Docket #0447 Date Filed: 5/17/2017

Joseph Mabe, OSB No. 045286
jmabe@brownsteinrask.com
BROWNSTEIN RASK
1200 SW Main St.
Portland, Oregon 97205
Telephone: (503) 412-6744

Matthew D. Umhofer (admitted *pro hac vice*; CSB No. 206607)
matthew@spertuslaw.com
Jennifer E. LaGrange (admitted *pro hac vice*; CSB No. 238984)
jennifer@spertuslaw.com
SPERTUS, LANDES & UMHOFER, LLP
1990 South Bundy Dr., Suite 705
Los Angeles, California 90025
Telephone: (310) 826-4700

Attorneys for Secured Creditors WEIDER HEALTH & FITNESS and BRUCE FORMAN

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. AEQUITAS MANAGEMENT, LLC; AEQUITAS HOLDINGS, LLC; AEQUITAS COMMERCIAL FINANCE, INC.; AEQUITAS CAPITAL MANAGEMENT, INC.; AEQUITAS INVESTMENT MANAGEMENT, LLC; ROBERT J. JESENIK; BRIAN A. OLIVER; and N. SCOTT GILLIS, Defendants.	Case No. 3:16-CV-00438-PK **SECURED CREDITORS WEIDER HEALTH & FITNESS'S AND BRUCE FORMAN'S MOTION FOR LEAVE TO FILE A SUR-REPLY TO THE RECEIVER'S MOTION TO SET RESERVE HEARING AND PROPOSED SUR-REPLY [ATTACHED AS EXHIBIT A]** **EXPEDITED RELIEF REQUESTED [BEFORE THE MAY 24, 2017 HEARING]**

1600438170518000000000001

Weider Health & Fitness (Weider) and Bruce Forman (Forman) respectfully move for leave to file the attached Sur-Reply to the Receiver's Motion to Set Reserve Hearing. Weider and Forman respectfully submit that further briefing should be allowed to address new evidence and arguments that the Receiver raised for the first time in its Reply (ECF Nos. 418-19), and new arguments raised by investors who joined the Receiver's Motion (Joinder, ECF No. 439). Weider and Forman request this relief on an expedited basis because the hearing on the underlying motion is scheduled for May 24, 2017 (ECF No. 437), and Weider and Forman would like the Court to have the benefit of the responses in the attached Sur-Reply before the hearing. Pursuant to Local Rule 7-1(a), Weider and Forman conferred with the Receiver's counsel concerning this motion for leave to file a sur-reply, and the Receiver does not consent to the relief requested in this motion.

The Local Rules provide only for a motion, response, and reply. D. Or. L.R. 7(e). "Unless directed by the Court, no further briefing is allowed." Id. 7(e)(3). At the same time, "[t]he general rule is that [a party] cannot raise a new issue for the first time in their reply briefs." Thompson v. Commissioner, 631 F.2d 642, 649 (9th Cir. 1980). "[A] fundamental purpose behind this rule is to prevent 'the unfair surprise and prejudice that can result from an untimely filed argument.'" BlueEarth Biofuels, LLC v. Hawaiian Elec. Co., Inc., 2011 WL 1230144, at *8 (D. Haw. Mar. 28, 2011) (citations omitted). As the Ninth Circuit explains:

> The unfairness of such a tactic is obvious. Opposing counsel is denied the opportunity to point to the record to show that the new theory lacks legal or factual support.

Sophanthavong v. Palmateer, 378 F.3d 859, 872 (9th Cir. 2004)

"'[W]here new evidence is presented in a reply to a motion …, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond." Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996) (citations omitted). Thus, "'[w]hen a party has raised new arguments or presented new evidence in a reply to an opposition, the court

may permit the other party to counter the new arguments or evidence.'" Ore. Nat'l Desert Ass'n v. Cain, 17 F. Supp. 3d 1037, 1048 (D. Or. 2014) (collecting cases).

Here, the Receiver filed the Motion to Set Reserve Hearing on March 13, 2017 (ECF No. 383), Weider and Forman filed their Response on April 3, 2017 (ECF No. 391), and the Receiver filed its Reply on April 24, 2017 (ECF No. 418). In connection with its Reply, the Receiver submitted and discussed four documents that it did not submit or discuss in its Motion, and which the Receiver never discussed with counsel for Weider and Forman. ECF No. 419. This new evidence is attached as Exhibits A through D to the Declaration of Brad Foster. Id. Weider and Forman respectfully request permission to respond to this new evidence. As the attached Sur-Reply explains:

- The Receiver submits **Exhibits A and B** in an attempt to show an apparent lack of good faith in connection with its purportedly forthcoming allegations of fraudulent transfer. Exhibits A and B, however, have nothing to do with the allegedly voidable transfer involving CarePayment Holdings, LLC. Instead, Exhibits A and B show Bruce Forman checking in with Aequitas personnel about Corinthian Colleges, Inc., which is not an Aequitas entity at all, but which supplied student loan receivables to CSF Leverage I, LLC, which receivables were collateral for Weider's pre-existing 2013 loans to CSF. The Receiver also omits the context for Exhibit B, which is the Consumer Financial Protection Bureau's September 2014 lawsuit against Corinthian. Regardless, Exhibits A and B are irrelevant to the issue presented, which is the need for a reserve hearing and amount of reserve. And, neither these exhibits nor anything in the Receiver's Reply address the wire transfer receipts and contract documents proving that allegations of insufficient consideration and lack of good faith will fail. See Sur-Reply 15-18, attached hereto as Exhibit A.

- The Receiver submits **Exhibit C** in an attempt to show that the collateral for Weider's and Forman's loans do not include the receivables, and further, as part of a new allegation that Weider's and Forman's argument is an attempt to defraud the Court. Not only is Exhibit C inadmissible parol evidence, but it proves that receivables are collateral for the Weider and Forman loans—specifically, it shows Brian Oliver, the Executive Vice President of Aequitas Capital Management, Inc., asking Forman to consider extending the term for the original $6 million loan, and consider loaning additional money (which Weider and Forman ultimately did), "secured by the same junior lien position on full recourse CarePayment receivables[.]" See Sur-Reply 1-10, attached hereto as Exhibit A.

- The Receiver submits **Exhibit D** in an attempt to show that Weider's and Forman's request for adequate protection is somehow harmful to the receivership proceeding because other investors are similarly situated. Exhibit D, however, shows that other investors' claims (if any) are subordinate to Weider's and Forman's claims because Weider and Forman are senior secured lenders. See Sur-Reply 18-21, attached hereto as Exhibit A.

Weider and Forman also respectfully request permission to respond to new arguments the Receiver raises for first time in its Reply. As the attached Sur-Reply explains:

- Weider's and Forman's argument that the collateral for their loans includes the receivables is a matter of contract interpretation and commercial law, which—even if it were incorrect (it is not)—would not be a fraud on the Court. See Sur-Reply 1-10, attached hereto as Exhibit A.

- The Receiver's cited authority, SEC v. Wencke, 783 F.2d 829 (9th Cir. 1986), proves Weider's and Forman's point that if the Receiver wishes to pursue fraudulent transfer allegations, it must do so in the appropriate type of proceeding, with proper notice and an opportunity to respond—not in an unprecedented, untested, and expedited "reserve hearing." See Sur-Reply 14-15, attached hereto as Exhibit A.

- The Order Appointing Receiver does not allow the Receiver to treat all sale proceeds as a consolidated pool of money for claims distribution. See Sur-Reply 21-22, attached hereto as Exhibit A.

- The Receiver's purported concerns about copy-cat lawsuits and fairness to other investors who have joined its motion are irrelevant to the reserve hearing, unsubstantiated, and fail to justify a "free and clear" sale that disposes of a secured creditor's interests without compensation or process. See Sur-Reply 22-26, attached hereto as Exhibit A.

Lastly, Weider and Forman respectfully request permission to respond to new arguments raised by the "Rahnama Intervenors" after Weider and Forman filed the Response. Joinder, ECF No. 439. As the attached Sur-Reply explains, the Joinder is based on the incorrect premise that the receivables are not collateral for Weider's and Forman's loans, prematurely attempts to address claims distribution when the issue here is adequate protection following the "free and clear" sale, improperly attempts to elevate the status of investors to that of secured creditors, and

misunderstands the "equality is equity" principle that still honors the priority of secured creditors. See Sur-Reply 23-26, attached hereto as Exhibit A.[1]

For these reasons, Weider and Forman respectfully move for leave to file the attached Sur-Reply to the Receiver's Motion to Set Reserve Hearing.

Dated: May 17, 2017

Respectfully submitted by,

/s/ Jennifer E. LaGrange

Matthew D. Umhofer (CSB No. 206607)
matthew@spertuslaw.com
Jennifer E. LaGrange (CSB No. 238984)
jennifer@spertuslaw.com
SPERTUS, LANDES & UMHOFER, LLP
1990 South Bundy Dr., Suite 705
Los Angeles, California 90025
Telephone: (310) 826-4700

Joseph Mabe (OSB No. 045286)
jmabe@brownsteinrask.com
BROWNSTEIN RASK
1200 SW Main St.
Portland, Oregon 97205
Telephone: (503) 412-6744

Attorneys for Secured Creditors WEIDER HEALTH & FITNESS and BRUCE FORMAN

[1] The Sur-Reply also addresses two other Joinders filed before the Response (ECF Nos. 389-90), but only to note that they raise no independent arguments so do not change the analysis. See Sur-Reply 23-24, attached hereto as Exhibit A.

