this Court to create a reserve and thereby obtain leverage to settle their claim before the Receiver learned all facts associated with their claimed security interest. From the outset, Weider/Forman have told this Court that "[t]here can be no question that … [Weider/Forman's] loans are secured by CarePayment receivables." *Weider/Forman Obj.* [Dkt. 344], p. 24. *See also id.* at 1 ("The Receiver has proposed a sale of assets that … ignores secured interests in CarePayment receivables."); *id*. at 6 ("Weider's loan is secured not only by equity interests in certain CarePayment Companies, but also rights and interests … includ[ing] receivables."); *id*. at 16 (asserting a "perfected first-priority, secured interest in the receivables"). They have re-asserted their claim that the Receivables Assets are collateral securing their loan at every opportunity. *See, e.g.*, *Weider/Forman Resp.* [Dkt. 391], p. 5 ("These receivables are part of the collateral for the Weider and Forman loans."); *id*. at 17 (arguing that if Receivables Assets are not described collateral in the security agreements, "nothing is"); *id*. at 22 ("Weider and Forman … have secured interest in the receivables, and their interests were perfected by filing the appropriate financial statements.").

Their oft-repeated contention is patently false. Weider/Forman cannot even claim to have engaged in a tortured construction of the security agreements.[1] The parties negotiated this

[1] As the Receiver has previously explained, Weider/Forman agreed that the collateral securing their promissory notes was "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). The security agreement includes boilerplate granting a security interest in "products and produce" of the equity collateral or any proceeds resulting from the disposition of

(*continued on next page*)

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very issue. Recently identified email communication clearly establishes that Wielder/Forman absolutely knew that they were not contracting for a security interest in the Receivables Assets.

As Weider/Forman acknowledge, prior to October 2014, CSF Leverage I, LLC ("CSF Leverage")—which is a company wholly separate from CP Holdings—owed Weider/Forman money. *Weider/Forman Resp.* [Dkt. 391], p. 4. The promissory notes issued by CSF Leverage were guaranteed by CSF Leverage's parent company, Campus Student Funding, LLC ("CSF") as well as CSF's parent company, Aequitas Commercial Finance, LLC ("ACF"). *Forman Decl. ISO Resp.* [Dkt. 392], Exs. F & H. The notes were secured by CSF Leverage's assets—specifically, CSF Leverage's "Eligible Receivables" in the form of "educational student loan receivables … that originated" under agreement with "Corinthian Colleges, Inc." *Forman Decl. ISO Resp.* [Dkt. 392], Ex. A, p. 14 (definition), Ex. E, ¶ 2 (security agreement identifying collateral to include "Eligible Receivables").

According to recently identified documents, Weider/Forman were highly concerned about their collateral, "Eligible [student loan] Receivables." During the summer of 2014, Weider/Forman already believed that Corinthian's rapid demise and resulting failure to pay its

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the equity collateral. *Forman Decl. ISO Obj.* [Dkt. 345], Ex. C (security agreement), ¶ 2(w)-(y). *See also, e.g.*, *Forman Decl. ISO Resp.* [Dkt. 392], Ex. N (2015 UCC financing statement noting that Weider was obtaining a security interest in equity interests in subsidiary *entities*—not the Receivables Assets).

Weider/Forman argue that "[i]f receivables [owned by CP LLC and CP FIT] are not the products, produce, accessories, and supplies of [equity in CP LLC and CP FIT], and accounts and proceeds from sale of the [equity in CP LLC and CP FIT], nothing is." *Weider/Forman Resp.* [Dkt. 391], p. 17. The argument is a *non sequitur*. Boilerplate about "products and produce" or proceeds from the sale **of the equity** simply does not grant a security interest in the particular assets owned by the company whose stock is pledged. None of the proceeds from the sale of the Receivables Assets are "products and produce" or proceeds from the equity CP Holdings pledged as collateral, which collateral is not being sold.

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obligations would undermine their security, leaving them to rely upon "CSF's guarantee … to repay the debt in full at the end of this year[.]" *Foster Decl. ISO Reply*, Ex. A (Janke/Forman 6/25/2014 email exchange). *See also SEC Compl*. [Dkt. 1], ¶ 1 (alleging a Ponzi-like scheme that commenced no later than July 2014, after "Corinthian Colleges … defaulted on its obligations"). In September of 2014, Olaf Janke spoke with Bruce Forman by phone and, shortly afterward, Janke reported to CEO Bob Jesenik, an SEC defendant, that Forman "[was] basically freaking out!" *Foster Decl. ISO Reply*, Ex. B (Janke 9/22/2014 email).

Weider/Forman clearly appreciated the stark difference between the collateral pledged by CSF Leverage ("Eligible [student loan] Receivables") and that pledged by CP Holdings (CP Holdings' "equity interests" in three subsidiary entities). During negotiations, Weider/Forman actively sought security interests in the CarePayment receivables and were flatly denied.

In June 2015, in conjunction with negotiating a new arrangement with CP Holdings, Weider/Forman insisted on (a) an interest rate of 12 percent, and (b) security in a "pool of [C]are[P]ayment receivables (not [C]are[P]ayment holdings membership interest)." *Foster Decl. ISO Reply*, Ex. C (Oliver/Forman 6/2015 email string), Forman June 9, 2015 email. Their demand was rejected outright.

Brian Oliver, Executive Vice President for Aequitas Capital, responded that Weider/Forman could not have anything beyond what they already had, a "pledge of equity interest."[2] *Id*. at Oliver June 12, 2015 email. Oliver provided a table summarizing what Weider

[2] Although "equity" can be a term for surplus value (*e.g.*, "home equity"), in the context of a commercial security agreement, a "pledge of equity interests" reflects a security interest in common stock or other ownership interests.

