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Of Attorneys for Rahnama Intervenors

**UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF OREGON**

**SECURITIES AND EXCHANGE COMMISSION,**

Plaintiff,

v.

**AEQUITAS MANAGEMENT, LLC; AEQUITAS HOLDINGS, LLC;**

No. 3:16-cv-00438-PK

**RAHNAMA INTERVENORS' MEMORANDUM JOINING RECEIVER'S POSITION ON MOTION TO SET RESERVE HEARING AND ON "STATEMENT ON PROPOSED PROCEDURE FOR ADEQUATE PROTECTION HEARING"**

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

Defendants.

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**MANI RAHNAMA; NAZANIN RAHNAMA; NIMA RAHNAMA; WARREN BEARDSLEY; MARY ANN BEARDSLEY; RANDY WHITMAN; DEBORAH WHITMAN; ALAN WHITNEY; MARY ANN WHITNEY;** and **TOM SMITH**,

Intervenors.

## I. INTRODUCTION

The relief sought by Weider/Forman in its "Statement on Proposed Procedure for Adequate Protection Hearing" (Doc. 373) is based upon the remarkable, legally unsupportable proposition that a security interest in one property—equity interests in an LLC—is actually a security interest in different property—receivables owed to the LLC.

The Rahnama Intervenors[1] join in the Receiver's position on the Motion to Set Reserve Hearing (Doc. 383) not just because they consider the relief sought by Weider/Forman to be based upon a legally and factually unsupportable proposition, but

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[1] Mani Rahnama, Nazanin Rahnama, Nima Rahnama, Warren Beardsley, Mary Ann Beardsley, Randy Whitman, Deborah Whitman, Alan Whitney, Mary Ann Whitney, and Tom Smith.



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because much more is at stake. If the Court were to grant such relief, not only would it diminish the assets available to compensate the hundreds of innocent victims of Aequitas's Ponzi scheme, but it would limit the ability of this Court's Receiver to put together a plan of distribution that treats all of the victims of the Aequitas Ponzi scheme equitably, and it would start an "every-person-for-themselves" free-for-all that could undermine the foundation of this Court's Receivership and increase the cost of developing, implementing, and administering a plan of distribution for an already very complicated estate.

## II. AN EQUITABLE AND ADMINISTRATIVELY WORKABLE DISTRIBUTION PLAN IN THIS CASE WILL NEED TO TREAT INVESTORS ON A *PARI PASSU*, *PRO RATA* BASIS

The Rahnama Intervenors' lawyers were involved in several prior District Court of Oregon SEC receiverships, notably for purposes of this case, Capital Consultants and Sunwest. Central to the successful outcome of those two receiverships was the district courts' adoption of plans of distribution that recognized that individual creditors should not be able to "tag" particular funds in a receivership where doing so would frustrate an equitable distribution of an estate with limited assets and many victims. *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 739 (9th Cir. 2005); *United States v. Real Property Located at 13328 and 13324 State Highway 75 North*, 89 F.3d 551 (9th Cir. 1996).

Here, as in those cases, Aequitas's fraud permeated its entire enterprise; and the funds raised were not used for their stated purposes, and were extensively



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commingled. As a result, one creditor's claim to particular funds should not be honored at the expense of all others.

In *Capital Consultants*, the district court (Judge King) adopted a plan of distribution that was "administratively workable" and had the "goal of distributing the limited assets of the receivership in a roughly equal fashion,"—what, in the court's judgment, constituted an "equitable method of allocating the limited assets of the receivership." 397 F.3d at 738.

In affirming Judge King's plan, the Ninth Circuit noted that "equity demand[ed] equal treatment of victims" and that it had rejected arguments in previous cases by a single customer who had wanted to receive all the proceeds of a particular real estate sale because, the customer had claimed, "the funds to purchase this property could be traced to it." *Id.* at 738-39 (discussing *Real Property Located at 13328 and 13324 State Highway 75 North*, 89 F.3d 551). The court rejected the argument because "allowing this claim in lieu of a pro rata distribution 'would frustrate equity.'" *Id*. The Ninth Circuit "agreed with the district court that 'the equities demand that all [customers] share equally in the fund of pooled assets in accordance with the SEC plan.'" *Id.* at 739. The court reiterated: "'this is a case where "equality is equity."'" *Id.* (quoting the original Ponzi scheme case, *Cunningham v. Brown*, 265 U.S. 1, 7, 13 (1924) ("The litigation grows out of the remarkable criminal financial career of Charles Ponzi.")).