EXHIBIT A

EXHIBIT A

Joseph Mabe, OSB No. 045286
jmabe@brownsteinrask.com
BROWNSTEIN RASK
1200 SW Main St.
Portland, Oregon 97205
Telephone: (503) 412-6744

Matthew D. Umhofer (admitted *pro hac vice*; CSB No. 206607)
matthew@spertuslaw.com
Jennifer E. LaGrange (admitted *pro hac vice*; CSB No. 238984)
jennifer@spertuslaw.com
SPERTUS, LANDES & UMHOFER, LLP
1990 South Bundy Dr., Suite 705
Los Angeles, California 90025
Telephone: (310) 826-4700

Attorneys for Secured Creditors WEIDER HEALTH & FITNESS and BRUCE FORMAN

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. AEQUITAS MANAGEMENT, LLC; AEQUITAS HOLDINGS, LLC; AEQUITAS COMMERCIAL FINANCE, INC.; AEQUITAS CAPITAL MANAGEMENT, INC.; AEQUITAS INVESTMENT MANAGEMENT, LLC; ROBERT J. JESENIK; BRIAN A. OLIVER; and N. SCOTT GILLIS, Defendants.	Case No. 3:16-CV-00438-PK **SECURED CREDITORS WEIDER HEALTH & FITNESS'S AND BRUCE FORMAN'S SUR-REPLY TO RECEIVER'S MOTION TO SET RESERVE HEARING** **ORAL ARGUMENT SCHEDULED FOR MAY 24, 2017 PER ECF NO. 437**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

As Weider Health & Fitness (Weider) and Bruce Forman (Forman) demonstrated in their Response (ECF No. 391), the Fifth Amendment requires the Receiver to preserve the status quo by segregating the amount of Weider's and Forman's secured interests pending final adjudication of the extent, validity, and priority of their secured interests. The Fifth and Fourteenth Amendments require that, to the extent the Receiver wishes to pursue fraudulent transfer allegations, it do so in either a summary or plenary proceeding, depending on the allegations, and only after providing notice and a meaningful opportunity to respond. Nothing in the Receiver's Reply (ECF No. 418), including the evidence it submits for the first time (ECF No. 419), changes these constitutional guarantees or justifies an ad hoc hearing to reserve **less** than the disputed amount pending later, more robust adjudication.

I. The Receiver's Argument That Weider And Forman Are Attempting To Defraud The Court Is Baseless; The Receiver's Own (Inadmissible) Evidence Proves That The Receivables Are Part Of The Collateral For Weider's and Forman's Loans

The Receiver argues that Weider and Forman are intent on defrauding the Court by arguing that the collateral for their loans includes the receivables. Reply 1, 24, 28-29, ECF No. 418. According to the Receiver, if the Court ignores the complete definition of collateral, and relies on an email chain that post-dates the security agreement defining the collateral (attached as Exhibit C to the Declaration of Brad Foster), then it will prove that the collateral does not include the receivables. Id. This argument fails for at least nine independent reasons.

First, the Receiver bases its argument on inadmissible parol evidence. "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990).[1] In addition, "'extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face.'" Id. at 163. "Extrinsic evidence of the parties' intent with regard to language in a contract is admissible only if the language is ambiguous." United States v. Johnson, 43 F.3d 1308, 1310

[1] The security agreements are governed by, construed, and enforced in accordance with New York law. Forman Decl. Ex. C ¶ 11(d), Ex. G ¶ 10(d), Ex. K ¶ 11(d), ECF No. 345.

(9th Cir. 1995); accord Schron v. Grunstein, 32 Misc. 3d 231, 238 (N.Y. Sup. Ct. 2011). Here, **the Receiver does not even attempt to argue that the security agreements are ambiguous**; the Receiver argues only that the Court should ignore portions of the definition of collateral as "boilerplate," and instead, define the collateral by reference to Exhibit C. Reply 4-5 & n.1, ECF No. 418. There is no ambiguity, so Exhibit C is inadmissible. As the Receiver offers no other reason why receivables would not be part of the collateral, this alone ends the inquiry.

Second, the collateral unambiguously includes the receivables. A contract term is "ambiguous when it is 'reasonably susceptible of more than one interpretation," whereas a contract term is "unambiguous when the language used has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion." RE/MAX of N.Y., Inc. v. Energized Realty Group, LLC, 135 A.D.3d 924, 925 (N.Y. App. 2016). In interpreting contract terms, courts must "give fair meaning to **all of the language** employed by the parties, to reach a **practical interpretation** of the parties' expressions," and "**may not by construction** add or **excise terms**, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." Id. (emphasis added); accord Brinderson-Newberg Jt. Venture v. P. Erectors, Inc., 971 F.2d 272, 278–79 (9th Cir. 1992). Here, the security agreements define the collateral to include anything that gives value to the collateral companies, including their: accessories, tools, and supplies; products and produce; accounts, rents, monies, and payments arising out of the sale or disposition of the collateral; and proceeds from the sale or disposition of the collateral. Response 5, 17, ECF No. 391. The CarePayment platform consists of nothing but receivables, so the receivables are necessarily the tools, supplies, products, produce, etc. of the collateral. Id. **The Receiver does not dispute this**. Instead, the Receiver argues that the Court should excise these words from the definition of collateral as "boilerplate." Reply 4-5 & n.1, ECF No. 418. This is exactly what the Court **cannot** do. Notably, Weider and Forman expressly highlighted this issue (Response 17, ECF No. 391), but the Receiver still offers no alternative as to what these items might include if they do not include receivables.

Third, the Receiver offers no argument or evidence to support its assertion that the agreed-upon definition of collateral includes boilerplate. Moreover, even if the definition does include boilerplate, this alone would not render the language ambiguous or unenforceable. Schwartz v. Pillsbury Inc., 969 F.2d 840, 847 (9th Cir. 1992) (rejecting defendant's argument that language deeming a transaction to have occurred in New York should be disregarded as "boilerplate," because "even if this were so, New York law prohibits us from looking beyond the plain words of the contract to construe this unambiguous language").

Fourth, even if the Court were to consider the inadmissible parol evidence, it would prove that the receivables are part of the collateral. The Receiver argues that Weider and Forman "absolutely knew that they were not contracting for a security interest in the Receivables Assets," and "were flatly denied" security interests in the receivables, based on a June 2015 email chain attached as Exhibit C to the Foster Declaration. Reply 5-8, 28, ECF No. 418; Foster Decl. Ex. C, ECF No. 419. The Receiver is wrong for at least four reasons:

1. Exhibit C post-dates the security agreement in which the parties defined the collateral, and therefore, is irrelevant in interpreting what the parties meant in drafting the definition of collateral.

   The collateral was first defined in the October 3, 2014 Commercial Security Agreement, and includes equity interests in companies owned for the purpose of purchasing receivables, **as well as** the tools, supplies, products, produce, etc. of the collateral. Forman Decl. Ex. G ¶ 2, ECF No. 345. When Weider and Forman extended additional loans the following year, the new security agreements carried forward the same definition of collateral. Id. Ex. C ¶ 2, Ex. K ¶ 2. Exhibit C to the Foster Declaration, on the other hand, reflects negotiations between the parties that occurred between June 4, 2015 and June 15, 2015. Foster Decl. Ex. C, ECF No. 419. These June 2015 negotiations cannot reflect the intent of the parties in drafting the October 2014 definition of collateral.

2. Even if Exhibit C could be useful in interpreting the definition of collateral, **Exhibit C proves that the collateral includes the receivables**.

   The first email in the chain, from Brian Oliver to Forman on June 4, 2015 at 3:35 p.m., shows Oliver following up with Forman regarding two options for extending the term of the original $6 million loan and advancing additional funds. Foster Decl. Ex. C at 3, ECF No. 419. In describing the first option, Oliver writes:

> **Extend the** extending [sic] **$6,000,000, and consider advancing additional funds** anywhere up to $12,000,000 total**, to CarePayment Holdings, LLC secured by the same junior lien position on full recourse CarePayment receivables** not to exceed a 100% advance of cost (**as of 3/31/15 we had $48MM of funded CarePayment receivables, less $36MM owed in senior debt to Bank of America and Wells Fargo**; but there has been some growth since then and we expect a pretty significant ramp in the 2nd half of the year). In exchange for the extension of the maturity to 6/30/17 (2 years) we would be willing to increase the interest rate from the current 7.0% up to 11.0%.

Id. (emphasis added). In sum, Oliver referred to the receivables as collateral for the loans, and induced Weider and Forman into both extending and increasing the loans by emphasizing the value of the receivables. Id.

3. Exhibit C reflects failed negotiations over an alternative investment vehicle, not failed negotiations over the receivables themselves.