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already had, what Weider/Forman wanted, and what CP Holdings could offer in a counter-proposal:

	Current Deal	Weider Proposal	Aequitas Counter
…	…	…	…
Interest	7% …	12% …	12% …
…	…	…	…
Collateral	Pledge of Equity Interest • CarePayment, LLC • CP Leverage I, LLC	2nd lien on dedicated pool of CarePayment receivables	Pledge of Equity Interest • CarePayment, LLC • CP Leverage I, LLC • CP Funding 1 [*sic*]

Id. at Oliver June 12, 2015 email. Oliver further explained that the denial of Weider/Forman's requested security interest in the Receivables Assets was intentional. Wells Fargo and Bank of America, the two lenders that financed CP Holdings' subsidiaries, "require that the junior capital be in the form of equity as opposed to 2nd lien debt [on the health care receivables]." *Id*. As such, "*the only structure* we can really accommodate … is at the parent entity level, *secured by the equity* of the [subsidiaries] that own the receivables." *Id*. (emphasis added). In 2015, CP Holdings refused to grant Weider/Forman any different collateral than what Weider already had, a "pledge of equity interests" in CP Holdings' subsidiaries. *Id*.

Weider/Forman eventually memorialized their acceptance of CP Holdings' "pledge of equity interests" in its subsidiaries in the security agreements that they have placed before the Court. When the parties ultimately reached agreement, partially in recognition that they did not get a security interest in the Receivables Assets, Weider/Forman raised the interest rate from 12 percent to a near-usurious 17 percent. *Forman Decl. ISO Obj.* [Dkt. 345], Ex. B (promissory note), ¶ 5. The security agreements were materially unchanged between 2014 and 2015 and cannot be construed to reflect a security interest in the Receivables Assets. *Compare Forman Decl. ISO Obj.* [Dkt. 345], Ex. G (2014 security agreement), ¶ 2 (defining collateral) *with* Ex. C

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(2015 security agreement), ¶ 2 (defining collateral). As outlined above, Weider/Forman expressly requested such an interest during negotiations and that request was expressly rejected and the security agreement was drafted accordingly.

The history of negotiations outlined above and the security agreement itself clearly establish that Weider/Forman know full well that their claim to a "perfected first-priority, secured interest in the receivables" is patently false. *Weider/Forman Obj.* [Dkt. 344], p. 16 (asserting same). Moreover, Weider/Forman know that the entities that own the healthcare receivables were not parties to the subject security agreements (or loan agreements) and did not sign the security agreements—a fundamental requirement to create a perfected security interest. Weider/Forman appear intent on defrauding this Court. Weider/Forman's false claim is asserted at the expense of innocent investors and creditors, many of whom have joined in the Receiver's motion. As described in the next section, it is in the best interests of those same investors and creditors that this Court continue to order a hearing sufficient to determine the existence or absence of a lien and valid debt—both of which are predicates to any right to a security interest in the proceeds of the Receivables Assets—lest this proceeding be infected by Weider/Forman's tactics and attempt to seize upon the Receiver's still developing knowledge.

II. It is in the best interests of innocent investors and creditors for this Court to immediately examine, to the extent practicable, whether (i) Weider/Forman have a perfected security interest in the assets being sold (the Receivables Assets) and (ii) whether CP Holdings has an obligation to Weider/Forman totaling $13 million plus interest accruing at more than $250,000 per month.

Weider/Forman told this Court that the Receivables Assets, which were approved for sale as part of the transaction involving the sale of the Receivership Entity's interest in CCM Capital Opportunities Fund, LP ("CCM"), are collateral securing their $10.5 million promissory notes. That claim is false. The Receiver, as well as innocent investors and creditors, simply asks the

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Court to examine whether Weider/Forman have a perfected security interest in the Receivables Assets. [*See* Dkt. 389, 390 (investors joining Receiver's Motion to Set Reserve Hearing).] In so doing, the Court will necessarily also examine whether CP Holdings has an obligation to Weider/Forman totaling $13 million plus interest accruing at more than $250,000 per month.

The Court's findings and conclusions following the reserve hearing will not necessarily determine Weider/Forman's ultimate right to a claim against CP Holdings. The principal and necessary goal of the hearing is to determine whether Weider/Forman have a security interest in the assets being sold and thus a right to a security interest in the proceeds of such assets. Weider/Forman's assertion that CP Holdings owes them a debt, and its amount, are also germane. If for some reason the Court finds a security interest exists in the Receivables Assets, such security interest cannot exceed CP Holdings' valid debt—without both a perfected security interest in the specific assets ***and*** a valid debt by CP Holdings, there can be no right to a replacement lien.

First, falsity aside, Weider/Forman's demand for a reserve could ensnare this entire receivership proceeding. Weider/Forman contend that CP Holdings issued promissory notes and security agreements that entitle them to a reserve when CP Holdings' *subsidiaries* sell assets, namely the Receivables Assets. Almost every investor in the Receivership Entities is similarly situated to Weider/Forman.[3] When lending money to any entity affiliated with Aequitas Holdings (all of which, including CP Holdings, are now part of the Receivership Entity), those

[3] An exception would be Terrell Group Management ("Terrell"), for whom the Receiver agreed to a reserve of certain sale proceeds. Terrell has an ostensibly valid lien in the very asset the sale of which resulted in the proceeds subject to the reserve. Based on the terms of the governing documents, Weider/Forman have a security interest in the borrower's equity interests in three subsidiary entities not, as does Terrell, a lien on the assets being sold.

