

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

3:16-CV-438-PK

v.

OPINION AND  
ORDER

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

Defendants.

PAPAK, Magistrate Judge:

Plaintiff the Securities and Exchange Commission (the "SEC" or the "Commission") filed this action against defendants Aequitas Management, LLC ("Aequitas Management"), Aequitas Holdings, LLC ("AH" or "Aequitas Holdings"), Aequitas Commercial Finance, LLC ("ACF"), Aequitas Capital Management, Inc. ("ACM"), Aequitas Investment Management, LLC ("AIM" and, collectively with Aequitas Management, AH, ACF, and ACM, the "Aequitas companies" or the "entity defendants"), Robert J. Jesenik, Brian A. Oliver, and N. Scott Gillis (collectively with



Jesenik and Oliver, the "individual defendants") on March 10, 2016. The SEC alleges the defendants' liability for securities fraud under the Securities Act of 1933 (the "Securities Act"), the Securities Exchange Act of 1934 (the "Exchange Act"), and the Investment Advisers Act of 1940 (the "Advisers Act"). This court has subject-matter jurisdiction over the SEC's action as expressly provided in the Securities Act, the Exchange Act, and the Advisers Act, and pursuant to 28 U.S.C. § 1331.

Judge Hernandez appointed Ronald F. Greenspan to serve without bond as receiver of the Aequitas companies, their subsidiaries, and their majority-owned affiliates on an interim basis effective March 16, 2016. On April 14, 2016, I confirmed Judge Hernandez' interim appointment of Greenspan as receiver of the Aequitas companies on a permanent basis.

On December 16, 2016, the receiver filed a motion (#323) by and through which he sought (*inter alia*) approval of the sale of certain receivership assets. Specially appearing third parties Weider Health & Fitness ("Weider") and Bruce Forman (collectively, "Weider/Forman") filed limited objections (#344) to the proposed asset sale. At a hearing held in connection with the receiver's motion on January 20, 2017, I overruled Weider/Forman's objections and permitted the proposed asset sale to go forward, but directed the receiver to place the proceeds from the sale into escrow pending a future hearing to determine whether Weider/Forman had (as they claimed) any special entitlement to those proceeds, and if so, in what amount. In addition, I directed the receiver and Weider/Forman to confer regarding the type of evidence that would be presented at the contemplated reserve hearing and the scope of discovery that would be required prior to the hearing.

Now before the court is the receiver's motion (#383), in which three groups of Aequitas

investors join (#389, #390, #439), to set a reserve hearing for the purpose of determining whether Weider/Forman have any right to reservation of any portion of the proceeds from the asset sale approved January 20, 2017. I have considered the motion, oral argument on behalf of the receiver, Weider/Forman, and the joining Aequitas investors, and all of the pleadings and papers on file. For the reasons set forth below, the receiver's motion (#383) to set a reserve hearing is denied as moot, my order of January 20, 2017, directing the receiver to segregate the proceeds from the asset sale pending a future hearing is dissolved, and the receiver is relieved of any obligation to reserve on Weider/Forman's behalf any portion of the proceeds of the asset sale approved January 20, 2017.

### ANALYSIS

It is Weider/Forman's position that they unambiguously hold a perfected security interest in the assets approved for sale on January 20, 2017, and that in light of their assurances that they hold such an interest this court should hold only a limited hearing to determine whether Weider/Forman lent money to an Aequitas entity, whether an Aequitas entity granted Weider/Forman a security interest, and whether that interest was perfected – without inquiry into the specific assets in which such interest may have been granted – following which the proceeds from the still-ongoing asset sale should be reserved in their entirety pending a future plenary evidentiary hearing (or summary judgment proceeding) at which Weider/Forman's purported security interest will be finally confirmed. The difficulty Weider/Forman face is that evidence already within the court's record establishes both that Weider/Forman lack any security interest in the subject assets and that Weider/Forman are in all material respects similarly situated to the great majority of creditors of the receivership entities, such that no grounds exist for reserving

any portion of the proceeds from the approved asset sale on Weider/Forman's behalf.