On June 9, 2015 at 10:53 a.m., in response to Oliver's request that Weider and Forman extend the original $6 million and consider loaning more money, Forman proposed an alternative, new structure for the collateral: a "**pool of carepayment receivables** (not carepayment holdings membership interest) **within our SPV**" and a "second lien interest/guarantee of carepayment llc." Foster Decl. Ex. C at 2, ECF No. 419 (emphasis added).

An SPV, or special purpose vehicle, is "[a] business established to perform no function other than to develop, own, and operate a large, complex project …, esp. so as to limit the number of creditors claiming against the project," which "provides additional protection for project lenders, which are usu. paid only out of the money generated by the entity's business, because there will be fewer competing claims for that money and because the entity will be less likely to be forced into bankruptcy." Special Purpose Vehicle (SPV), Black's Law Dictionary (10th ed. 2014).

Stated simply, Forman asked Oliver to create a new SPV that would contain a dedicated pool of receivables as an alternative form of collateral. Foster Decl. Ex. C at 2, ECF No. 419. This is summarized in the June 12, 2015 4:14 p.m. email from Oliver to Forman, which describes the "**Borrower**" under Weider's proposal as "**Weider SPV**," and the "**Collateral**" as "2nd lien on **dedicated pool** of CarePayment receivables." Id. at 1 (emphasis added).

On June 9, 2015 at 1:41 p.m., Oliver responded that he thought this proposal would face two challenges, one being that "I don't know if we can operationally **segregate pools of CarePayment receivables; and, particularly I don't think we would be able to segregate a pool of receivables into an SPV** and still utilize/access any of the senior leverage we have, as those receivables have to stay within the senior lender's SPV." Id. at 2 (emphasis added).

On June 12, 2015 at 4:14 p.m., having confirmed the segregation issue, Oliver explained that Aequitas "**cannot move pools of receivables to a separate, segregated SPV**," and as to the pre-existing Bank of America and Wells Fargo SPVs, "they require that the junior capital be in the form of equity as opposed to 2nd lien debt." Id. at 1 (emphasis added). Oliver explained that "the only structure we can really accommodate for the junior financing is at the parent entity level, secured by the equity of the underlying SVPs that own the receivables." Id.

This email chain shows that Aequitas declined to create a Weider SPV containing its own dedicated pool of receivables as an alternative form of collateral. Id. at 1-4. The email does not alter the collateral that Weider and Forman already had in October 2014, and retained in June 2015—equity interests **and** receivables, even according to Oliver's June 4, 2015 3:35 p.m. email (just not a dedicated pool of receivables in a separate SPV).[2]

4. The Receiver's focus on "pledge of equity interests" in isolation (Reply 6, ECF No. 418) improperly excises agreed-upon language from the definition of collateral.

   When Oliver summarized the offers and counter-offers on June 12, 2015 at 4:14 p.m., he short-handed "Collateral" to be "pledge of equity interests," "2nd lien on dedicated pool of CarePayment receivables," and "pledge of equity interests," respectively. Foster Decl. Ex. C at 1, ECF No. 419. Oliver's short-hand does not change the definition of collateral that both pre- and post-dated the email exchange, which unambiguously includes more than equity interests. Forman Decl. Ex. C ¶ 2, Ex. G ¶ 2, Ex. K ¶ 2, ECF No. 345.

Fifth, even if it were appropriate to examine parol evidence in interpreting the security agreements, full discovery and briefing would be needed before the Court could reach any conclusions regarding the receivables as collateral. To date, the Receiver has offered a skewed and incomplete picture of the negotiations—attaching only one email concerning these negotiations to its Reply (an email never provided to or discussed with counsel for Weider and Forman, thereby prompting this sur-reply). Litigation over the extent, validity, and priority of Weider's and Forman's interests in the receivables should, as the Receiver acknowledges, occur

[2] The Receiver faults Weider and Forman for referring to "Aequitas" companies and personnel where appropriate (Reply 1, ECF No. 418), yet Oliver himself referred to "Aequitas" as the entity negotiating extension of the original $6 million loan and a potential loan of additional funds (Foster Decl. Ex. C at 1, ECF No. 419).

after a full investigation and claims process (Response 8-9 n.3, ECF No. 391), or, at a minimum, after both parties have had a chance to exchange relevant documents (id. at 34-35).[3]

Sixth, the adequate protection requirement covers Weider's and Forman's interests in the receivables, even though the subsidiary companies did not sign the security agreements. As Weider and Forman explained, they have liens against the receivables and, even if they did not, protected "interests" include more than liens against the property to be sold, so includes their interests here. Response 22-23 & n.10, ECF No. 391. The Receiver continues to insist that only CarePayment Holdings signed the security agreements, and it does not have title to the receivables (its subsidiaries do), so CarePayment Holdings had no authority to grant a security interest in the receivables in the first place. Reply 1, 25-29, ECF No. 418. This is incorrect.

"Under the U.C.C., a debtor need not have title to collateral in order to grant a security interest in such collateral." In re WL Homes, LLC, 452 B.R. 138, 145 (Bankr. D. Del. 2011), aff'd, 534 Fed. App'x 165 (3d Cir. 2013). "'[C]ontrol over the collateral, rather than record ownership, is the key factor in determining a debtor's rights in collateral' for the purpose of granting a security interest." Id. "**[A] security interest in the subsidiary's asset granted by the parent's agent to a third party is enforceable if it otherwise satisfies the requirements set forth in Article 9 of the Uniform Commercial Code**." Id. at 140 (emphasis added). This is particularly true where, as here, the agents signing agreements on behalf of parent and subsidiary companies wear multiple hats in these companies. Id. (recognizing "legal significance" should be

[3] The Receiver's submission of this email in its Reply highlights the need for a **full** investigation, not an ad-hoc hearing based on incomplete evidence. The Receiver refers to the email as a "[r]ecently identified email communication" (Reply 1, 5, ECF No. 418), but knew about it more than two months ago when it also referred to "[n]ew information [that had] come to light" (Jan. 31, 2017 Report 39, ECF No. 365). Yet the Receiver did not provide Weider and Forman an opportunity to respond to the email at any time, let alone in its Response; instead, choosing to attach the email to the Reply only. Weider and Forman respectfully request that the Court prohibit future gamesmanship by enforcing the judicially-established procedures set forth in its Response, including proper notice of allegations, brought in a proper proceeding, with a meaningful opportunity to respond. United States v. Blau, 961 F. Supp. 626, 633 (S.D.N.Y. 1997), aff'd, 159 F.3d 68 (2d Cir. 1998) ("The Court is troubled by what it views as possible gamesmanship. This is the first time the Defendant has raised this issue.").

accorded to the actions of an agent who "wear[s] multiple hats" and acts on behalf of both the parent and subsidiary); In re Terrabon, Inc., 2013 WL 6157980, at *9 (Bankr. S.D. Tex. Nov. 22, 2013) (finding authority to grant security in collateral; "due to [executive's] undisputed knowledge of the fact of the Assignment, even though he made such assignment wearing his Subsidiary CEO hat, this Court imputes knowledge—and therefore assent—of the Assignment to the Debtor itself").[4] Indeed, if CarePayment Holdings had not had the authority to grant the collateral it granted, Weider and Forman would have a claim against CarePayment Holdings to recoup the $10.5 million they loaned. E.g., Benz v. State, 25 A.D.2d 482, 482 (N.Y. App. 1966) ("a contract may be rescinded for a unilateral mistake").[5]

Seventh, even if the Court were to conclude that the receivables themselves are not part of the collateral for Weider's and Forman's loans, Weider and Forman would **still** have an interest in the sale proceeds, and the Court would **still** be required to order adequate protection, because the "free and clear" sale diminished (if not rendered worthless) the value of Weider's and Forman's collateral. The Receiver acknowledges that Weider's and Forman's collateral

[4] See also In re Coupon Clearing Serv., Inc., 113 F.3d 1091, 1103 (9th Cir. 1997) ("we find that [agent company] had sufficient rights in the coupon proceeds [of principal company] to grant [a third party] a valid security interest, which properly attached to the coupon proceeds"); In re WL Homes, LLC, 452 B.R. at 146 ("The established case law is clear that a debtor may grant a security interest in collateral that the debtor does not actually own if the owner of such collateral consents to such an arrangement, because 'all of the courts that have considered the question have ruled that an owner's permission to use goods as collateral creates rights in the debtor sufficient to give rise to an enforceable security interest.'") (citations omitted); accord In re Stewart, 10 B.R. 214, 218 (Bankr. C.D. Cal. 1981); In re Helionetics, Inc., 70 B.R. 433, 436 (Bankr. C.D. Cal. 1987).