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investors generally obtained security interests in all of that entity's assets, including equity in that entity's subsidiaries—this appears to include all investors who collectively invested $318 million in Aequitas Commercial Finance, LLC ("ACF") and are the victims upon which the SEC Complaint focuses. *See Foster Decl. ISO Reply*, Ex. D (exemplar promissory note from ACF secured by, *inter alia*, "All of Maker's rights … to … all of its personal property …, including … all … securities, investments, [and] accounts receivable, … together with ... all products and proceeds … of any and all of the foregoing"). ACF is a holding company. Its assets are equity interests in its subsidiary companies, one of which is CP Holdings. Like ACF, CP Holdings is a holding company and its only assets are equity interests in its subsidiaries, including CP LLC and CP FIT (a subsidiary of a subsidiary), the two entities that own the subject Receivables Assets being sold by the Receiver.

Each of the hundreds of investors in ACF can parrot Weider/Forman's novel and legally-unsupported position that this Court must segregate funds from the sale of the Receivables Assets because, according to Weider/Forman: (a) the grant of a security interest in the equity interests of an entity also grants a security interest in the assets owned by such entity (here, accounts receivable); and (b) a party that owns stock (or other equity) or even a security interest in that equity may prevent a court-appointed receiver from using that entity's assets to administer the receivership in contravention of accepted law and the Receivership Order entered in this case. In fact, CP Holdings is one such entity whose equity has been pledged to the $318 million of ACF Private Note investors. Logic alone illustrates that Weider/Forman's legal theory fails because, broadly applied, it would also grant those other investors a security interest in the assets owned by CP Holdings, including its equity in CP Holdings' subsidiaries. In fact, many of those investors predate Weider/Forman and would, as a consequence, have a lien on the subsidiaries'

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assets senior to any lien held by Weider/Forman. This inevitable conclusion—and the fact that not a single similarly situated investor advances Weider/Forman's theory through their able counsel—clearly illustrates why Weider/Forman's response is bereft of legal support for their position. Indeed, having analyzed Weider/Forman's objections, many of those very investors filed a joinder with the Receiver in this motion.

Not only is Weider/Forman's position false and meritless, *see infra* Section IV.B, but this Court should confront it at its earliest opportunity because that position cuts at the heart of this Court's *Order Appointing Receiver* [Dkt. 156]. The Order requires the Receiver:

> [t]o use Receivership Property for the benefit of the Receivership Entity, which … shall be treated as a consolidated enterprise for the purpose of making payments and disbursements, including payments to professionals, and incurring expenses as may be necessary or advisable in the ordinary course of business *in discharging his duties as Receiver*[.]

Id. at ¶ 6.D (emphasis added). While that initial consolidation is without prejudice to Weider/Forman's eventual claims for distribution, Weider/Forman would have this Court segregate *all* proceeds from the sale of Receivables Assets (in excess of liens held by DLI, successor to Bank of America, and Wells Fargo). That is, Weider/Forman demand this Court silo assets on an entity-by-entity basis, which, if this Court adopted that approach, would mean that the Receiver's investigation of fraud in relation to a particular entity would have to be funded entirely by that entity's assets. In other words, they are asking the Court to bar the Receiver from funds to fully investigate the possibility of fraudulent conveyances to Weider/Forman and others, involving CP Holdings, CP LLC and CP FIT. By successfully proving fraudulent conveyance claims, the Receiver would benefit the investors and creditors of the Receivership Estate as a whole. Conversely, if Weider/Forman succeed in effectively

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precluding the Receiver from fully investigating and prosecuting fraudulent conveyance claims arising from the pre-receivership actions of CP Holdings, CP LLC and CP FIT, they stack the deck in their favor and to the significant detriment of innocent investors and creditors. This Court should address Weider/Forman's novel position through the hearing sought by the Receiver.

The Receiver relies on proceeds from the monetization of the Receivership Estate's assets to perform its duties. Weider/Forman take conflicting positions on whether segregation of the roughly $20 million is even necessary. Weider/Forman initially claimed a reserve is necessary because of their "concern" that money from the CCM sale would be "used to fund the Receivership or for other Receivership purposes," apparently leaving insufficient funds to cover their claim unless segregated. *Weider/Forman Obj. to CCM Sale* [Dkt. 334], p. 2. Now, when it serves them differently, Weider/Forman suggest that the Receivership is awash in money. *Weider/Forman Resp.* [Dkt. 391], p. 3. As addressed above, if Weider/Forman's false and legally-unsupported position gains any traction, copy-cat claims affecting all of the Receivership's assets will be inevitable. The financial impact of such claims would paralyze the Receivership and ultimately result in significantly reduced recoveries by innocent investors and creditors.

This Court should also weigh heavily the Receiver's concern that Weider/Forman are attempting to create a Hobson's choice. Tellingly, in their 35-page response, Weider/Forman never dispute that they hope to use the reserve and requirement to continue to deposit additional monies monthly to cover claimed compounding interest to leverage a settlement before the Receiver and Court learn the full scope of what Weider/Forman knew of the imminent demise of the Corinthian Colleges and the SEC defendants' alleged fraudulent scheme—knowledge which

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could void the entire debt.[4] The Receiver does not seek to fully and finally litigate those issues now but reserves his rights to do so as part of the subsequent claims process which will follow the full forensic investigation, which is just now underway.

As described below in Section IV, the Receiver has identified factual and legal bases that, through the proposed hearing, may well avoid the Hobson's choice Weider/Forman endeavor to exploit and, thereby, ensure that the Receiver may continue to utilize the Receivership Entity's assets—on which Weider/Forman have no lien—to discharge his duties. In light of these material benefits to the innocent investors and creditors, Weider/Forman's claimed inconvenience in defending their demand to a reserve of roughly $20 million during a two-day hearing should count for little. It benefits innocent investors and other unsecured creditors as a group for this Court to test Weider/Forman's claims, to the extent practicable, at the Court's earliest opportunity.

III. There is no procedural impediment to this Court relying on its substantial equitable authority to undertake a sufficient preliminary hearing on Weider/Forman's reserve.

In its motion, the Receiver noted this Court's broad equitable 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). That authority extends to disposing of property "free and clear," with any lien attaching to the sales proceeds to the same extent, validity, and

[4] The Receiver submits that Weider/Forman substantially mischaracterize the prior settlement discussions and the Receiver's positions therein. However, in accordance with Federal Rule of Evidence 408 and in light of the fact that the discussions are entirely irrelevant to the issues addressed on the Receiver's motion, the Receiver does not further address those erroneous characterizations herein.

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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 *SEC v. American Capital Invs.*, 98 F.3d 1133 (9th Cir. 1996), 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").

Weider/Forman have directed this Court to no authority that prevents it from addressing claims and defenses that may affect (in whole or part) the extent and validity of a lien in property being sold at a time and in a manner that serves the overriding interests of the Receivership. As described below, Weider/Forman's reliance on the Bankruptcy Code and the Fifth Amendment are misplaced; neither gives rise to the procedural prohibitions that Weider/Forman imagine.

A. Weider/Forman's reliance on the Bankruptcy Code is misplaced.

As the Receiver has acknowledged, the Bankruptcy Code may in some instances provide useful analogies for the Court's evaluation of some issues in a receivership proceeding. However, the Receiver has not agreed and this Court has not ordered that the preliminary reserve hearing should duplicate bankruptcy procedure. *See SEC v. Sunwest Mgmt.*, No. 09-6056-HO, 2009 U.S. Dist. LEXIS 93181, *33 (D. Or. Oct. 1, 2009) ("Federal equity receivership courts are not required to exercise bankruptcy powers and nor to strictly apply bankruptcy law.").

True, the Receiver has had occasion to demonstrate that Weider/Forman's arguments fail even under the Bankruptcy Code. For example, the Receiver demonstrated that Weider/Forman would have no right even under the Bankruptcy Code to prevent the sale of an asset "free and clear" (with liens attaching to the proceeds) because one or more bona fide disputes exist. But in doing so, the Receiver has not bound itself or this Court to the Bankruptcy Code.

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Weider/Forman cite two cases for their proposition that "Courts sometimes allow SEC receivers to sell assets 'free and clear' of interests and, in doing so, look to 11 U.S.C. § 363 for guidance." *Weider/Forman Resp.* [Dkt. 391], p. 13. Weider/Forman contend that the district court in *SEC v. Capital Cove Bancorp LLC*, 2015 WL 9701154, at *4-8 (C.D. Cal. Oct. 13, 2015), "look[ed] to the Bankruptcy Code for guidance" in relation to a motion to sell property free and clear. *Weider/Forman Resp.* [Dkt. 391], p. 13. Similarly, Weider/Forman contend that in *SEC v. Kirkland*, 2008 WL 4491528, at *9 n.10 (M.D. Fla. Sept. 30, 2008), the district court "rel[ied] on section 363 as authority for allowing the sale to proceed 'free and clear' of liens." *Weider/Forman Resp.* [Dkt. 391], p. 13. Neither case aids Weider/Forman's attempt to circumscribe the scope of this Court's preliminary reserve hearing.

First, neither of the cases Weider/Forman cite involved the district court making a discretionary decision to invoke the Bankruptcy Code. In *Capital Cove*, 2015 WL 9701154 at *4, that district court applied the Bankruptcy Code because the local rules in that district "direct[] a receiver" to do so when possible. In *Kirkland*, 2008 WL 4491528 at *9, that district court observed that "28 U.S.C. § 960, which addresses tax liability of court-appointed receivers, specifically incorporates the provisions of the Bankruptcy Code by reference." Weider/Forman's remaining cases construing the Bankruptcy Code appear to arise from bankruptcy proceedings. Because the two receivership courts only did as required, neither case suggests that this Court should, much less must, adopt the Bankruptcy Code's procedures, as sought by Weider/Forman.

Second, Weider/Forman construe "need not" to mean "may not." Weider/Forman emphasize that it is "critical" in relation to selling an asset "free and clear" based on a bona fide dispute that the Court "*need not* determine the probable outcome of the dispute[.]" *Weider/Forman Resp.* [Dkt. 391], p. 14 (emphasis, quotation marks, and citation omitted;

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emphasis added). However, Weider/Forman point to nothing in the Bankruptcy Code or related case law that *prohibits* a Court from resolving a bona fide dispute in part or whole at a time that advances the particular needs of a proceeding—especially in this circumstance when the resolution of the dispute is necessary to determine whether Weider/Forman have a security interest in the sold assets—a necessary predicate to requiring a security interest be granted in the proceeds of such assets.

Third, even a court in a bankruptcy action has inherent equitable power separate from the Bankruptcy Code to dispose of property "free and clear," with liens attaching to proceeds. Weider/Forman cite *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2d Cir. 1988), to support their unremarkable observation that, in bankruptcy actions, courts often reserve funds in relation to unadjudicated claims. *Weider/Forman Resp.* [Dkt. 391], p. 15 & n.6. In that case, however, the Second Circuit observed that "even absent the express statutory authority, the Bankruptcy Court had the inherent equitable power to sell a debtor's property and to transfer third-party interest to the proceeds of the sale." *MacArthur*, 837 F.2d at 93 (citing *Van Huffel v. Harkelrode*, 284 U.S. 225 (1931), among other authority). There is no basis for concluding that here, where this Court is proceeding in equity, it has less equitable power.

