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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 TO STAY THE JUNE 9, 2017 OPINION AND ORDER (ECF NO. 465) PENDING THE DISTRICT COURT'S REVIEW OF THE OBJECTION

REQUEST FOR ORAL ARGUMENT

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LR 7-1 CERTIFICATION

Pursuant to Local Rule 7-1(a), Weider Health & Fitness (Weider) and Bruce Forman (Forman) conferred with the Receiver's counsel concerning this motion to stay, and the Receiver does not consent to the relief requested herein.

MOTION TO STAY ORDER PENDING RULING ON OBJECTION

Weider Health & Fitness (Weider) and Bruce Forman (Forman) respectfully request that the Court stay enforcement of its June 9, 2017 Opinion and Order pending the district court's review of Weider's and Forman's concurrently-filed objection. The effect would be to continue the interim adequate protection measures that were in place before the Order—i.e., the Receiver will continue to segregate "all of the proceeds (after the payment of senior debt that is secured by those receivables)" in a "non-interest bearing account under the same terms as … for the TGM proceeds[.]" Jan. 31, 2017 Report 40, ECF No. 365; Jan. 20, 2017 Hr'g Tr. 33:1-7.

"[A]s part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." Nken v. Holder, 556 U.S. 418, 421 (2009). A stay "hold[s] a ruling in abeyance to allow an appellate court the time necessary to review it." Id. The standard for a motion to stay pending appeal is the same as that for a preliminary injunction. Tribal Village of Akutan v. Hodel, 859 F.2d 662, 663 (9th Cir. 1988). The movant must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011). The Ninth Circuit applies a "sliding scale" approach to these factors, under which "a stronger showing of one element may offset a weaker showing of another." Id. "For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." Id. These factors justify a stay here.

I. Weider And Forman Will Suffer Irreparable Injury Absent A Stay

Weider and Forman will suffer irreparable injury absent a stay for three reasons.

First, the denial of adequate protection for their interests, which are in bona fide dispute, is irreparable harm. "[T]he law is clear, if party has an interest in property that is in bona fide dispute, sale of the property free and clear of the party's interest will not result in irreparable harm *because* the party has recourse against the proceeds of the sale." In re GGW Brands, LLC, 2013 WL 6906375, at *24 (Bankr. C.D. Cal. Nov. 15, 2013) (emphasis added). Here, by contrast, the Order denies Weider and Forman recourse against the proceeds of the sale, so they *will* suffer irreparable harm. Indeed, in In re First South Savings Association, the Fifth Circuit held that the district court clearly abused its discretion in denying a motion to stay pending appeal when the order under review failed to provide adequate protection for secured creditors. 820 F.2d 700, 710, 714 (5th Cir. 1987). The Fifth Circuit reasoned that the order "displaces liens on which creditors have relied in extending credit, [and] a court that is asked to authorize such [proceedings] must be particularly cautious when assessing whether the creditors so displaced are adequately protected." Id.

Second, the Order effectively extinguishes Weider's and Forman's lien on both the receivables and the subsidiary companies, which is irreparable harm. "[A]n extinguishment of a first-position lien is a concrete harm and irreconcilable once lost." JPMCC 2007-CIBC 19 E. Greenway, LLC v. Bataa/Kierland, LLC, 2013 WL 210845, at *5 (D. Ariz. Jan. 18, 2013); accord In re Lanai Properties, LLC, 2009 WL 2424111, at *2 (Bankr. S.D. Tex. July 31, 2009). Weider and Forman indisputably have first-priority liens in certain CarePayment Holdings, LLC property (Forman Decl. Ex. A ¶ 2(b), Ex. E ¶ 2(b), Ex. I ¶ 2(b), ECF No. 345); the parties simply dispute whether these liens attach to equity interests in the subsidiaries only, or to the receivables and/or proceeds from the sale of receivables too. The Order extinguishes any lien on the receivables and the proceeds from the sale of receivables by concluding that Weider and Forman have neither security interests in the receivables nor the proceeds from their sale. Order 3, 7, ECF No. 465. It renders worthless any lien on the equity interests in the subsidiaries by allowing the Receiver to sell all of the subsidiaries' assets, leaving them with nothing. Jan. 31, 2017 Report 40, ECF No. 365. It guts Weider's and Forman's first-priority position by declaring their