[5] The Receiver states that, if there is a Fifth Amendment takings claim here, it belongs to the subsidiary companies because their parent company conveyed their assets without their signatures. Reply 26, ECF No. 418. This argument fails for reasons discussed above and because a takings claim requires Government action—something that does not exist when a parent company validly assigns its rights in its subsidiaries' assets, but something that does exist if this Court endorses a "free and clear" sale that disposed of Weider's and Forman's collateral without compensation. Broad v. Sealaska Corp., 85 F.3d 422, 431 (9th Cir. 1996) ("Regulatory takings generally require some government regulation or other government action that compels the owner to sacrifice all economically viable use of his or her property…. Without governmental encouragement or coercion, actions taken by private corporations pursuant to federal law do not transmute into government action under the Fifth Amendment.").

includes equity interests in the subsidiary companies, and that the "free and clear" sale disposed of those companies' main—and only—asset. Reply 2, 4-6 & n.1, 10, 21, 24, 27, 29, ECF No. 418. Courts cannot authorize "free and clear" sales that deprive a secured creditor of the value of its collateral, even when the item being sold is not itself part of that collateral. Response 17, 23, ECF No. 391. This is because, as a matter of both policy and constitutional law, "secured creditors should not be deprived of the benefit of their bargain." Bankruptcy Reform Act, H.R. Rep. 95-595, 339 (1978), 1978 U.S.C.C.A.N. 5963, 6295. Adequate protection is the mechanism by which, although "the creditor might not receive his bargain in kind, … the secured creditor receives in value essentially what he bargained for." Id. Indeed, the Ninth Circuit expressly holds that a "'security-holder must be protected against diminutions in the value of the security that arise **not only from sale,** but also from other events or transactions **that damage the security**.'" In re Pac./W. Comms. Group, Inc., 301 F.3d 1150, 1153 (9th Cir. 2002) (explaining a security interest includes identifiable proceeds from sale, destruction, or diminution of collateral) (emphasis added) (citations omitted); see also N.Y. U.C.C. Law § 9-306 (showing New York's U.C.C. § 9-306 is identical to California's U.C.C. § 9-306); accord McGonigle v. Combs, 968 F.2d 810, 828 (9th Cir. 1992); In re Wiersma, 324 B.R. 92, 108 (Bankr. App. 9th Cir. 2005), rev'd in part on other grounds, 483 F.3d 933 (9th Cir. 2007). Any other result would mean that this Court approved a sale that destroyed the value of Weider's and Forman's collateral, without their contractually-required consent, over their objection, without the protections surrounding "free and clear" sales, and with no compensation or process.[6]

[6] In the bankruptcy context, any shortfall in adequate protection for a secured creditor is remedied by a superpriority claim for the difference in value, which is paid **before** any other administrative expense claim (e.g., the receiver's bill). 11 U.S.C. § 507(b); In re Ctr. Wholesale, Inc., 759 F.2d 1440, 1451 (9th Cir. 1985); In re Mazama Timber Prods., Inc., 63 B.R. 280, 288 (Bankr. D. Or. 1986). Of course, as this Court recognizes, by the time of any later distribution in this SEC receivership based on an alleged Ponzi scheme, the money may already be gone. Response 7, ECF No. 391. And, if the Receiver remains true to form, it is likely to argue against applying the Bankruptcy Code's superiority protections, leaving Weider and Forman with nothing.

The Receiver states that Weider's and Forman's claims would have the lowest priority (Reply 24 & n.7, ECF No. 418), but its cited case supports Weider's and Forman's first priority as secured creditors. N. Pac. R. Co. v. Boyd, 228 U.S. 482, 508 (1913) ("the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever"). Indeed, in this series of cases, the United States Supreme Court:

> [R]eaffirm[s] the 'familiar rule' that 'the stockholder's interest in the property is subordinate to the rights of creditors. First, of secured, and then of unsecured, creditors.

Case v. L.A. Lumber Prods. Co., 308 U.S. 106, 116 (1939). The Receiver's reference to Weider and Forman as shareholders (Reply 25, ECF No. 418) makes no sense, as even the Receiver acknowledges that Weider and Forman are secured creditors (id. at 2, 4-6 & n.1, 10, 21, 24, 27, 29).

Eighth, setting all of this aside, the Court simply does not need to reach any of these issues to determine the amount of reserve required here. As Weider and Forman explained, the Court need not resolve a "bona fide dispute" before ordering a "free and clear" sale; instead, once the Court determines that a "bona fide dispute" exists, the proceeds of the sale are held subject to the disputed interest and later distributed as dictated by final resolution of the dispute. Response 1, 14, 18, ECF No. 391. The Court need do nothing more at this time to preserve the status quo pending the claims process. Id. The Receiver acknowledges this. Reply 28, ECF No. 418 ("This Court need not engage these issues now[.]").

Ninth, the Receiver's claim of fraud is baseless, and calls the Receiver's impartiality into question. Weider's and Forman's arguments—which are matters of contract interpretation and commercial law—cannot constitute a fraud on the Court. "Fraud, civil or criminal, is a serious charge." Klein v. Heckler, 761 F.2d 1304, 1312 (9th Cir. 1985). "[T]he phrase, fraud on the court, is generally limited to egregious conduct attacking the judicial machinery itself, such as bribing a judge." U.S. ex rel. Bonner v. Warden, Stateville Corr. Ctr., 78 F.R.D. 344, 347 (N.D. Ill. 1978). It refers to the "'species of fraud which does or attempts to, defile the court itself, … so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are

presented for adjudication.'" Latshaw v. Trainer Wortham & Co., Inc., 452 F.3d 1097, 1104 (9th Cir. 2006). Even unpersuasive or erroneous legal arguments are not frauds on the courts. A.B. Dick Co. v. Marr, 95 F. Supp. 83, 99 (S.D.N.Y. 1950) ("If [legal] argument constitutes fraud upon the courts, the courts are being defrauded every day."); see also Super. Seafoods, Inc. v. Tyson Foods, Inc., 620 F.3d 873, 879 (8th Cir. 2010) ("purportedly incorrect overstatement of the extent of [the company's] rights" was not fraud on the court); Oxxford Clothes XX, Inc. v. Expeditors Int'l of Wash., Inc., 127 F.3d 574, 578 (7th Cir. 1997) ("An erroneous legal contention, being out in the open as it were, does not have obstructive capability, and is not fraud merely because if believed it would confer an advantage on the party making it."); accord Hongsermeier v. Commissioner, 621 F.3d 890, 900 (9th Cir. 2010). As shown above, Weider's and Forman's arguments are not erroneous—they are meritorious, and the Receiver has been unable to articulate any reason why the receivables are not collateral for the secured loans. The Receiver may take allegations of fraud-on-the-court lightly, but Weider and Forman do not. That the Receiver would resort to this level of baseless accusation continues to beg the question whether the Receiver is acting in the best interests of **all** creditors and investors, as it is required to do. Response 11-12, ECF No. 391.

II. The Receiver Offers No Law Or Logic Supporting Its Proposed Hearing

The Receiver's remaining arguments fail to address the constitutional, procedural, factual, and logistical impediments to the reserve hearing it requests.

A. The Receiver's Proposed Hearing Is Premature And Impractical

Weider and Forman have demonstrated that no fact-finding is necessary to determine the amount of reserve because the Receiver obtained a "free and clear" sale on the basis of a "bona fide dispute," so the Fifth Amendment now requires the Receiver to segregate the sale proceeds representing the value of Weider's and Forman's interests until final adjudication of that "bona fide dispute." Response 1, 13-23, ECF No. 391. It would be premature and impractical to attempt to resolve the "bona fide dispute" at this time because the Receiver's arguments depend on resolving issues that are currently being litigated in the underlying lawsuit—to which Weider and Forman

are not even parties. Id. at 2, 24-34. Indeed, the Reply clarifies that the Receiver intends the hearing to cover fraudulent transfer allegations (Reply 17, 20-23, 30, ECF No. 418), but these allegations depend on discovery from and about the underlying defendants, who are the alleged Ponzi scheme operators and whose intent and solvency matters (Response 27-30, ECF No. 391).

The Receiver concedes that the Bankruptcy Code would require segregating the entire disputed amount without any need for a hearing, but argues that this Court is not bound by the Bankruptcy Code and should choose not to follow it. Reply 14-15, 29, ECF No. 418. Yet the Receiver offers **no** judicially-approved alternative procedure for the Court to follow, **no** reason why it was appropriate for the Court to look to the Bankruptcy Code in approving the "free and clear" sale but the Court is now free to ignore the Bankruptcy Code's constitutional limitations on "free and clear" sales (Sale Mot. ¶ 30, ECF No. 323), and **no** response to the leading treatise on receiverships explaining that the Bankruptcy's Code's adequate protection procedures should apply to "free and clear" sales (Response 18-20, ECF No. 391). In attempting to distinguish one of Weider's and Forman's cited cases, the Receiver does nothing more than underscore that Weider's and Forman's secured interests in the collateral transferred to the proceeds of the "free and clear" sale, and therefore, the proceeds representing the value of their interests must now be protected pending final adjudication. Reply 22, ECF No. 418. Notably, the Receiver has not—since January—provided any authority for its approach, or coherent reason why this Court should not look to the Bankruptcy Code for guidance here, as other federal courts have done.

The Receiver argues that Weider and Forman offered no authority from the receivership context supporting its position. Reply 24, ECF No. 418. This is incorrect. Weider and Forman cited the above discussion of the leading receivership treatise, along with SEC v. Capital Cove Bancorp LLC, 2015 WL 9701154 (C.D. Cal. Oct. 13, 2015), and SEC v. Kirkland, 2008 WL 4491528 (M.D. Fla. Sept. 30, 2008), from the receivership context. Response 13, 14, 18, 19, 24, 25, ECF No. 391. The Receiver ignores the treatise and tries to distinguish the cases by arguing that those courts lacked discretion to ignore the Bankruptcy Code in their SEC receiverships because of local rules or tax law. Reply 15, ECF No. 418. Yet Kirkland explains that "[t]he

provisions of the Bankruptcy Code governing trustees are often relied upon for guidance in … receivership cases." 2008 WL 4491528, at *8 n.10. It is the Receiver that has failed to provide any authority (whether receivership or not) in which a Court denied protection when a "free and clear" sale disposed of or impaired the value of a secured creditor's collateral.