The Bankruptcy Code simply does not prevent this Court from undertaking a necessary review of Weider/Forman's claim, in whole or part, at a time that serves the needs of this action. Nothing in the Bankruptcy Code strips this Court of its authority, which derives from equity.

B. The Fifth Amendment does not require this Court to delay in hearing substantive aspects of Weider/Forman's claims.

The Receiver proposes that this Court hear evidence that (a) the security instruments executed by CP Holdings in favor of Weider/Forman do not encompass the Receivables Assets;

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and, regardless, (b) the alleged obligation (and hence security interest, if one were to exist) is voidable. As to the latter, Weider/Forman contend that the Fifth Amendment precludes a hearing because, according to Weider/Forman, such a hearing may result in the Receiver being "allow[ed] … to reserve less [than their claim] … without notice or the required procedures …." *Weider/Forman Resp.* [Dkt. 391], p. 19.

Weider/Forman miss the point. The Receiver intends the Court, to the extent practicable, to reach partial findings that obviate some or all of Weider/Forman's claimed security interest. Weider/Forman will obtain the protection *actually due* to them following a proceeding that affords them due process. "At its core, due process requires that a party have adequate notice and opportunity to be heard." *United States v. Alisal Water Corp.*, 431 F.3d 643, 657 (9th Cir. 2005). Under the Receiver's proposal, Weider/Forman receive notice, discovery, and an opportunity to present and dispute evidence. The Fifth Amendment requires no more.

SEC v. Wencke, 783 F.2d 829, 838 (9th Cir. 1986), illustrates that the Receiver's proposed hearing does not violate Weider/Forman's due process rights. There, the defendant engaged in securities fraud and transferred the proceeds to a corporation in which he had an interest, Ramapo Corporation, where new assets were purchased. Although Ramapo had not itself undertaken fraudulent activities and there were other shareholders who were not alleged to have engaged in wrongdoing, the district court found Ramapo to be a constructive trustee of those new assets (held for the benefit of defrauded shareholders of other corporations) and ordered the assets disgorged. *Id*. at 831-33. As a result of the disgorgement, the non-defendant shareholder's shares in Ramapo became "virtually worthless." *Id*. at 833.

A non-defendant shareholder in *Wencke* appealed, arguing that the district court violated his due process rights by employing a summary proceeding "rather than requiring the Receiver to

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pursue a separate, plenary action." *Id*. at 835-36. The Ninth Circuit was unconcerned. "[C]ourts must focus not on the *form* of the proceeding, but on their substance[.]" *Id*. at 836 (emphasis in original; discussing *SEC v. Universal Financial*, 760 F.2d 1034, 1037 (9th Cir. 1985)). Due process does not entitle the nonparty to "a formal complaint and answer." *Id*. at 837. Instead, a party obtains due process if it has "notice of the disgorgement proceeding," an opportunity to "fil[e] a responsive pleading" and is not "prevented … from … seeking discovery …." *Id*. at 838. At a hearing, the nonparties' due process rights are met by "the opportunity to introduce evidence and to call and cross-examine witnesses …." *Id*. *See also SEC v. Ross*, 504 F.3d 1130, 1141 (9th Cir. 2007) (a district court overseeing receivership may use a summary proceeding—that is, notice and a right to be heard—to reclaim assets that have been "fraudulently transferred by the defendant in the underlying securities enforcement action"); *Universal Fin.*, 760 F.2d at 1037 (no entitlement to a plenary proceeding when the summary proceeding entitled the nonparty to "virtually all of the procedural protections which would [be] available in plenary proceedings").

Weider/Forman can point to no material distinction between fraudulent conveyances of (a) profits (as in *Wencke*) and (b) promissory notes and security interests (as here). The test of due process is whether, following notice and an opportunity for Weider/Forman to be heard, the Receiver can make a showing that Weider/Forman have no security interest in the assets sold or the Receivership is the rightful holder of the assets for the benefit of innocent investors and creditors.

Weider/Forman's broad-stroke contention that discovery is unavailable to them is equally meritless. First, even by Weider/Forman's proposal, the Court will order discovery. *See Weider/Forman Resp.* [Dkt. 391], p. 35 (proposing document discovery). Second, the Receiver

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agrees that Weider/Forman are entitled to discovery. Third, even the authority Weider/Forman cite when asserting that "no precedent … allow[s] non-parties to conduct discovery," *id*. at 30 (emphasis omitted), notes that a nonparty may intervene if they wish to obtain discovery, *see Patriot Rail Corp. v. Sierra R.R. Co.*, 2016 WL 704456, at *4 n.4 (E.D. Cal. Feb. 23, 2016) ("non-parties have ample process available to them," but failed to intervene and thereby obtain discovery). Finally, with due respect to the Eastern District of California, which was not addressing a receivership action or even a bankruptcy, the Ninth Circuit has approved of third parties who claim an interest in receivership property obtaining discovery. *See Wencke*, 783 F.2d at 838 (nonparty appellant could not dispute availability of discovery because "nothing in the record indicates that he *sought* any discovery on behalf of himself or [the company the district court found to hold defrauded shareholder's assets as a constructive trustee]" (emphasis in original)); *Universal Fin.*, 760 F.2d at 1037 (nonparty "[i]nvestors were allowed extensive discovery, including the right to take depositions"). This Court, sitting in equity, determines the scope of discovery and should disregard Weider/Forman's conflicting statements about whether discovery is theoretically available.