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Likewise, in Sunwest, the district court (Judge Hogan) entered an injunction providing "no creditor of or claimant against any of the Receivership Entities…shall take any action to interfere with the Receiver's… control, possession, or management of the Receivership Entities or any of their assets, including, but not limited to, the filing of any lawsuits, liens or encumbrances…." *Oregon Investors v. Harder*, 2010 WL 3219992 (D. Or. 2010). On appeal, the Ninth Circuit noted "the district court's broad *in rem* jurisdiction over receivership assets," and that "district courts may stay foreclosure proceedings in an SEC enforcement action." *SEC v. ING USA Annuity and Life Ins. Co.*, 360 Fed. Appx. 826, 828 (9th Cir. 2009) (citing *SEC v. Wencke*, 622 F.2d 1363, 1369, 1370 n. 11 (9th Cir.1980); *SEC v. Universal Fin.*, 760 F.2d 1034, 1037–39 (9th Cir.1985)). Thus, although the Ninth Circuit remanded for the district court to make "adequate findings," there was no question about the district court's broad authority to ensure equitable distribution of the receivership estate.

Meanwhile, the district court (Judge Hogan) had approved a plan of distribution "premised on the Court recognizing that the use of funds by the Sunwest Enterprise was on a unitary enterprise basis, without regard to separate purposes or restrictions, and that it would be inequitable to treat the claims of investors and creditors in any manner other than on a par[]i passu, pro rata equitable claim calculation basis…." *SEC v. Sunwest Management, Inc.*, 2009 WL 3245879 at *5 (D. Or. 2009). The court noted that "investor and creditor funds were utilized for purposes that were not disclosed prior to the investments



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and for purposes inconsistent with the expectations and documents related to the investments" (*Id.*), and that "there was extensive and wrongful commingling of funds, both from successful Receivership Entities to less successful Receivership Entities, and from Receivership Entities that were in serious financial distress to solvent and successful Receivership Entities" (*Id.* at *6). The court concluded that the evidence of commingling was "so extensive and pervasive," and the impact of the commingling was "so significant" that in order to make an "equitable distribution to investors and creditors," and to serve the "public purpose of establishing an orderly mechanism to administer the assets of the Receivership Estate," the distribution plan treating all investors and creditors equally was appropriate. *Id.* at 8.

## III. ALLOWING WEIDER/FORMAN'S REQUESTED RELIEF WOULD FRUSTRATE EQUITY

In this case, the SEC has alleged the very same factual predicates found in Capital Consultants and Sunwest. Among other things,

> 3. … By at least July 2014, Jesenik and Oliver knew that redemptions and interest payments to prior investors were being paid primarily from new investor money in a Ponzi-like fashion, and that very little investor money was being used to purchase trade receivables. The cash flow shortages at ACF and Aequitas Holdings continued with increased severity through 2015.
>
> 4. …Jesenik and Oliver decided to cover the cash shortfall – and continue paying the growing expenses of the enterprise, including their own lucrative salaries, a private jet and pilots, and dinners and golf outings for prospective investors – by raising funds from new investors and convincing prior investors to reinvest. Between January 2014 and January 2016, they raised approximately $350 million through ACF and the Aequitas Funds.



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> 5. However, they never disclosed to investors that: (1) ACF and Aequitas Holdings were effectively insolvent; (2) the vast majority of investor funds was not used to purchase trade receivables but instead to pay redemptions and interest to prior investors and to pay for operating expenses; and (3) only a fraction of the notes issued by ACF and the Aequitas Funds were backed by trade receivables.

Complaint, ¶ 3-4; see also *id*. at ¶¶ 54-56. The SEC has alleged that Aequitas transferred substantial funds, $183.3 million, from Aequitas Commercial Finance, its primary securities issuer, to Aequitas Holdings. *Id*. at ¶¶ 46-47.

The Rahnama Intervenors respectfully believe that it would be a mistake at this point in the case for the Court to approve any step that breaks the Receivership's Estate into pieces; that doing so may hinder the ability of the Receiver to develop and implement a plan of distribution that is administratively workable and treats all investors and creditors fairly.

One final note: the Weider/Forman parties bargained for the risk that Aequitas would implode. They are seeking 17% interest and 25% default interest on their loan, which are terms they secured when they tried to better their position vis-a-vis other investors. What risk was Weider/Forman compensating for with its "loan shark" interest rates? Answer: The risk that Aequitas would implode, that a Receiver would be appointed, that the Court would disregard supposed security interests and pool all of Aequitas's assets together, that the Court would put all innocent investors and creditors on an equal footing and provide for an equitable plan of distribution that treats innocent



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investors and creditors equally. Weider/Forman assumed the risk that what happened would happen and there is nothing unfair about denying them the relief they seek.

DATED this 4th day of May, 2017.

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