The Receiver characterizes Weider's and Forman's opposition to the reserve hearing as a "novel" position, an attempt to take advantage of "the Receiver's still developing knowledge," an attempt to prevent a full investigation into potential fraudulent transfer, and a request for this Court to prejudge their claim. Reply 3, 8, 10, 12-13, 20, 23-24, ECF No. 418. This is ironic. The Receiver asked to sell the collateral for Weider's and Forman's secured loans without mentioning Weider's and Forman's interests. Response 6, ECF No. 391. To preserve their rights, Weider and Forman explained the nature of their interests to the Court, and rather than object to the sale outright, asked the Court for adequate protection for their secured interests in the form of **either** segregation of the amount of their interests pending the later claims process **or** immediate repayment to extinguish their interests. Weider & Forman Limited Obj. 2-3, 25-26, 29-30, ECF No. 344. **The first option allows the Receiver to take as much time as it wants to investigate any alleged fraudulent transfers**. It is the Receiver that asks the Court to immediately hold a hearing to explore the same issues that the actual parties to this dispute are still litigating, in less time than the actual parties, without any notice or substantive and procedural protections, to reach some interim decision that will not determine Weider's and Forman's "ultimate right to a claim against CP Holdings," and without any precedent or logic supporting such a hearing. Reply 3, 8-9, 13, 23, ECF No. 418. This should not be allowed.

B. The Receiver's Proposed Hearing Would Violate The Fifth Amendment's Prohibition Against Government Takings And The Fifth And Fourteenth Amendments' Due Process Clauses

The Receiver argues that the Fifth Amendment requires only the notice, discovery, and opportunity to present argument that it proposes. Reply 16-20, 26, ECF No. 418. To recap, that "opportunity" consists of 60 days for written discovery, 10 depositions in 45 days, and a two-day

hearing to cover issues that are the subject of the underlying lawsuit **and** issues specific to the Weider and Forman transactions—not to mention **expert** discovery and testimony that the Receiver now states may be required (Reply 23, ECF No. 418)—which is less time than the actual parties have been given to litigate the underlying case and assumes that the named defendants and other deponents will be willing to sit for depositions and testimony when they have not had a chance to prepare their claims and defenses. Mot. 28-30, ECF No. 383; Response 31, ECF No. 391. In making this argument, the Receiver improperly conflates and then ignores distinct Fifth and Fourteenth Amendment requirements, both of which are required here.

The relief the Receiver seeks—the ability to take and spend the sale proceeds representing the value of Weider's and Forman's interests based on "partial findings" (Reply 17, ECF No. 418)—would violate the Fifth Amendment. Weider's and Forman's secured interests remain their private property unless and until voided in a full and fair proceeding. Response 24-25, ECF No. 391. The Fifth Amendment "prohibits the taking of private property by the government without just compensation." David Hill Dev., LLC v. City of Forest Grove, 688 F. Supp. 2d 1193, 1206 (D. Or. 2010). To ensure that a court order approving a "free and clear" sale does not constitute a government taking without just compensation, the interest-holder's interest in the property that is sold **must** transfer to the proceeds of the sale, and those proceeds **must** be protected for the interest-holder. Response 14-16, 18-20, ECF No. 391. Stated differently, to ensure that this Court's order approving the "free and clear" sale did not unconstitutionally deprive Weider and Forman of their secured interests without any compensation or process whatsoever, the sale proceeds representing the value of their interests must be preserved pending a full and fair proceeding. Id.

Separately, the process the Receiver proposes—an unprecedented, untested, and expedited proceeding to achieve "partial findings" for the express purpose of voiding Weider's and Forman's interests (Mot. 28-30, ECF No. 383; Reply 17, ECF No. 418)—would violate the Fifth and Fourteenth Amendments. When a receiver wishes to challenge an interest as a voidable fraudulent transfer, both the Fifth and Fourteenth Amendments' Due Process Clauses require that the Receiver do so in the appropriate type of proceeding—summary or plenary— which can be

determined only after the receiver's allegations are made explicit. Response 32-33, ECF No. 391. Whether summary or plenary, the fraudulent transfer allegations can then be litigated only after notice of the allegations and a fair opportunity to litigate them. Id. Weider and Forman still do not have notice of the Receiver's allegations, let alone the particularized notice required by Federal Rule of Civil Procedure 9(b). Id. at 32-33. Without notice, there is no authority that would allow the Receiver to proceed with summary proceedings in lieu of plenary proceedings. Id. Given the issues that must be decided to rule on fraudulent transfer allegations, and the fact that they are inextricably intertwined with the underlying litigation, the Receiver's proposed hearing simply cannot provide the requisite meaningful opportunity for a response. Id. at 2, 25-33.

The Receiver cites SEC v. Wencke, 783 F.2d 829 (9th Cir. 1986), as support for its position. Reply 3, 17-19, ECF No. 418. Wencke is inapposite. There, the SEC obtained a judgment against the securities violators, then the Court appointed a receiver to manage the companies' assets, and then the receiver pursued fraudulent transfer allegations in two ways: it filed a disgorgement application against various investors, including Ramapo and deLusignan, in the underlying proceeding itself (thereby initiating a summary proceeding) and it filed a separate adversary action. 783 F.2d at 832. In the summary proceeding, the district court ordered Ramapo to disgorge its shares, which rendered deLusignan's shares worthless. Id. at 834. The Ninth Circuit rejected deLusignan's challenge to the use of summary proceedings because deLusignan had proper notice through service of a disgorgement application, and over two years for discovery and briefing, but had done nothing. Id. at 836-38. There are no analogous facts here: there is no underlying judgment against the alleged Ponzi scheme operators; the Receiver has filed neither a disgorgement application nor an adversary action; and Weider and Forman certainly have not had two years for discovery and briefing.

The Receiver next appears to argue that the Court should imagine "a hypothetical pleading" filed by the Receiver, then construe all "facts and inferences" from it in the Receiver's favor, and then deem the Receiver to have "stated a claim" for fraudulent transfer, which will then presumably constitute sufficient notice of its allegations. Reply 20-23, ECF No. 418. The Receiver's own

caselaw required filing and service of a disgorgement application to institute summary proceedings. Wencke, 783 F.2d at 832. Whether summary proceedings are permissible at all depends on the nature of the Receiver's allegations. Response 32-33, ECF No. 391. And fraudulent transfer must be plead with particularity. In re Berjac of Oregon, 538 B.R. 67, 80 (D. Or. 2015) (allegations of fraudulent transfer must comply with Rule 9(b)'s heightened pleading requirements).

The Receiver contends that Weider's and Forman's concerns regarding the lack of a clearly-defined procedure for non-parties to conduct discovery (Response 30, ECF No. 391) is meritless because Weider and Forman can intervene and become parties if they want discovery, non-parties are allowed discovery in summary proceedings, and "the Court will order discovery" (Reply 18-19, ECF No. 418). When counsel for Weider and Forman suggested a motion for and complaint in intervention, this Court stated—consistent with the Receiver's repeated insistence on a later, full investigation and claims process—that it "would likely stay the declaratory relief on your claim until all the claims are properly before me." Jan. 20, 2017 Hr'g Tr. 28:13-25. The Receiver has not instituted summary proceedings by filing an application specifically notifying Weider and Forman of its allegations. Wencke, 783 F.2d 832. And the Receiver's comment that the Court can simply order discovery ignores that: Weider and Forman are the ones who must propound and enforce discovery, yet there is no procedure for them to do so as non-parties; any discovery would duplicate discovery being conducted by the actual parties, but occur through something probably akin to cumbersome third-party procedures; and, of course, this entire procedure would unjustly saddle non-party, potentially-defrauded victims with the cost of litigating this action before the actually parties litigate it. Response 27-34, ECF No. 391.

C. The Receiver's Merit-Based Arguments Have Nothing To Do With The Need For A Reserve Hearing And Remain Premature To Adjudicate At This Time

The Receiver repeats its arguments that Weider and Forman did not provide $6 million of "fair consideration" to CarePayment Holdings and alleges that Weider and Forman must have known that "fraud was afoot." Reply 1, 3, 5-6, 12-13, 16-17, 20-23, ECF No. 418. According to the Receiver, if the Court ignores (1) the wire transfer receipts proving Weider's loan of $12

million to CSF Leverage I, LLC, (2) CSF's obligation to timely repay that $12 million, and (3) Weider's agreement to forego timely repayment of $6 million from CSF in exchange for loaning that sum to CarePayment Holdings on new terms, and—further—if the Court relies on two isolated emails attached as Exhibits A and B to the Foster Declaration, then the Court can conclude that the Receiver has stated a claim for fraudulent transfer, which presumably somehow justifies a reserve hearing. Id. This does not justify a reserve hearing for at least three reasons.