It appears to be undisputed that at all material times, Aequis entity ACF was the corporate parent of Campus Student Funding, LLC ("CSF"), and that CSF was, in turn, the corporate parent of an entity named, at various times, either ASFG Leverage 1, LLC, or CSF Leverage I, LLC ("CSFLI"). It is additionally undisputed that CarePayment Holdings ("CPH"), a part of the "Receivership Entity" subject to the terms and conditions of Greenspan's receivership, *see* Final Receivership Order (#156) dated April 14, 2016 ("Final Receivership Order"), Exh. A, *see also id.*, § I(1), is the sole owner of both CarePayment, LLC ("CP"), and CP Funding I Holdings, LLC ("CPFIH"), and that CPFIH is the sole owner of CP Funding I Trust ("CP Trust"), *see* Declaration of Bruce Forman (#345) dated January 17, 2017 ("Forman Decl. I"), ¶ 3, Exhs. A-M. It is further undisputed that the CCM Capital Opportunities Fund, LP ("CCMCOF"), another part of the Receivership Entity subject to the terms and conditions of Greenspan's receivership, *see* Final Receivership Order, Exh. A, *see also id.*, § I(1), which is 69.04% owned by Aequis entities ACF, AH, Aequis Private Client, LLC ("APC"), and Aequis Capital Opportunities GP, LLC ("ACOGP"), *see* Declaration of Robert Greenspan (#324) dated December 16, 2016 ("Greenspan Decl. I"), ¶ 3, is the 92.1% owner of CarePayment Technologies, Inc. ("CP Technologies"), *see* Report of Ronald F. Greenspan (#444) dated April 30, 2017 ("Receiver's April 2017 Report"), Exh. A.

In May 2011, Weider/Forman loaned \$2 million to ACF. Declaration of Bruce Forman (#368) dated January 20, 2017 ("Forman Decl. II"), Exh. A. In May 2012, Weider/Forman invested \$2 million in Aequis CarePayment Fund, LLC, *see id.*, whose place in the Aequis companies' corporate hierarchy I cannot determine from the evidence of record, but which is

apparently a subsidiary of CPH. In January 2013, Weider/Forman loaned \$5 million to CSFLI. *See id.* In May 2013, Weider/Forman loaned \$3 million to CSFLI. *See id.*

In or around early November 2013, Weider/Forman renegotiated the terms of their aggregate total of \$12 million in loans and investments to ACF, CSFLI, and Aequis CarePayment Fund, LLC. *See* Declaration of Bruce Forman (#392) dated March 31, 2017 ("Forman Decl. III"), Exh. A ("Restated Loan Agreement"). Pursuant to Weider/Forman's Restated Loan Agreement of November 1, 2013, CSFLI became responsible for repayment of the full \$12 million. *See id.* at 1. CSFLI's repayment obligation was secured by all of CSFLI's assets and by all "Eligible Receivables" of ACF and CSF, collectively. *See id.*, ¶ 14(f). "Eligible Receivables," in turn, refer to educational student loan receivables that originated pursuant to a Tuition Loan Program Agreement dated June 29, 2011, between Corinthian Colleges and ACF and CSF, as to which CSFLI had purchased the right to all cash flows therefrom. *See id.*, ¶14(i) and (j). CSFLI's repayment obligation was not secured by any equity interest in CSFLI or any other entity, except to the extent that such interests were assets of CSFLI. *See id.*, *passim*.

In June 2014, the Corinthian Colleges began defaulting on their payments due to ACF and CSF. *See* Complaint, ¶ 36. As a result, it appears that Weider/Forman accordingly became concerned regarding the value of the collateral securing their loans. *See* Declaration (#414) of Brad Foster ("Foster Decl."), Exh. A. It appears to be undisputed that at or around this time, CSFLI repaid \$6 million of the \$12 million it owed to Weider/Forman, leaving an outstanding debt of \$6 million.

In October 2014, CPH and Weider/Forman entered into a set of agreements pursuant to which those parties agreed that CPH would repay CSFLI's outstanding debt to Weider/Forman of

\$6 million, *see* Forman Decl., Exhs. E, F, G, and, in exchange for no new consideration, that CPH's new obligation to Weider/Forman would be secured by CPH's equity interests in CP and in CP Leveraged I, LLC, or any successor thereto, including any later-acquired equity interests in those two companies and any right to acquire such interests in those two companies. *See* Forman Decl. I, Exh. G, ¶ 2. The collateral additionally included all "products and produce" of such equity interests, all "accounts, general intangibles, instruments, rents, monies, payments and all other rights, arising out of a sale, lease or other disposition of" those same equity interests, and all "proceeds" from the sale or other disposition of those same equity interests. *Id.*

In June 2015, in connection with an additional loan of \$4.5 million to CPH, Weider/Forman sought further renegotiation of the terms of the foredescribed loans, specifically seeking to change the collateral from CPH's equity interests in CP and in CP Leveraged I, LLC, to the accounts receivable of CP and CP Trust (and also seeking to raise the interest rate applicable to arrears on the loan from 7% to 12%). *See* Forman Decl., Exh. C. CPH refused to consent to the requested modification. *See id.* Ultimately, the parties agreed that Weider/Forman would lend CPH the additional \$4.5 million, and that the parties would expand the collateral securing the entire debt of \$10.5 million from CPH's equity interests in CP and in CP Leveraged I, LLC, to CPH's equity interests in those two companies plus CPH's equity interests in CP Trust (and to raise the interest rate on arrears from 7% to 17%, rather than the requested 12%). *See* Forman Decl. I, Exh. B. The terms of the parties' agreement governing collateral were not otherwise materially changed from those of the agreements of October 2014 discussed above. *See id.*

The proceeds that Weider/Forman seek to segregate for their benefit arise out of the sale

of accounts receivable of CP and CP Trust. The accounts receivable of CP and/or CP Trust do not constitute CPH's equity interests in CP, CP Trust, or CP Leveraged I, LLC, and there can be no serious argument they constitute "products and produce" of such equity interests, accounts of any kind arising out of the sale of such equity interests, or proceeds from the sale of such equity interests. In consequence, it follows that Weider/Forman have no security interest in the assets approved for sale January 20, 2017.<sup>1</sup>

Moreover, contrary to Weider/Forman's proffered argument, this court is not bound by the Bankruptcy Code to segregate the proceeds of the sale, notwithstanding that the receiver invoked 11 U.S.C. § 363 in connection with his request for approval of the sale of the assets free and clear of liens or other encumbrances. *See, e.g., SEC v. Sunwest Mgmt.*, Case No. 09-6056, 2009 U.S. Dist. LEXIS 93181, \*33 (D. Or. Oct. 1, 2009). Indeed, even if this court were bound by Section 363, the requirement of Section 363(e) that a creditor with an interest in the assets to be sold be granted "adequate protection" for its interest would not require this court to protect Weider/Forman's interest in assets *other* than those which were sold, and as discussed above, Weider/Forman have no security interest in the assets approved for sale January 20, 2017.

Finally, Weider/Forman argue that if this court were to refrain from segregating the proceeds of the asset sale, it would be in violation of the Fifth Amendment's prohibition against government takings without due process. I disagree. Because Weider/Forman have no interest in

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<sup>1</sup> To be sure, Weider/Forman are entitled to the benefit of any valid and enforceable bargain they may have entered into with CPH or with any other entity related to or owned by the Aequitas companies (to the extent they entered into any such agreement). However, they are not different in this respect from the great majority of creditors with a claim on any portion of the receivership estate, and this fact, without more, does not entitle Weider/Forman to segregation for their special benefit of any of the proceeds from the approved sale.

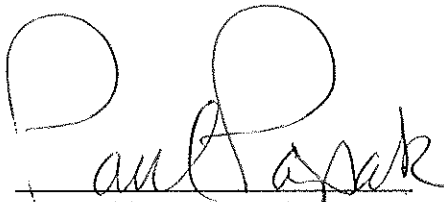
the assets approved for sale January 20, 2017, it follows that their due process rights are not implicated by the free and clear sale of those assets.

For the foregoing reasons, the hearing requested by the receiver is unnecessary. The evidence of record is sufficient to compel the conclusion that Weider/Forman have no security interest in the sold assets, and are therefore not entitled to segregation of the proceeds from the sale thereof. In consequence, the receiver's motion (#383) to set a reserve hearing is denied as moot, my order of January 20, 2017, directing the receiver to segregate the proceeds from the asset sale pending a future hearing is dissolved to the extent it so directed the receiver, and the receiver is relieved of any obligation to reserve on Weider/Forman's behalf any portion of the proceeds of the asset sale approved January 20, 2017.

#### CONCLUSION

For the reasons set forth above, the receiver's motion (#383) to set a reserve hearing is denied as moot, my order of January 20, 2017, directing the receiver to segregate the proceeds from the asset sale pending a future hearing is dissolved to the extent it so directed the receiver, and the receiver is relieved of any obligation to reserve on Weider/Forman's behalf any portion of the proceeds of the asset sale approved January 20, 2017.

Dated this 9th day of June, 2017.



Honorable Paul Papak  
United States Magistrate Judge