In sum, Weider/Forman's procedural objections to the Receiver's proposed hearing ring hollow. They acknowledge that this Court may, without further delay, decide whether CP Holdings purported (or even had the legal authority) to grant them a security interest in the Receivables Assets, which they concede were owned by CP Holdings' subsidiaries and not CP Holdings itself. *Weider/Forman Resp.* [Dkt. 391], pp. 3, 34. In doing so, Weider/Forman belie their own procedural objections. Nothing in the Bankruptcy Code prevents this Court from deciding aspects of Weider/Forman's claim now. The Court can and should tailor the proceedings to focus on those legal and factual issues that implicate the existence or lack thereof

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of a security interest in the sold assets—recognizing that failure to have a valid debt owed by CP Holdings would invalidate a security interest, even if one were found to exist. Similarly, nothing in the Fifth Amendment precludes the hearing that the Receiver seeks or even a ruling that Weider/Forman do not have a security interest in the Receivables Assets based simply on the declarations they submitted. Even if this Court were to conclude that further procedural protections were required to vindicate Weider/Forman's due process rights, the solution is to provide more process—*e.g.*, exchanging notice pleadings or Weider/Forman intervening—rather than sabotaging the necessary hearing that the Receiver and many investors have concluded is in the best interest of the Receivership Estate.

IV. Weider/Forman provide no basis for this Court to prejudge what it will conclude about their claimed entitlement to a replacement lien following a hearing.

The Receiver recommends a hearing sufficient to test several issues regarding Weider/Forman's right to a replacement lien. Weider/Forman and the Receiver disagree about what the Court is likely to find following such a hearing. Regardless, just as the Court does not guess at its eventual findings at the pleading stage in a typical civil action, there is no present basis for this Court to prejudge the parties' respective contentions here or, given the pleadings already on file, to doubt that this subject will be illuminated by the parties' presentation of witness testimony and cross-examination.

A. The Receiver stated a claim that Weider/Forman do not have a security interest in the assets being sold, and certainly not to the extent of $10.5 million growing at the rate of $250,000 monthly.

Weider/Forman contend that in October 2014, a $6 million liability of CSF Leverage to Weider was "converted" to a liability of CP Holdings, *Weider/Forman Supp. ISO Obj.* [Dkt. 355], p. 4, and that CP Holdings conveyed to Weider/Forman (a) a promissory note for

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$6 million representing such "converted" liability; and (b) a security interest in the valuable healthcare Receivables Assets owned by CP LLC and CP FIT. No party, including Weider/Forman, provided fair consideration to CP Holdings for CP Holdings to convey those two assets to Weider.

Digging deeper into the October 2014 transaction only furthers the sense that fraud was afoot. As noted above, Weider/Forman were apparently "freaking out!" because of their exposure through CSF Leverage I, LLC ("CSF Leverage") to fallout from Corinthian Colleges' alleged fraudulent activities and collapse. In October 2014, not only did Weider obtain a new promissory note from a new company—CP Holdings—but Weider/Forman also received new collateral (a security interest in CP Holdings' equity ownership of three subsidiary entities) even though Weider's old collateral with CSF Leverage was distressed by Corinthian's default. For all of this, CP Holdings received nothing—from anyone.

Weider/Forman had access to the CP Holdings' financials.[5] Even so, Weider/Forman do not suggest they have any evidence that CP Holdings ever received "fair consideration" for issuing a $6 million promissory note to Weider in October 2014, or for providing Weider a security interest in any assets at that time. Indeed, despite its central role in the viability of their claim for an enforceable obligation, Weider/Forman feign disinterest in these "matters purely

[5] Such access included monthly financial statements showing CP Holdings' "balance sheet" and an overview of CP Holdings' "assets and liabilities," *Forman Decl. ISO Obj.* [Dkt. 345], Ex. E (2014 Loan Agreement), ¶ 5(b), Ex. I (2015 Loan Agreement), ¶ 5(b) (similar), as well as the right to "examine or audit Borrower's books, accounts and records" upon reasonable notice, *id*. at Ex. E (2014 Loan Agreement); ¶ 5(c); Ex I (2015 Loan Agreement), ¶ 5(d) (similar).

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concerning Aequitas personnel and Aequitas bookkeeping." *Weider/Forman Resp.* [Dkt. 391], pp. 28-29.

Construing the facts and inferences in favor of the Receiver—as this Court would do when construing whether a hypothetical pleading stated claims and defenses[6]—the conveyances to Weider/Forman are voidable in whole or in part (even under the assumption that a security interest had been created in the healthcare receivables). Under New York law, a conveyance is voidable if it is made without "fair consideration," and one of three conditions is met. The Receiver has alleged that, even without establishing an overarching Ponzi scheme, it anticipates establishing that, at the time it issued the $6 million promissory note and also allegedly conveyed a security interest to Weider, CP Holdings was: (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. *See Receiver's Mot. to Set Reserve Hr'g* [Dkt. 383], p. 21 (asserting same). Likewise, the Receiver contends that, regardless of Weider/Forman's asserted good faith, the conveyances to Weider/Forman were made with the transferor's intent to "hinder, delay, or defraud either present or future creditors." N.Y. Debt. & Cred. Law § 276.

While the Receiver has mentioned the SEC's allegations about a Ponzi scheme in passing, Weider/Forman erect those allegations as a strawman in hopes of scaring this Court away from a necessary hearing. To be clear, while an overarching Ponzi scheme *may also* render

[6] As noted in Section III.B, *supra*, the Ninth Circuit has repeatedly recognized that the notice requirements of due process can be met without a formal complaint, answers, and summons.

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Weider/Forman's claimed security interests and promissory notes voidable conveyances, the Receiver *need not* (and does not now intend to) establish such a scheme broadly as to the entire Receivership Entity or even narrowly as to CP Holdings to void the particular conveyances at issue. Instead, for example, CP Holdings' books and records will describe its assets, liabilities and expected cash flow at the time it allegedly conveyed promissory notes and security interests to Weider/Forman and whether it received "fair consideration" in return. Such objective evidence, together with any expert testimony helpful to the Court, can be readily exchanged between the parties, may be presented in two days and would, if it illustrates what the Receiver contends, render the transactions voidable. *See* N.Y. Debt. & Cred. Law §§ 273-75. Similarly, if discovery taken from Weider/Forman shows that they failed to act in good faith in relation to one or more of the conveyances, the Receiver could establish that the conveyances were made to "hinder, delay, or defraud either present or future creditors." N.Y. Debt. & Cred. Law § 276.

Weider/Forman ask this Court to prejudge what such evidence, presented over two days, could show. But given that the parties have not yet exchanged written discovery and have taken no depositions, it is simply premature to speculate now about what facts may be presented during the two-day hearing.

B. The hearing should encompass Weider/Forman's false claim that CP Holdings gave them a security interest in the Receivables Assets.

While seemingly a ploy to have this Court decide an issue before the Receiver has uncovered all of the pertinent facts, Weider/Forman acknowledge that this Court may hear whether CP Holdings executed a security instrument in their favor covering the Receivables Assets. *Weider/Forman Resp.* [Dkt. 391], p. 34 (acknowledging that the Court may engage in "contract interpretation," as well as fact-finding about perfection and prior payments). As such,

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a full response to their claim to a security interest in the Receivables Assets can wait.

Briefly, however, the evidence indicates that Weider/Forman are attempting to defraud this Court by claiming that CP Holdings gave them a security interest in the Receivables Assets.

Weider/Forman's alternative contention that by virtue of a security interest in equity, they thereby are entitled to a reserve following the sale of the Receivables Assets is equally meritless. *Id*. at 17. Tellingly, Weider/Forman have offered no supporting authority from a similar receivership proceeding. Counsel for the Receiver have been unable to identify any receivership proceeding arising from alleged fraud in which a creditor secured by equity has held the receivership hostage to its demand for adequate protection in the sale of assets owned by the receivership entity. Weider/Forman's contention appears truly novel and, as noted above, if correct would support a claim by hundreds of investors for a lien on the proceeds of every consumer receivable asset sold by this receivership. Such a result would render this receivership, and most other receiverships, impossible to operate.

Such authority is likely absent for good reason. First, even if Weider/Forman actually owned the equity collateral outright, they—like any business owner in a receivership or bankruptcy—would have the absolute lowest priority claim. They would be behind secured creditors, unsecured creditors, investors asserting voidable transfers into the entity, administrative claims, and the receiver's rights, pursuant to the Order Appointing Receiver, to use the receivership's assets in furtherance of the receivership.[7] One never gains more rights

[7] *See N. P. R. Co. v. Boyd*, 228 U.S. 482, 505 (1913) ("Any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation." (internal quotation marks and citation omitted)). *Cf. also Del. Trust Cos. v. Energy Future*

(*continued on next page*)

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having a lien on an asset than inure to the owner of that asset. *See Sprint Nextel Corp. v. U.S. Bank Nat'l Ass'n* (*In re Terrestar Networks, Inc.*), 457 B.R. 254, 273 (Bankr. S.D.N.Y. 2011) ("The NYUCC allows secured parties no greater interest in collateral than the debtor itself holds."). CP Holdings had no legally cognizable ownership of the Receivables Assets. *See Brock v. Poor*, 216 N.Y. 387, 401, 111 N.E. 229, 234 (1915) ("even complete ownership of capital stock does not operate to transfer the title to corporate property and that ownership of capital stock is by no means identical with or equivalent to ownership of corporate property"); *5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 323, 486 N.Y.S.2d 877, 884, 476 N.E.2d 276, 283 (1984) ("[S]hareholders do not hold legal title to any of the corporation's assets. Instead, the corporation—the entity itself—is vested with the title."); *In re Beck Indus., Inc.*, 479 F.2d 410, 415 (2d Cir. 1973) ("Ownership of all of the outstanding stock of a corporation … is not the equivalent of ownership of the subsidiary's property or assets."); *Klein v. Bd. of Tax Supervisors*, 282 U.S. 19, 24 (1930) ("The corporation is a person and its ownership … makes it impossible to attribute an interest in its property to its members.").

Second, regardless of what procedural rights a lender only secured in equity might have in a bankruptcy proceeding, Weider/Forman's claim does not arise in a bankruptcy proceeding. Although they contend that the Fifth Amendment "requires" such relief, *Weider/Forman Resp.* [Dkt. 391], p. 13, they do not back that contention with any case law holding that shareholders (let alone creditors with claims secured by equity) are entitled to adequate protection following the sale of a company's assets. Indeed, such a holding would wrongly elevate shareholders

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Intermediate Holding Co. (*In re Energy Future Holdings Corp.*), 533 B.R. 106 (Bankr. Del., 2015) ("equity lies at the bottom of the waterfall of priorities under the Bankruptcy Code").

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above creditors of the corporation in which shares are held and, in the case of a receivership, above the rights and powers granted to the receiver. *See In re U. S. Fin., Inc.*, 648 F.2d 515, 520 (9th Cir. 1980) (extensive discussion of the reasons equity has the lowest priority, including, for example, that "[i]t is … appropriate to impose the risk of illegality in securities issuance on shareholders[.]"). Further, to the extent that Weider/Forman suggest a due process right to have notice and be heard before a reserve is denied to them, those rights are being provided. *See supra* Section III.B.

Third, Weider/Forman have no amorphous Fifth Amendment right that entitles them to seize the benefits but shirk the burdens of the receivership proceeding. Weider/Forman do not own the equity and even if they did, a claim asserting that the assets of the corporations were being taken would belong to CP LLC or CP FIT, not them. *See First Hartford Corp. Pension Plan & Tr. v. United States*, 42 Fed. Cl. 599, 617-19 (1998) ("plaintiff and other shareholders owned stock in Dollar Dry Dock during the time periods relevant to this action, but that stock is not the property allegedly taken," and a claim that the assets of the corporation were taken belongs to the corporation). Moreover, courts have repeatedly rejected similar arguments even by stockholders in similar heavily regulated industries. In a leading case, *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1074-75 (Fed. Cir. 1994), the Federal Circuit held that even a bank's stockholders have no right to compensation when the government puts the bank into receivership. An investor cannot "possess[] either the historically rooted expectation of compensation or the reasonable investment-backed expectation necessary to support a Fifth Amendment taking because it chose to invest in an entity—the Bank—which did not possess the right to exclude others [by virtue of being] a member of a highly regulated industry." *Id*. *See also American Continental Corp. v. United States*, 22 Cl. Ct. 692, 701 (Cl. Ct. 1991) (denying

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taking claim because "[t]he instant case involves a regulatory action in a highly regulated industry in which the government took actions that reasonably should have been expected by plaintiffs and Lincoln"); *Franklin Sav. Corp. v. United States*, 46 Fed. Cl. 533, 535-36 (2000) ("[t]he Federal Circuit has never upheld a claim that a seizure of a financial institution under the statutes and regulations designed to insure safe and secure banking institutions constituted a taking" because "banking is a highly regulated industry and that one engaged in that business is deemed to understand that if his bank becomes insolvent or, in the judgment of the regulatory authorities, is engaged in unsafe or unsound banking practices, the bank may be seized by government officials and be operated and/or liquidated by them"); *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 245 (D.D.C. 2014) ("the plaintiff shareholders could not have 'developed a historically rooted expectation of compensation' for any possible seizures that occurred during FHFA's conservatorship" because plaintiffs "'voluntarily entered into [investment contracts with] the highly regulated'" industry (internal citations omitted)).

Here, Weider/Forman sought huge profits at the intersection between the highly regulated securities industry and the highly regulated healthcare industry. *See generally, e.g.*, 15 U.S.C. Chs. 2A, 2B, 2B-1, 2D, 2E; Title XIX of the Social Security Act, 42 U.S.C. §§ 1395g(c), 1395u(b)(6) and 1396(a)(32).[8] Weider/Forman knew or should have known that regulatory and judicial proceedings against the SEC defendants and the rest of the Receivership Entity could impair the value of their collateral, CP Holdings' equity in its subsidiaries. Indeed,

[8] For example, under the so-called "Anti-Assignment provisions" of the Social Security Act, a state plan for administration of federal healthcare assistance programs must "provide that no payment under the plan for care or service provided to an individual shall be *made to anyone other than such individual or the person or institution providing such care or service*[.]" (Emphasis added.)

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Weider/Forman apparently had a similar prior experience when, in autumn of 2014, they were "freaking out!" as they realized that their collateral in Corinthian loan receivables was in serious jeopardy. Just as Weider/Forman had no Fifth Amendment claim when government investigations of Corinthian Colleges distressed the value of their collateral, "Eligible [student loan] Receivables," they presently have no claim when, at the SEC's request and showing, this Court appointed a Receiver in part to vindicate the interests of investors and creditors injured by alleged securities fraud.

This Court need not engage these issues now, as it previously indicated that it is willing to engage in fact-finding that may affect whether and to what extent Weider/Forman have a security interest and a cognizable claim. At such a hearing, the Receiver believes that this Court will conclude that Weider/Forman have intentionally misled this Court about their claimed security interest in the Receivables Assets.

V. Conclusion

Weider/Forman seek leverage in the form of a roughly $20 million reserve—essentially the net proceeds expected to be received by CP LLC and CP FIT from the sale of their assets. The basis for that claim, that the Receivables Assets are collateral securing promissory notes, is false. CP Holdings' security agreements do not pledge the Receivables Assets owned by CP Holdings' subsidiaries. Weider/Forman knew that because that is what the parties actually negotiated after Weider/Forman expressly requested a security interest in the Receivables Assets and had that request flatly rejected. The security agreements do not reference these assets. Indeed, the owners of these assets, CP LLC and CP FIT, who would be necessary to create a perfected security interest, were not even parties or signatories to the security agreement. The Receiver is left to conclude, based on their sworn declarations and statements in their pleadings,

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that Weider/Forman are intent on defrauding this Court.

It is in the best interests of innocent investors and creditors that this Court confront Weider/Forman's claim to both a security interest and a valid debt obligation before creating a substitute lien in the sales proceeds. Declining to do so may well result in copy-cat claims by almost all the other investors who, like Weider/Forman, have agreements purporting to grant a security in equity interests rather than the underlying assets being monetized. Nothing in the Bankruptcy Code or the Fifth Amendment prevents this Court from relying on its inherent equitable authority in this receivership proceeding to order a hearing sufficient to resolve these basic issues. Two days is sufficient for this Court to hear evidence that (a) the security instruments executed by CP Holdings in favor of Weider/Forman cannot legally grant a security interest in the Receivables Assets owned solely by CP LLC and CP FIT; (b) $6 million of the funds lent by Weider/Forman were not lent to CP Holdings and therefore cannot support a

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repayment obligation by insolvent CP Holdings or a security interest; and (c) the balance of the asserted obligation is a voidable conveyance and therefore it too cannot support a security interest.

Dated this 24th day of April, 2017.

Respectfully submitted,

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