First, these arguments are irrelevant to the need for a reserve hearing. A reserve preserves the status quo pending final adjudication of allegations (if any) that Weider's and Forman's interests are voidable. Response 13-23, ECF No. 391. By contrast, the Receiver's fraudulent transfer allegations are relevant to the final adjudication itself. More specifically, the Receiver's allegations concerning Exhibits A and B pertain to either a good faith defense to fraudulent transfer (if the allegation is actual fraud) or an alleged lack of good faith (if the allegation is constructive fraud). Id. at 21 n.8, 26-28, 30, 31 n.15, 33. Litigation concerning good faith follows litigation over whether the alleged Ponzi scheme operators committed actual or constructive fraud in the first place, something that has not been established here. Id. None of these issues can be litigated under the Receiver's proposed timeline, and none is relevant to the amount of reserve, which is based on the amount of the disputed interest. Id. at 30-33.

Second, the Receiver's arguments do not address the wire transfer receipts and contract documents proving that the allegations will fail. Id. at 4, 17-18, 33-34.

Third, Exhibits A and B do not show lack of good faith because they do not relate to the CarePayment Holdings transaction at all. Lack of good faith is demonstrated by showing either that the investor knew that the debtor was operating a Ponzi scheme, or by showing facts sufficient to have put a reasonable investor on notice that the debtor intended to defraud its creditors or was insolvent. In re Agric. Research & Tech. Group, Inc., 916 F.2d 528, 535 (9th Cir. 1990). Here, the debtor is CarePayment Holdings and the challenged transaction is the October 2014 $6 million loan to CarePayment Holdings. Exhibits A and B have nothing to do with CarePayment Holdings, and contain nothing that would cause a reasonable person to

suspect that CarePayment Holdings was operating a Ponzi scheme, intended to defraud its creditors, or was insolvent. Indeed, CarePayment Holdings was and is more than solvent. Sept. 14, 2016 Report 51-52, ECF No. 246.

Although no further inquiry is necessary, Exhibits A and B also show nothing about the intent or solvency of either CSF or Aequitas Commercial Finance, LLC (ACF).[7] Exhibits A and B relate to Corinthian Colleges, Inc. (sometimes referred to by its ticker symbol "COCO"), **which is not an Aequitas entity at all**, but which sold student loan receivables to CSF (which is an Aequitas subsidiary). Foster Decl. Exs. A-B, ECF No. 419. Corinthian receivables were part of the collateral for Weider's pre-existing 2013 loans to CSF. Response 4, ECF No. 391; Forman Decl. Ex. A ¶¶ 14(f) & (j), ECF No. 392. Corinthian was under investigation by various entities, but this was and had been publicly-known for some time. Forman Decl. Ex. A ¶ 4(d)(ii).[8] Exhibit A shows Forman checking in with Aequitas personnel about the status of the collateral in light of the ongoing investigations into Corinthian. Foster Decl. Ex. A, ECF No. 419. Exhibit B was written on September 22, 2014—six days after the Consumer Financial Protection Bureau filed a lawsuit against Corinthian for false advertising—so presumably captures Olaf Janke's perception of Forman's reaction to that event, but would require input from the Aequitas personnel who authored it for more background as to its meaning. Id. Ex. B; CFPB v. Corinthian Colleges, Inc., No. 14-cv-7194 (N.D. Ill.) (filed Sept. 16, 2014). Even then, Exhibit B does nothing to show that either CSF or ACF were operating a Ponzi scheme, intended to defraud its creditors, or were insolvent. Indeed, in a September 30, 2014 balance sheet certified by Olaf Janke, Chief Financial

[7] ACF is CarePayment Holdings' ultimate parent, and the guarantor of the $6 million loan. Jan. 31, 2017 Report Ex. A, ECF No. 365; Forman Decl. Ex. H, ECF No. 345.

[8] See also Corinthian Colleges, Inc., Annual Report (Form 10-K) at 19, 52-54 (Sept. 3, 2013) available at https://www.sec.gov/Archives/edgar/data/1066134/000104746913008803/a2216385z10-k.htm (disclosing April 2012 investigative demand from Consumer Financial Protection Bureau, June 2013 subpoena from SEC, and inquiries from state attorneys general); Corinthian Colleges, Inc., Annual Report (Form 10-K) at 21, 56-58 (Aug. 24, 2012), available at https://www.sec.gov/Archives/edgar/data/1066134/000104746912008511/a2210652z10-k.htm (making similar disclosures).

Officer of Aequitas Capital Management, Inc., Aequitas represented CSF's total equity as approximately $100 million.[9] Thus, Exhibits A and B do nothing to show lack of good faith.[10]

D. Contrary To The Receiver's Position, Almost Every Investor In The Receivership Entities Is Not Similarly Situated To Weider And Forman

The Receiver argues that providing adequate protection could potentially "ensnare this entire receivership proceeding" because almost every investor can claim security interests in ACF's subsidiaries, which includes CarePayment Holdings and its subsidiaries. Reply 9-10, 24, ECF No. 418. The Receiver submits Exhibit D to the Foster Declaration as an "exemplar promissory note from ACF" and proof that other investors are secured by equity interests in all ACF subsidiaries, including CarePayment Holdings, placing them in the same position as Weider and Forman. Id. at 10. Exhibit D is not specific to the CarePayment platform, and regardless, proves that Weider's and Forman's claims take priority over other investors' claims.

Exhibit D repeatedly states that these other investors' claims are subordinate to those of senior secured creditors:

- "This is one of a series of Secured **Subordinated** Promissory Notes (collectively, the 'Secured Notes') issued by Maker [ACF] which comprise the **revolving**

[9] Weider and Forman will produce this and other balance sheets if and when ordered by the Court, and will look to the Court for guidance regarding whether they should produce them confidentially, given that Aequitas marked them "Confidential."

[10] The Receiver argues that it can establish fraudulent transfer based on intent to defraud if it can show that Weider and Forman lacked good faith. Reply 23, ECF No. 418. The Receiver continues to misunderstand the elements of fraudulent transfer. Response 26-28, 33-34, ECF No. 391. It is the intent and solvency of the **debtor**—CarePayment Holdings—that matters in proving fraudulent transfer; good faith is either an affirmative defense to a claim of actual fraud, or an element of a claim for constructive fraud. Id.; see also In re Bledsoe, 569 F.3d 1106, 1109 (9th Cir. 2009) ("Federal bankruptcy law, like state fraudulent transfer laws, generally allows a creditor to ask the court to void certain transfers if the creditor can establish either actual fraud or constructive fraud. An actual fraud theory alleges that the debtor transferred assets … and that the debtor did so with a fraudulent intent. Constructive fraud proceeds on the theory that, although the debtor may not have had a fraudulent intent, the court nevertheless should void the transfer, usually because the debtor received inadequate consideration.").

subordinated debt facility arranged by Maker." Foster Decl. Ex. D at 1, ECF No. 419 (emphasis added).

- "**The Lien on the Collateral for the benefit of Holder is expressly subordinate to any security interest granted by Maker to secure Senior Indebtedness (as defined below)**." Id. at 2 (emphasis added).

- "'Senior Creditor' means any bank, commercial finance company, insurance company, surety company or other institutional lender, or other person who provides a credit facility to Maker or any subsidiary of Maker." Id. at 3.[11]

- "'Senior Indebtedness' means all obligations now or hereafter owed by Maker or any subsidiary of Maker to Senior Creditors for or in connection with borrowed money, capitalized leases, guaranties, surety bonds or other similar obligation." Id.

- "**Holder**, by acceptance hereof, **acknowledges that this Note shall be subordinate and junior in right of payment to all Senior Indebtedness** (as defined herein) of Maker." Id. (emphasis added).

- "Upon any dissolution, winding up, liquidation or reorganization of Maker, whether voluntary or involuntary, or in bankruptcy, insolvency, **receivership** or other proceedings, **all Senior Indebtedness shall first be paid in full in cash, or payment thereof provided for, before any payment is made on the obligations evidenced by this Note, and any payment received by Holder in violation of the foregoing shall be paid to the holders of Senior Indebtedness for application to the payment of all Senior Indebtedness remaining unpaid to the extent necessary to pay all Senior Indebtedness in full in cash, after giving effect to any concurrent payment to the holders of Senior Indebtedness**. The provisions of this paragraph are included solely for the purpose of **defining the relative rights of Holder and holders of Senior Indebtedness**, and nothing herein shall impair, as between Maker and Holder, Maker's unconditional and absolute obligation to pay Holder all amounts owing hereunder." Id. at 4 (emphasis added).

- "Notwithstanding the foregoing, **unless all of the Senior Indebtedness has been paid in full, Holder shall not take any of the following actions without consent of all Senior Creditors** (which consent may be withheld in the sole and absolute discretion of the Senior Creditors) … : … (b) Possess any of Maker's assets, or enforce any security interests in, foreclose, levy or execute upon or collect or attach any such assets, whether by private or judicial action or otherwise; … (d) Contest, protest or object to any foreclosure proceeding,

[11] A "credit facility" is a "formal agreement[] to extend credit," and can take many forms, including the form of a term loan. Mullins v. TestAmerica, Inc., 564 F.3d 386, 410 & n.10 (5th Cir. 2009); accord In re Friedman's Inc., 385 B.R. 381, 401 n.4 (S.D. Ga. 2008), vacated in part on other grounds, 394 B.R. 623 (S.D. Ga. 2008). A "term loan" is "[a] loan with a specified due date, usu. of more than one year." Term Loan, Black's Law Dictionary (10th ed. 2014).