status the same as the majority of other creditors of a separate company, Aequitas Commercial Finance, LLC. Order 3-4, 7, ECF No. 465. And it purports to void a portion of the lien on the receivables, the proceeds from the sale of the receivables, and the equity interests by declaring that there was no new consideration for the October 2014 transaction. Id. at 6.

Third, the Order allows the subsidiaries' assets to dissipate, which is irreparable harm. Legal remedies are inadequate when "assets [are] in danger of dissipation or depletion," especially in light of a company's potential insolvency. Deckert v. Indep. Shares Corp., 311 U.S. 282, 290 (1940). Courts consistently find irreparable injury when there is a danger that assets will be dissipated without a stay. Johnson v. Couturier, 572 F.3d 1067, 1081 (9th Cir. 2009) (irreparable injury when "there is a likelihood that Defendants will not have the resources to reimburse TEOHC if defense costs are advanced"); In re Focus Media Inc., 387 F.3d 1077, 1086 (9th Cir. 2004) (irreparable injury to the estate "if these funds are not frozen"); FDIC v. Garner, 125 F.3d 1272, 1280 (9th Cir. 1997) (same). Here, this Court has already recognized that "things happen," "[m]oney goes away," and without protection, there is a danger that Weider and Forman will recover nothing on their first-priority claims in this receivership resulting from an alleged Ponzi-scheme. Jan. 20, 2017 Hr'g Tr. 21:8-24, 31:7-13. The Receiver himself reports that there "significant downside risk" for expected recovery for unsecured creditors. Sept. 14, 2016 Report 82, ECF No. 246. And, the Receiver's threats to spend the proceeds representing the value of Weider's and Forman's secured interests unless they took a "haircut" now prompted Weider and Forman to file a limited objection in the first place. Forman Decl. ¶¶ 23-24, ECF No. 345; Mandler Decl. ¶ 8, ECF No. 346.

For these reasons, Weider and Forman will suffer irreparable injury without interim protection, and this factor weighs heavily in favor of a stay.

II. Weider And Forman Are Likely To Succeed On The Merits

Weider and Forman respectfully submit that they are likely to succeed on the merits. This Court concluded, without a hearing, that Weider and Forman do not have "security interests" in the receivables, and therefore are not entitled to adequate protection. Order 3, 7, ECF No. 465. Yet the "interests" protected by the adequate protection requirement are broader than "security interests." In

re PW, LLC, 391 B.R. 25, 41-42 (Bankr. App. 9th Cir. 2008) ("a lien is but one type of interest"). Interests include any "'obligations that are connected to, or arise from, the property being sold.'" In re Trans World Airlines, Inc., 322 F.3d 283, 289 (3d Cir. 2003) (citations omitted). "When the creditor's recovery would have been greater had Section 363(f) not extinguished its 'interest' in the sold property, then it has suffered a decrease in value, that is, a monetary loss, that requires 'adequate protection[.]'" Ill. Dep't of Revenue v. Elk Grove Village Petroleum, LLC, 541 B.R. 673, 678 (N.D. Ill. 2015), amended, 2015 WL 8481961 (N.D. Ill. Dec. 9, 2015).

Here, even if Weider's and Forman's collateral includes only equity interests in CarePayment Holdings, LLC's subsidiaries, Weider and Forman would still have "interests" in the receivables that require adequate protection. The value of their equity interests in the subsidiaries depends on the value the subsidiaries' assets. The value of the subsidiaries' receivables was at least $76.2 million before the sale (Sept. 14, 2016 Report 58, ECF No. 246), but will be $0 after the sale because the assets are being sold to another entity (Jan. 31, 2017 Report 37-38, ECF No. 365). In other words, the sale will render worthless any equity interest in the subsidiaries. As such, Weider and Forman indisputably have "interests" in the receivables, even if they are not "security interests." Indeed, 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) (emphasis added) (citations omitted).

Weider and Forman are likely to succeed on the merits for six additional reasons.

First, the Order violates the Fifth and Fourteenth Amendment Due Process clauses. "[F]undamentally, due process mandates that all property claimants receive appropriate notice and opportunity to object to any decision affecting their property interests." In re Morabito Bros., Inc., 188 B.R. 114, 117 (Bankr. W.D.N.Y. 1995). An opportunity to be heard requires "'the opportunity to be heard "at a meaningful time and in a meaningful manner."'" Brock v. Roadway Exp., Inc., 481 U.S. 252, 261 (1987) (citations omitted). "Depending on the circumstances, and the interests at stake, a fairly extensive evidentiary hearing may be constitutionally required before a legitimate claim of entitlement may be terminated." Id. Here,

the Order concludes that Weider and Forman have no security interest in the receivables, there was "no new consideration" for the October 2014 transaction (subjecting it to claims of invalidity), and Weider and Forman are similarly situated to other creditors (destroying their priority), without any opportunity to litigate these issues.

Second, the Order violates the Fifth Amendment. The Court held that denying adequate protection does not violate the Fifth Amendment because Weider and Forman do not have interests in the property to be sold that would require adequate protection (Order 7-8, ECF No. 465), but as shown above, this premise is incorrect. Thus, even under the Court's own rationale, approval of the sale "free and clear" of Weider's and Forman's interests violates the Fifth Amendment.

Third, contrary to the Court's conclusion (Order 3, 7, ECF No. 465), Weider and Forman have security interests in the receivables. Their collateral includes equity interests in CarePayment Holdings, LLC's subsidiaries owned "for the purpose of purchasing [receivables]." Forman Decl. Ex. C ¶ 2(a), Ex. K ¶ 2(a), ECF No. 345. It also includes the tools and supplies of the collateral, and the products and produce of the property described in the collateral section. Id. Tools are things to help perform a job; supplies are necessary equipment to engage in a project; products are articles refined for sale; and produce are the results of one's efforts. Oxford English Dictionary, available at https://en.oxforddictionaries.com. Because the subsidiaries exist to purchase receivables, the receivables are tools, supplies, products, and produce. Evidence concerning the way parties may have negotiated other contracts, or what parties may have said during negotiations, is inadmissible because no one has ever argued that this definition is ambiguous. W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990).

Fourth, contrary to the Court's conclusion (Order 3-4, 7, ECF No. 465), Weider and Forman are not similarly situated to other Aequitas creditors. "[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). "Secured creditors … enjoy privileged status under the law." All Points Capital Corp v. Architectural Metal Prods., Inc., 2010 WL 1610013, at *2 (N.D. Cal. Apr. 20, 2010). Here, the Receiver admits that

Weider and Forman are secured creditors of CarePayment Holdings, LLC (Mot. to Set Reserve Hearing 2, 9, ECF No. 383; Reply 21, ECF No. 418); it simply disputes the nature of the security. The only evidence it provided proves that other creditors are subordinate to any senior secured indebtedness. Foster Decl. Ex. D, ECF No. 419. Therefore, Weider and Forman are not similarly situated to creditors (secured or otherwise) of a separate company, Aequitas Commercial Finance, LLC. To the extent the Court is ultimately concerned about fair distribution at the conclusion of these proceedings, it is important to note that, even for purposes of distribution in equity receiverships, "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." SEC v. Cap. Consultants, LLC, 397 F.3d 733, 752 (9th Cir. 2005) (Fletcher, J., concurring and dissenting); cf. In re 801 S. Wells St. Ltd. P'ship, 192 B.R. 718, 726 (Bankr. N.D. Ill. 1996) ("The policy of equality and equity among creditors only ensures that *similarly situated creditors* will be treated equally;" there are "different classes of creditors with different respective rights," such as "[s]ecured creditors [that] receive priority treatment for their claims to the extent of the value of their collateral," and "[u]nsecured creditors [that] are paid last on a pro-rata basis along with claims similarly classified under.").

Fifth, contrary to the Court's conclusion (Order 6, ECF No. 465), there was consideration for the October 2014 transaction. "[A] promissory note containing a promise to pay … a sum certain on or before a date certain" is sufficient consideration in exchange for a loan. Beitner v. Becker, 34 A.D.3d 406, 408 (N.Y. App. 2006). Here, the Court correctly noted that, by October 2014, CSF Leverage I, LLC had an outstanding $6 million debt to Weider. Order 5, ECF No. 465. CSF Leverage I, LLC was required to repay this $6 million debt before the end of 2014. Forman Decl. Ex. B ¶ 6, Ex. C ¶ 6, Ex. D ¶ 6, ECF No. 392. In October 2014, CSF Leverage I, LLC repaid this debt by transferring the $6 million to CarePayment Holdings, LLC, instead of transferring it directly to Weider. Forman Decl. Ex. E ¶ 3, ECF No. 345; Forman Decl. Ex. B at 3, ECF No. 368. This arrangement had been agreed-to by the parties to facilitate a separate loan to CarePayment Holdings, LLC. Id. Parties can and do enter into agreements to facilitate the orderly repayment of debt. CIBC

Bank & Trust Co. (Cayman) Ltd. v. Banco Cent. do Brasil, 886 F. Supp. 1105, 1107 (S.D.N.Y. 1995). This $6 million was Weider's consideration for the October 2014 loan to CarePayment Holdings, LLC (Forman Decl. Ex. E ¶ 3, ECF No. 345; Forman Decl. Ex. B at 3, ECF No. 368); in return, CarePayment Holdings, LLC provided a promise to repay $6 million with interest by October 31, 2015 (Forman Decl. Ex. F ¶¶ 4-5, ECF No. 345); and the arrangement facilitated CSF Leverage I, LLC's repayment of a prior obligation (Forman Decl. Ex. B, ECF No. 368).

Sixth, to the extent the Court's conclusion concerning "no new consideration" (Order 6, ECF No. 465) is based in part on the Receiver's allegation that CarePayment Holdings, LLC may not have benefitted from the $6 million loan principal, this is a fraudulent transfer claim that would require notice, an opportunity to respond, and the appropriate type of proceeding before being litigated. SEC v. Ross, 504 F.3d 1130, 1142 (9th Cir. 2007); SEC v. Wencke, 783 F.2d 829, 836-38 (9th Cir. 1986). Attempting to litigate it before the actual parties resolve the underlying case is not feasible, because the dispute depends on issues inextricably intertwined with the underlying proceedings. See Donell v. Kowell, 533 F.3d 762, 770-72 (9th Cir. 2008) (detailing fraudulent transfer framework).

For these reasons, Weider and Forman respectfully submit that they are likely to succeed on the merits of their objection, and this factor weighs heavily in favor of a stay.

III. The Balance of Equities Favors A Stay

The balance of equities favors a stay. Balancing the equities requires identifying the harm that a stay might cause to the non-moving party, and weighing those against the harm to the moving party without a stay. In re Excel Innovations, Inc., 502 F.3d 1086, 1097 (9th Cir. 2007).

There is no dispute that Weider and Forman are secured creditors with perfected liens. Mot. to Set Reserve Hearing 2, 9, ECF No. 383; Reply 21, ECF No. 418. A secured creditor is "[a] creditor who has the right, on the debtor's default, to proceed against collateral and apply it to the payment of the debt." Secured Creditor, Black's Law Dictionary (10th ed. 2014). These rights remain in place despite receivership. Marshall, 254 U.S. at 385. As the Ninth Circuit explains, the rights of a secured creditor take priority over the rights of unsecured creditors and investors, and "any plan 'by which the subordinate rights and interests of the stockholders are attempted to be secured at

the expense of the prior rights of either class of creditors comes within judicial denunciation." In re Consol. Rock Prods. Co., 114 F.2d 102, 107 (9th Cir. 1940), aff'd, 312 U.S. 510 (1941).

Without interim adequate protection, Weider and Forman will suffer substantial harm to their property rights, including that: (1) when the subsidiaries' assets are sold, it will destroy the value of the Weider/Forman collateral (In re Boca Del Rio Properties, Inc., 2006 WL 2459445, at *2 (S.D. Tex. Aug. 23, 2006) (harm results through use of collateral)); (2) they will be denied any "right of recourse to the collateral" (In re Monroe Park, 17 B.R. 934, 940 (D. Del. 1982)); (3) they will face delay and uncertainty concerning protection for their secured interests (In re 347 Linden LLC, 2011 WL 2971496, at *9 (E.D.N.Y. July 20, 2011)); and (4) their claims will impermissibly become subordinate to those with lower priority (In re Chevy Devco, 78 B.R. 585, 590 (Bankr. C.D. Cal. 1987) (refusing to allow secured creditor to be treated as an investor)).

The Receiver previously identified three potential harms if the Court orders adequate protection: (1) a negative effect on its ability to monetize receivership assets; (2) less money in the collective pool for other creditors and investors; and (3) copy-cat claims. Reply 12-13, 29, ECF No. 418. None of these potential harms outweigh the substantial and irreparable harms to Weider and Forman. Weider and Forman *are part of the pool of creditors* whom the Receiver is meant to protect; selling the only assets that provide value to the subsidiaries that are the Weider/Forman collateral, and then denying Weider/Forman recourse to the proceeds representing the value of that collateral, does not protect their interests. It cannot be forgotten that the Receiver had previously agreed to ear-mark $8.5 million for Weider and Forman (Sept. 14, 2016 Report 54, ECF No. 246), so asking the Receiver to segregate $13,211,460 as of January 18, 2017, plus interest as it accrues—out of the approximately $122 million sale price for one of the many Aequitas entities—is not a substantial burden. Lastly, any concern over copy-cat claims cannot be considered a harm; Weider and Forman are simply asserting their rights as secured creditors. As one court explains, "[w]hile this court may have broad powers to carry out the purpose of the Receivership, the court is disinclined to put the interests of the buyers and the Receivership over the interests of secured creditors." SEC v. Madison Real Est. Group, LLC, 647 F. Supp. 2d 1271, 1277 (D. Utah 2009).

For these reasons, the balance of equities weighs heavily in favor of a stay.

IV. The Public Interest Favors A Stay

Lastly, the public interest favors a stay. The public interest favors a stay when the stay: (1) preserves the value of collateral for secured creditors (Williamston Invs., Inc. v. Best Express Foods, Inc., 2012 WL 12941125, at *1 (W.D. Mich. Oct. 25, 2012)); (2) upholds the "bedrock principle of American contract law is that parties are free to contract" and courts must enforce those agreements (Tocco v. Tocco, 409 F. Supp. 2d 816, 832 (E.D. Mich. 2005)); (3) "protect[s] the integrity of the claim resolution process" (In re Union Trust Philadelphia, LLC, 465 B.R. 765, 774 (Bankr. E.D. Pa. 2011), aff'd, 460 B.R. 644 (E.D. Pa. 2011)); and (4) preserves the status quo (MicroStrategy, Inc. v. Bus. Objects, S.A., 661 F. Supp. 2d 548, 562 (E.D. