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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 RESPONSE TO WEIDER/ FORMAN'S MOTION TO FILE SUR-REPLY OPPOSING RECEIVER'S MOTION TO SET

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.

RESERVE HEARING

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On May 24, 2017, this Court is scheduled hear the Receiver's Motion to Set Reserve Hearing [Dkt. 383], which addresses the procedure and scope of the hearing on Weider Health & Fitness and Bruce Forman's (collectively "Weider/Forman") demand that proceeds from the eventual sale of certain healthcare receivables (the "Receivables Assets") be set aside to address Weider/Forman's claim. The parties dispute, among other issues, whether CarePayment Holdings LLC ("CP Holdings") could and did grant Weider/Forman a security interest in the Receivables Assets, which were owned by CP Holdings' subsidiaries. The parties agree that this Court may hear that issue in advance of a full litigation of the parties' claims, but Weider/Forman are desperate to avoid a simple two-day evidentiary hearing and limited pre-hearing discovery. In simple terms, Weider/Forman urge this Court not to exercise its equitable authority to also find facts at that hearing that may defeat any eventual claim they may make against the Receivership Entity, such as facts relating to voidable conveyances.

Before reaching the procedural issues associated with the scope of a hearing, this Court must first consider Weider/Forman's request [Dkt. 447] to file a sur-reply opposing the Receiver's motion. Sur-replies are disfavored, *see Numrich v. Qwest Corp.*, No. 3:14-CV-01864-BR, 2015 U.S. Dist. LEXIS 53763, *6 (D. Or. Apr. 23, 2015) (collecting authorities), and Weider/Forman's request is late and unfounded. Their proposed 27-page sur-reply re-argues the purported merits of Weider/Forman's claim or reiterates points they attempted to make previously. This Court should deny Weider/Forman's latest attempt to have the "final word" on a motion filed by the Receiver.[1]

[1] Without seeking permission or consent, Weider/Forman previously filed a sur-reply. *See Weider/Forman "Supplemental Brief" re: Sale of CCM* [Dkt. 344] (filed unilaterally and just minutes before the hearing); *Docket Text* (describing same as "Sur-Reply to Reply to Motion").

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I. Weider/Forman's motion to file a sur-reply is untimely.

This Court need not address the merits of Weider/Forman's motion to file a sur-reply because it was filed too late and Weider/Forman make no attempt to justify their delay. The Receiver filed its reply brief on April 24, 2017 [Dkt. 418]. Weider/Forman then waited more than three weeks, until May 17, 2017, to seek leave to file a sur-reply. This Court should find that Weider/Forman's calculated delay is fatal to their motion.

This Court's local rules require parties be diligent and promptly file any final brief. Absent leave of the Court, a party has only 14 days to file a reply brief. LR 7-1(e)(2) & (f)(2). Under the only circumstance that a sur-reply is authorized without leave of the Court, a party must file the brief even more quickly—it is due within 7 days. LR 56-1(b) (authorized to address evidentiary objections raised in a reply in support of a motion for summary judgment).

Whether this Court considers the presumptive deadline for Weider/Forman's sur-reply to be 14 days (like a reply) or 7 days (like the only authorized sur-reply), Weider/Forman are too late. *See* LR 7-1(e)(2) & (f)(2) (deadlines "must" be met). Any sur-reply should not be considered. *See* LR 7-1(e)(3) (sur-replies presumptively improper).

While this Court has discretion to extend deadlines, Weider/Forman failed to meet their burden for extending the presumptive deadline from either 7 or 14 days to the 23-plus days they now seek. Court deadlines may only be extended upon a showing of "good cause," "effective prior use of time," and "the impact of the proposed extensions upon other existing deadlines, settings, or schedules." LR 16-3(a). The "good cause" aspect of extending court-imposed deadlines "primarily considers the diligence of the party seeking the amendment." *Johnson v. Mammoth Recreations*, 975 F.2d 604, 609 (9th Cir. 1992) (construing the "good cause" standard in Federal Rule of Civil Procedure 16(b)(4)); *Priest v. United States*, No. 3:14-cv-500-AC, 2015

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U.S. Dist. LEXIS 144939, *13-14 (D. Or. Sept. 30, 2015) (quoting from and relying on same to find that the moving party failed to show "good cause" to extend deadlines under LR 16-3).

Weider/Forman's motion is silent as to *why* this Court should excuse their delay and no excuse is apparent on the record. For example, the Receiver noted in its reply that CP Holdings expressly rejected Weider/Forman's request for a security interest in the Receivables Assets. *Reply ISO Mot. re: Hearing* [Dkt. 418], pp. 4-8. If an innocent explanation existed for Weider/Forman's fraud in representing the opposite to this Court, a diligent party would not need more than three weeks to express it. No issue addressed in the Receiver's reply was factually or legally more complicated and could justify a three-week delay. Because Weider/Forman have failed to demonstrate their diligence or, relatedly, their "effective prior use of time," this Court should decline to extend the presumptive deadline for filing any sur-reply that the Court might, if promptly sought, consider authorizing. *See Johnson*, 975 F.2d at 609 ("If [the moving] party was not diligent, the inquiry should end."); *Lyon v. Chase Bank USA, N.A.*, No. 07-1779-AC, 2009 U.S. Dist. LEXIS 88173, *4-5 (D. Or. Sept. 22, 2009) (denying motion to amend case scheduling order because plaintiff failed to make showing of effective use of prior time); *Wickenkamp v. Steen*, No. 2:15-CV-330-PK, 2016 U.S. Dist. LEXIS 54719, *9-13 (D. Or. Mar. 4, 2016) (Papak, J.) (denying *pro se*'s motion to extend deadline because litigant was not diligent and did not make effective use of her time).

Further, Weider/Forman failed to address "the impact" of their proposed extension of the presumptive deadline for filing a sur-reply "upon other existing deadlines, settings, or schedules." LR 16-3. Given Weider/Forman's proposed 27-page sur-reply, as well as the low bar on extra briefing sought by Weider/Forman, granting Weider/Forman's motion would necessitate allowing the Receiver sufficient time to file another brief as well. But owing to

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Weider/Forman's unexplained delay, time has grown short. Instead of the three-plus weeks over which Weider/Forman honed their brief, granting Weider/Forman's motion would provide the Receiver less than a week to investigate their factual representations (which experience teaches require careful scrutiny), draft a further written rebuttal, seek leave to file that brief, and submit it in time for this Court's consideration. Given the extreme length of Weider/Forman's proposed 27-page sur-reply this Court should conclude that Weider/Forman's requested extension of the presumptive deadline for filing a sur-reply is unfair and impairs the orderly litigation of this proceeding.

This Court should deny Weider/Forman's motion seeking leave to file a sur-reply because it is untimely. They failed to make the requisite showing for extending the presumptive deadlines under LR 16-3(a), including, importantly, failing to show that they were diligent. As the Ninth Circuit has held in relation to the "good cause" standard, "[i]f [the moving] party was not diligent, the inquiry should end." *See Johnson*, 975 F.2d at 609. This Court should deny Weider/Forman's motion.

II. Weider/Forman's motion to file a sur-reply is unfounded.

On the merits, Weider/Forman's motion should also be denied. "'[S]urreplies are disfavored and the party seeking to submit one has to demonstrate a compelling reason for permitting the additional filing ….'" *Numrich*, 2015 U.S. Dist. LEXIS 53763 at *6 (quoting *Raybould v. JPMorgan Chase Bank, N.A.*, No. 6:13-CV-1966-TC, 2014 U.S. Dist. LEXIS 174472, *2-3 n.2 (D. Or. Dec. 11, 2014), and collecting further authority).

Weider/Forman have failed to "demonstrate a compelling reason" to obtain 27-pages of the "last word" on the Receiver's motion. That length hints at the same issue that a closer examination establishes: Weider/Forman are not seeking a sur-reply to focus narrowly on any

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supposed new evidence or new arguments. Instead, the purported newness is conjured and, even then, it is only pretense to re-argue the purported merits of their claims and reiterate prior arguments.

A. Standard

As noted, sur-replies are disfavored. *Numrich*, 2015 U.S. Dist. LEXIS 53763 at *6. In the typical context of a motion for summary judgment, a district court should provide a party that wishes to respond to "new evidence" or "new issues" raised in a reply brief an opportunity to be heard. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (a court should not consider new evidence raised in the reply to a motion for summary judgment without giving the nonmoving party an opportunity to respond); *James v. Lindstrom*, No. 2:15-CV-00919-SU, 2016 U.S. Dist. LEXIS 105633, *21-22 (D. Or. June 9, 2016) (applying same in relation to "new issues").

A non-moving party, however, is not entitled to be heard further when, by its own response brief and evidence, the non-moving party invited arguments or evidence that the moving party did not present in the original motion. *See Edwards v. Toys "R" Us*, 527 F. Supp. 2d 1197, 1205 n. 31 (C.D. Cal. 2007) ("Evidence is not 'new,' however, if it is submitted in direct response to proof adduced in opposition to a motion"); *Heil Co. v. Cumotto Can Co.*, No. 04-1590, 2004 U.S. Dist. LEXIS 23618, *2 n.1 (N.D. Cal. Nov. 16, 2004) (denying request to file sur-reply because "plaintiff's reply does not raise new legal arguments, but, rather, responds to legal arguments made in defendant's opposition"); *Acumed, LLC v. Stryker Corp.*, No. 04-CV-513-BR, 2007 U.S. Dist. LEXIS 86866, *5 (D. Or. Nov. 20, 2007) (similar).

B. The evidence that the Receiver submitted with its reply does not sanction a sur-reply by Weider/Forman.

Weider/Forman are not entitled to a sur-reply in relation to any evidence the Receiver

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submitted with its reply brief. Not only did such evidence rebut Weider/Forman's statements and arguments in their response brief, but Weider/Forman's proposed sur-reply strays far from both the procedural issues this Court will hear on May 24, 2017, as well as the Weider/Forman's ostensible rationale for filing a sur-reply.

Exhibit C (negotiations). The Receiver's motion seeks procedural relief—namely, this Court reaffirming its prior order allowing discrete fact-finding during the hearing on Weider/Forman's claim that they are entitled to a "replacement lien." In rebuttal of Weider/Forman's repeated false and misleading arguments on *the merits of their claims*—for example, falsely claiming that CP Holdings pledged the Receivables Assets as "collateral for the Weider and Forman loans[,]" *Weider/Forman Resp.* [Dkt. 391], p. 5—the Receiver submitted Exhibit C. *See Reply ISO Mot. re: Hearing* [Dkt. 418], p. 4 (collecting false statements); *id.* at 6-8 (discussing Exhibit C). Exhibit C shows that, in written negotiations in June 2015, CP Holdings rejected outright Weider/Forman's demand that the collateral include the Receivables Assets, which were owned by other entities. *Foster Decl. ISO Reply* [Dkt. 419], Ex. C (e-mail exchange). Exhibit C is comprised of e-mail communications with Weider/Forman; they cannot claim surprise that this recently identified written communciation impeaches their false statements to this Court. Any procedural injury Weider/Forman could claim from Exhibit C is wholly self-inflicted.

Moreover, Weider/Forman's proposed sur-reply in relation to Exhibit C relates to *the purported merits of their claim*. Weider/Forman dedicate 10 pages of their proposed sur-reply—much of it single-spaced—to disputing that their claim is fraudulent. *See Weider/Forman Mot. re: Sur-reply* [Dkt. 447], Ex. A, pp. 1-10. This Court should be extremely reticent to consider Weider/Forman's brief on the merits without a written response from the Receiver. Moreover,

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the issue is premature. Because Weider/Forman already conceded that this Court may engage in "contract interpretation" without delay, *Weider/Forman Resp.* [Dkt. 391], p. 34, this Court need not presently consider Weider/Forman's arguments that, on the merits, their claim is not fraudulent.

Exhibit A (Weider/Forman anticipated their pre-October 2014 loan would be paid by guarantor) and Exhibit B (Weider/Forman "freaking out!"). Weider/Forman say that they want to show that this evidence is "irrelevant" to the "need for a reserve hearing and amount of reserve." *Weider/Forman Mot. re: Sur-reply* [Dkt. 447], p. 2. But Weider/Forman do not limit their proposed sur-reply to that issue. Weider/Forman use only a small portion of an 11-line paragraph to acknowledge that Exhibits A and B are relevant to the Receiver's voidable conveyance claim but argue that the exhibits are supposedly irrelevant to "the need for a reserve hearing"—at least as Weider/Forman envision and desperately seek to constrain that hearing. *See Weider/Forman Mot. re: Sur-reply* [Dkt. 447], Ex. A, p. 16. The remainder of that section of Weider/Forman's proposed sur-reply, which spans 4 pages, repeats their arguments from their response brief or raises further arguments on the merits of a fraudulent transfer claim, not to the merits of the procedural motion. (*Id.*) Weider/Forman fail to justify the *actual sur-reply* they propose to file.

Exhibit D (exemplar pledge of collateral). The Receiver submitted Exhibit D to substantiate its concern that providing Weider/Forman a reserve would inspire copy-cat claims. *Reply ISO Mot. re: Hearing* [Dkt. 418], p. 10 ("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[.]"). Weider/Forman's stated rationale for a sur-reply is unrelated to that issue—specifically, they want to argue that "other investors' claims (if

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any) are subordinate to Weider's and Forman's claims …." *Weider/Forman Mot. re: Sur-reply* [Dkt. 447], p. 3. At most, that contention goes to the merits of Weider/Forman's claims, rather than the procedural motion this Court is scheduled to hear on May 24, 2017.

Weider/Forman have failed to demonstrate that they require a sur-reply to address "new evidence." Their response brief invited impeachment. This Court is not aided by Weider/Forman trying to re-argue *the merits of their demand for a replacement lien* in relation to Exhibits A through D. Weider/Forman's 27-page sur-reply is not warranted.

C. The Receiver did not raise new issues that warrant a sur-reply.

Rather than direct this Court with particularity to supposed new issues in the Receiver's reply, Weider/Forman simply outline the sur-reply they propose to file. They propose to address: (a) their fraud; (b) the Receiver's citation to *SEC v. Wencke*, 783 F.2d 829 (9th Cir. 1986); (c) the treatment of the Receivership Entity's assets in the Order Appointing Receiver; (d) fairness and efficiency; and (e) the entirety of the Rahnama Investors' joinder. *Weider/Forman Mot. re: Sur-reply* [Dkt. 447], p. 3. No such expansive sur-reply is warranted.

Weider/Forman's apparent fraud. As noted above, Weider/Forman addressed the purported merits of their claim in their response brief—albeit, with a false representation about the scope of the security agreement. As noted above, Weider/Forman spend 10 pages of a proposed sur-reply addressing why their claim survives despite their fraud on this Court. That argument goes to the merits of their claim, not the scope of a hearing on their demand for a replacement lien. No further briefing is required for this Court to accept Weider/Forman's prior concession that it is entitled to engage in "contract interpretation" without delay. *Weider/Forman Resp.* [Dkt. 391], p. 34.

Wencke. As it did in its motion, the Receiver noted in its reply this Court's equitable

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authority to transfer assets and set any appropriate replacement lien. *See, e.g.*, Mot. [Dkt. 383], p. 27; *Reply ISO Mot. re: Hearing* [Dkt. 418], pp. 16-20. In doing so, the Receiver rebutted Weider/Forman's argument that "due process" somehow impairs this Court's equitable authority, after notice and an opportunity for Weider/Forman to be heard, to find facts in the hearing proposed by the Receiver. *Weider/Forman Resp.* [Dkt. 391], p. 19 (arguing that the Fifth Amendment precludes a hearing because if the Receiver is "allow[ed] … to reserve less [than their claim] … without notice or the required procedures …."). The Receiver directed this Court to substantial authority that rebuts Weider/Forman's argument, including *Wencke*, 783 F.2d 829. *Reply ISO Mot. re: Hearing* [Dkt. 418], pp. 16-20 (dissecting Weider/Forman's "due process" argument) For example, *Wencke*, 783 F.2d at 837, establishes that due process does not entitle Weider/Forman to "a formal complaint and answer," so long as they receive notice and an opportunity to be heard. No doubt, Weider/Forman may want a mulligan on their "due process" argument. But nothing about the Receiver's reply provides that opportunity.

Order Appointing Receiver. In its reply, the Receiver addressed the logical ends of Weider/Forman's contention that a *security interest in equity* in a particular entity is equivalent to a security interest in that entity's assets. If accepted, Weider/Forman's argument would have this Court siloing assets on an entity-by-entity basis. In relation to Weider/Forman's claim for $10.5 million plus interest accruing at more than $250,000 per month specifically, the process Weider/Forman demand could prevent the Receiver from relying on funds from the sale of the Receivables Assets to investigate whether, for example, CP Holdings' transfers to Weider/Forman were voidable based on actual or constructive fraud. As the Receiver showed, Weider/Forman's claim "cuts at the heart of this Court's *Order Appointing Receiver,*" which requires assets to be consolidated and used "'as may be necessary or advisable in the ordinary

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course of business in discharging his duties as Receiver[.]'" *Reply ISO Mot. re: Hearing* [Dkt. 418], p. 11 (quoting Order [Dkt. 156], at ¶ 6.D). However, the Receiver acknowledged that the "initial consolidation is without prejudice to Weider/Forman's eventual claims for distribution[.]" *Id.* at 11.

Weider/Forman say they want a sur-reply in to the Order Appointing Receiver to tell the Court that its order does not yet consolidate funds "for claims distribution." *Weider/Forman Mot. re: Sur-reply* [Dkt. 447], p. 3. But the Receiver's reply already acknowledged that. And, at most, the Receiver was simply replying to Weider/Forman's arguments. Weider/Forman fail to show that a sur-reply is warranted.

Copy-cat lawsuits and fairness. Weider/Forman seek a sur-reply because, according to them, the prospect of copy-cat claims and unfairness is "irrelevant, unsubstantiated, and fail[s] to justify a 'free and clear' sale that disposes of a secured creditor's interest without compensation or process." *Weider/Forman Mot. re: Sur-reply* [Dkt. 447], p. 3. Weider/Forman cannot obtain a sur-reply by mischaracterizing the Receiver's arguments. The Receiver raised the danger of copy-cat claims for "replacement liens" in part to address the implications of arguments Weider/Forman raised in their response, and also to encourage this Court to rely on its equitable powers to test Weider/Forman's claim immediately, to the extent practicable. *Reply ISO Mot. re: Hearing* [Dkt. 418], § II, pp. 8-13. *See also id.* at p. 13 ("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.").[2] The Receiver never argued, as asserted by

[2] Further, the argument follows in the slip-stream of an issue the Receiver raised in its original motion—specifically, that the Receiver and Court have a "joint interest in preserving the Receivership Estate for the benefit of all investors and creditors, … [which] interests are not well

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Weider/Forman, that the danger of copy-cat claims and unfairness somehow authorizes this Court to "dispose[] of a secured creditor's interest without compensation or process." *Weider/Forman Mot. re: Sur-reply* [Dkt. 447], p. 3. Weider/Forman's stated rationale for seeking a sur-reply is simply false.

Additionally, despite representing that they need 5 pages of their proposed sur-reply to address "copy-cat lawsuits" and "fairness," *Weider/Forman Mot. re: Sur-reply* [Dkt. 447], p. 3, Weider/Forman actually only dedicate 5 lines of their 27-page proposed sur-reply to "copy-cat lawsuits," *see Weider/Forman Mot. re: Sur-reply* [Dkt. 447], Ex. A, p. 23. "Fairness" occupies a single paragraph. *Id*. at 25-26.

Rahnama Investors' joinder. The Rahnama Investors' joinder amplifies arguments previously raised by the Receiver about why it is in the best interests of investors for this Court to exercise its full range of equitable authority in relation to Weider/Forman's demand for a supposed "replacement lien." They explained that they wrote separately to reinforce that:

> If the Court were to grant [the relief sought by Weider/Forman], 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.

Rahnama Joinder in Motion re: Hearing [Dkt. 439], p. 3.

Weider/Forman fail to identify any issue raised by the Rahnama investors that was not

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served by the limited discovery and perfunctory hearing that Weider/Forman again seek despite this Court's earlier contrary ruling." *Mot*. [Dkt. 383], p. 30.

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previously raised by the Receiver. Indeed, even Weider/Forman's own summary of issues merely reiterates their prior points—*e.g.*, arguing that (a) their security interests reach the Receivables Assets, (b) a mere perfunctory "adequate protection" hearing is required, and (c) their supposed priority. *Weider/Forman Mot. re: Sur-reply* [Dkt. 447], p. 3.

Sur-replies are disfavored and Weider/Forman failed to meet their burden of establishing that their proposed sur-reply would be proper. This Court should deny their motion.

III. Conclusion

To rebut the arguments that Weider/Forman raised in their response, the Receiver's reply was more than a cut-and-paste of its motion, which is entirely unremarkable. True rebuttal implicates new analysis even when the issues remain constant. If the Court lowers the bar on a sur-reply to the level sought by Weider/Forman, briefing would seemingly never be complete until waived by a party. The incentive to do as Weider/Forman propose—use supposed narrow new arguments as pretext to reiterate virtually the entirety of their response—could only result in unnecessary burdens and delays for this Court.

Over three weeks ago, the Receiver filed its Reply in Support of Its Motion to Set Reserve Hearing [Dkt. 418], thereby completing briefing on its motion. *See* LR 7-1(e)(3)

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("Unless directed by the Court, no further briefing [beyond a reply] is allowed."). Sur-replies are disfavored and Weider/Forman's request for one is late and unfounded. This Court should deny Weider/Forman's motion.

Dated this 18th day of May, 2017.

Respectfully submitted,

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