> postpetition financing, use of cash collateral, or other action brought by a Senior Creditor or any other exercise by a Senior Creditor of any rights and remedies under any of its loan documents. **Holder acknowledges** and agrees that the fact that Holder can take the above-described actions under the circumstances specified in the foregoing paragraphs **does not entitle Holder to receive or obtain any payments in respect of this Note, or to accept or obtain any assets (or any interest therein) of Maker, if Maker is in default of any of its obligations with respect to Senior Indebtedness**." Id. at 4-5 (emphasis added).

Weider and Forman are senior secured creditors because:

- They loaned $10.5 million to CarePayment Holdings, an ACF subsidiary, as evidenced by term loan agreements. Forman Decl. Exs. A-L, ECF No. 345.
- The security agreements provide Weider and Forman with "**a first priority Security Interest in the Collateral**." Forman Decl. Ex. A ¶ 2(b), Ex. E ¶ 2(b), Ex. I ¶ 2(b), ECF No. 345.
- And CarePayment Holdings agreed to "**do all things necessary to preserve and keep in full force and effect** the perfection and **first lien priority of the Security Interest**." Id. Ex. A ¶ 4(a), Ex. E ¶ 4(a), Ex. I ¶ 4(a) (emphasis added).

Thus, unlike other investors, Weider and Forman are secured creditors of CarePayment Holdings itself and indisputably in a priority position.

This result is not unfair. "[A] receiver appointed by a federal court takes property **subject to all liens, priorities**, or privileges existing or accruing under the laws of the state." Marshall v. New York, 254 U.S. 380, 385 (1920) (emphasis added). The priority of secured creditors is indisputable. In re Anchorage Int'l Inn, Inc., 718 F.2d 1446, 1449 (9th Cir. 1983) ("liens are not void in bankruptcy simply because they favor secured creditors at the expense of general creditors"); Butler v. Pac. Nat'l Ins. Co., 375 F.2d 518, 521 (9th Cir. 1967) (recognizing "the priority of the secured creditors"); see also Ticonic Nat. Bank v. Sprague, 303 U.S. 406, 412 (1938) ("to the extent that one debt is secured and another is not there is manifestly an inequality of rights between the secured and unsecured creditors, which cannot be affected by the principle of equality of distribution").

The Receiver argues that many "investors predate Weider/Forman," which would mean that their liens are senior to Weider's and Forman's liens. Reply 10-11, ECF No. 418. This does nothing to show that these or any other investors have a secured interest in CarePayment

receivables, which are the subject of the "free and clear" sale at issue here. Regardless, and assuming arguendo that these investors have liens, the plain language of their agreements dictate that their interests are subordinate to senior secured creditors like Weider and Forman. Lastly, priority among secured creditors of the same collateral is determined by the first-in-time to perfect a lien, not the first-in-time to invest or loan money. N.Y. U.C.C. Law § 9-322(a)(1) ("[P]riority among conflicting security interests … in the same collateral is determined according to the following rules: (1) Conflicting perfected security interests … rank according to priority in time of filing or perfection."); Edwards v. Your Credit Inc., 148 F.3d 427, 437 (5th Cir. 1998) ("between two perfected secured creditors, the creditor that perfects first in time receives priority"); In re Microfab, Inc., 105 B.R. 152, 158 (Bankr. D. Mass. 1989) (referring to "'first in time, first in right' rule, which governs priority among secured creditors").

The Receiver contends that Terrell Group Management, LLC (TGM) receives priority because it "has an ostensibly valid lien in the very asset the sale of which resulted in the proceeds subject to the reserve." Reply 9 n.3, ECF No. 418. So too do Weider and Forman. Weider & Forman Limited Obj. 5-8, 15-16, ECF No. 344; Response 4-5, 16-18, ECF No. 391. Even the Receiver agreed with this before Weider and Forman filed their limited objection. Response 16, ECF No. 391. Therefore, Weider's and Forman's claims require adequate protection.

E. The Receivership Order Does Not Allow The Receiver To Treat The Receivership Entity As A Consolidated Entity For All Purposes

The Receiver argues that it should not be required to segregate funds from the "free and clear" sale because the Order Appointing Receiver allows it to treat the proceeds as part of a consolidated pool of money. Reply 11-12, ECF No. 418. The Receiver misreads the order, which simply allows the Receiver to use money from any entity to pay receivership expenses in the ordinary course of discharging its duties, but does not allow the Receiver to consolidate money from any source into a general pool for the benefit of all claimants. Order Appointing Receiver ¶ 6(D), ECF No. 156. Specifically, the Order Appointing Receiver states that:

> Subject to the specific provisions in Sections IV through XV, below, the Receiver shall have the following general powers and duties:
>
> To use Receivership Property for the benefit of the Receivership Entity, which, from the date of this Order, **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; **however, this provision shall have no force or effect with respect to whether the Receivership Entity shall be treated as a consolidated enterprise for the distribution (claims payment) phase of this matter** nor after a motion and court order prospectively making this paragraph of no further force or effect[.]

Id. (emphasis added). Indeed, the Order Appointing Receiver envisions the Receiver establishing unique custodial accounts for individual Receivership Entities to protect each entity's individual assets. Id. ¶¶ 25-27.

F. The Receiver Offers No Evidence That Providing Adequate Protection Will Leave Insufficient Funds For Its Investigation

Weider and Forman demonstrated that providing adequate protection does not negatively impact the amount of money available to fund the Receivership and its investigation because Weider's and Forman's interests are worth $13,211,460 as of January 18, 2017 plus interest as it accrues, but the sale will likely generate at least $122 million ($70 million attributable to receivables), and the receivables are only one of Aequitas' many assets. Response 2, 18, 21 n.7, ECF No. 391. In its Motion, the Receiver argued that adequate protection would render about $20 million unavailable for its investigation over the course of three years, factoring in interest. Mot. 1, 30, ECF No. 383. Now, in its Reply, the Receiver argues that Weider and Forman are essentially asking this Court to silo all of the proceeds from every sale on an entity-by-entity basis, thereby preventing the Receiver's investigation into possible fraud. Reply 2, 9, 11-13, 24, ECF No. 418. This is demonstrably false. Weider/Forman Limited Obj. 2-3, 25-26, 29-30, ECF No. 344; Response 2, 18, 21 n.7, ECF No. 391. Weider and Forman ask this Court to protect their secured interests, which is necessary because, ever since they filed a limited objection to the sale to preserve their rights, the Receiver has been overtly hostile and refused to provide the same protection it is providing to other secured creditors. Id. The Receiver has not demonstrated that

the approximately $122 million generated from the CarePayment sale, along with the millions of dollars generated from other Aequitas sales, are insufficient to fund its investigation.

It is worth noting that the Receiver's proposed reserve hearing (not to mention the briefing that has occurred in connection with it) is likely to consume a substantial amount of Receivership money, admittedly not result in a final adjudication of claims, and duplicate the underlying litigation. This is wasteful, and the cost is being borne not by the Receiver, but by the Receivership Estate.

The Receiver argues that it is inconsistent for Weider and Forman to request a reserve to ensure there are funds to satisfy their claims at the end of these proceedings, while at the same time noting that "the Receivership is awash in money." Reply 12, ECF No. 418. There is no inconsistency. Weider's and Forman's concern is that, unless the Court protects the sale proceeds representing the value of their secured interests now, the Receiver will spend it as he previously threatened to do. Weider/Forman Limited Obj. 2, 10-11, 25, ECF No. 344. The Court itself articulated a similar concern, previously refusing "to tell Weider/Forman that we'll have a hearing, and when we get to the end of it, there [are] no assets," and recognizing the need for "protections … to preserve Weider's rights, if in fact they are correct that they are … entitled to some priority on a larger share of the assets." Response 7, ECF No. 391 (quoting Jan. 20, 2017 Hr'g Tr. 21:9-14).

The Receiver contends that the Court should not provide adequate protection because, if it does, there will be a flood of copy-cat claims. Reply 12, 29, ECF No. 418. The Receiver cites no authority for the proposition that adequate protection is not required when others might be entitled to it, and more importantly, identifies no creditors who are entitled to it or have asked for adequate protection yet have not received it.

III. The Submissions By Other Investors, Who Have Every Incentive To Undermine Weider's And Forman's Claims To Maximize The Pool Of Assets Available For Later Distribution, Have Nothing To Do With The Proposed Reserve Hearing

The Receiver argues that the Court should grant its Motion because other investors have joined it. Reply 8, 11, ECF No. 418. To date, three sets of investors have joined the Receiver's Motion: (1) 83 investors in Aequitas promissory notes (Joinder, ECF No. 389); (2) the named

plaintiffs who hope to represent a class of Aequitas investors in Ciuffitelli et al. v. Deloitte & Touche LLP et al., No. 16-cv-580 (D. Or.) (contrary to the implication in the notice, the class has not been certified) (Joinder, ECF No. 390); and (3) the "Rahnama Intervenors," who are Aequitas investors (contrary to the implication in the title of the document, the Court denied the Rahnama Intervenors' motion to intervene, see Mot. to Intervene, ECF No. 53; Order Denying Mot. to Intervene, ECF No. 163) (Joinder, ECF No. 439).

The first two Joinders raise no new arguments and do not add to the analysis. The third Joinder is incorrectly premised on the notion that the receivables are not collateral for Weider's and Forman's loans, and Weider and Forman do not otherwise have an interest in the sale proceeds (Notice of Joinder 2-3, ECF No. 439), so also adds nothing to the analysis. This ends the inquiry, and the Court need look no further to order adequate protection.

Weider and Forman sympathize with these Aequitas investors because, if Aequitas was operating a Ponzi scheme, it is possible that they may not receive their money back. Donell v. Kowell, 533 F.3d 762, 776 (9th Cir. 2008). This would be tragic, id. at 776 n.9, but cannot justify a situation in which secured creditors Weider and Forman are deprived of their first-priority secured interests too. This potential shortfall of funds exposes the motive behind these Joinders, and why these investors purported to support the relief the Receiver seeks. Yet they, like the Receiver, have been unable to articulate any reason why Weider and Forman are not entitled to protection for their first-priority, secured interests. In addition, and for the sake of completeness, Weider and Forman note that the Rahnama Intervenors' arguments also fail for the following reasons.

The Rahnama Intervenors contend that, if the Court were to grant adequate protection, it might limit the Receiver's ability to create a distribution plan that treats all investors equitably. Joinder 3, 7, ECF No. 439. There is no support or explanation for why this might be. Moreover, this argument raises distribution issues, which—the Receiver itself emphasizes—are premature. Response 8-9 & n.3, ECF No. 391. The issue here is a reserve to protect Weider's and Forman's secured interests pending ultimate adjudication, not claims distribution. Moreover, the Rahnama Intervenors' argument ignores that a receiver takes property subject to all pre-existing liens and

priorities. Marshall, 254 U.S. at 385. And it improperly elevates the status of investors to that of secured creditors. L.A. Lumber Prods. Co., 308 U.S. at 116.

The Rahnama Intervenors' cited cases (Joinder 3-6, ECF No. 439) do not support their position and have nothing to do with a reserve hearing. Two of their cited cases support Weider and Forman, as they recognize that equity demands equal treatment **for similarly situated victims**. SEC v. Cap. Consultants, LLC, 397 F.3d 733, 738-39 (9th Cir. 2005) ("equity demands equal treatment of victims in a factually similar case"); United States v. Real Prop. Located at 13328 & 13324 State Hwy. 75 N., 89 F.3d 551, 554 (9th Cir. 1996) (requiring similar treatment for "similarly situated parties"). The Rahnama Intervenors' are Aequitas investors, and Weider and Forman are CarePayment Holdings secured creditors, so they are **not** similarly situated (not to mention that neither the SEC nor Receiver has proven that anyone is a victim). Indeed, in his Capital Consultants concurring and dissenting opinion, Judge William Fletcher explains that "**the 'equality is equity' principle does not mean necessarily, or even usually, that all claimants must receive equal percentage payouts on their claims," because "secured creditors receive all they are owed, up to the value of their security**." Id. at 752 (Fletcher, J., concurring and dissenting) (emphasis added).

One of the cited cases is inapposite, as it denied an order for fees as moot because it would interfere with a pre-existing bankruptcy stay. Ore. Inv'rs v. Harder, 2010 WL 3219992, at *1 (D. Or. Aug. 10, 2010). Weider and Forman do not request fees; they request constitutionally-required segregation of the sale proceeds representing their secured interests, which need not even be paid at this time. One of the cited cases states that courts may stay certain proceedings in SEC enforcement actions. SEC v. ING USA Annuity & Life Ins. Co., 360 Fed. App'x 826, 828 (9th Cir. 2009). Weider and Forman do not challenge the Court's authority to stay anything, including their intended motion for and complaint in intervention. And one of the cited cases treats **un**secured creditors the same as investors, SEC v. Sunwest Mgt., Inc., 2009 WL 3245879, at *8 (D. Or. Oct. 2, 2009), but Weider and Forman are secured creditors.

The Rahnama Intervenors argue that allowing investors to "tag" certain funds is unfair because the alleged fraud permeated the entire Aequitas enterprise. Joinder 3-4, ECF No. 439.

The SEC has yet to prove the alleged Ponzi scheme, the Receiver has yet to prove that any alleged fraud affected Weider's and Forman's transactions, and the Ponzi scheme presumptions do not apply for reasons previously explained. Response 29 & nn.13-14, ECF No. 391. Moreover, this argument fails to address that other secured creditors—e.g., Wells Fargo Bank, N.A., the Comvest entities (Comvest Capital III, L.P. and Comvest Freedom Administration, LLC), and TGM—were paid off or otherwise received protection for their secured interests, while Weider and Forman have not. Wells Fargo Limited Objs., ECF Nos. 5, 55; Stipulated Order Resolving Wells Fargo's Limited Obj., ECF No. 157; Comvest Limited Obj., ECF No. 26; Comvest Joinder, ECF No. 78; Order Approving Sale, ECF No. 196; Comvest Notice of Withdrawal, ECF No. 257; Sale Mot. ¶ 29(a), ECF No. 323; TGM Limited Obj., ECF No. 349; Response 8, ECF No. 391. This inconsistent treatment for secured creditors is not equitable.

The Rahnama Intervenors maintain that "it would be a mistake" to approve any step that "breaks the Receivership's Estate into pieces." Joinder 7, ECF 439. As explained above, by law, the Receivership Entities **are** separate entities, and remain so, even in light of the Order Appointing Receiver. Order Appointing Receiver ¶¶ 6(D), 25-27, ECF No. 156. The order simply allows the Receiver to treat the Receivership Property as a consolidated enterprise for purposes of paying Receivership expenses. Id.

Lastly, the Rahnama Intervenors argue that Weider and Forman "bargained for the risk that Aequitas would implode," as evidenced by the interest rate on the June 2015 loans. Joinder 7-8, ECF No. 439. Weider and Forman have already explained why there is nothing nefarious or unusual about the interest rates on their loans, which were the junior debt that facilitated purchase of the CarePayment receivables in the first place. Response 20-21, ECF No. 391.

CONCLUSION

No fact-finding is necessary on the amount of reserve because the "free and clear" sale proceeded over Weider's and Forman's objection and the Receiver must now preserve the status quo by segregating the full amount of the disputed interest unless and until there is a Court order voiding the interest. It would be premature and impractical to litigate voidness at this time because fraudulent

transfer depends on the results of the underlying litigation. To the extent the Court nevertheless wishes to hold a reserve hearing to address some disputed issues before a full investigation and claims process, Weider and Forman respectfully request the hearing in Section III of its Response.

Dated: May 17, 2017

Respectfully submitted by,

/s/ Jennifer E. LaGrange

Joseph Mabe (OSB No. 045286)
jmabe@brownsteinrask.com
BROWNSTEIN RASK
1200 SW Main St.
Portland, Oregon 97205
Telephone: (503) 412-6744

Matthew D. Umhofer (CSB No. 206607)
matthew@spertuslaw.com
Jennifer E. LaGrange (CSB No. 238984)
jennifer@spertuslaw.com
SPERTUS, LANDES & UMHOFER, LLP
1990 South Bundy Dr., Suite 705
Los Angeles, California 90025
Telephone: (310) 826-4700

Attorneys for Secured Creditors WEIDER HEALTH & FITNESS and BRUCE FORMAN

Joseph Mabe, OSB No. 045286
jmabe@brownsteinrask.com
BROWNSTEIN RASK
1200 SW Main St.
Portland, Oregon 97205
Telephone: (503) 412-6744

Matthew D. Umhofer (admitted *pro hac vice*; CSB No. 206607)
matthew@spertuslaw.com
Jennifer E. LaGrange (admitted *pro hac vice*; CSB No. 238984)
jennifer@spertuslaw.com
SPERTUS, LANDES & UMHOFER, LLP
1990 South Bundy Dr., Suite 705
Los Angeles, California 90025
Telephone: (310) 826-4700

Attorneys for Secured Creditors WEIDER HEALTH & FITNESS and BRUCE FORMAN

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

Case No. 3:16-CV-00438-PK

[PROPOSED] ORDER GRANTING SECURED CREDITORS WEIDER HEALTH & FITNESS'S AND BRUCE FORMAN'S MOTION FOR LEAVE TO FILE A SUR-REPLY TO THE RECEIVER'S MOTION TO SET RESERVE HEARING

The Court, having considered Secured Creditors Weider Health & Fitness's And Bruce Forman's Motion For Leave To File A Sur-Reply To The Receiver's Motion To Set Reserve Hearing, and for good cause shown, hereby **GRANTS** the Motion. **IT IS HEREBY ORDERED THAT** the Sur-Reply, attached to the Motion as Exhibit A, is deemed filed.

SO ORDERED.

Dated: May __, 2017

United States Magistrate Judge Paul Papak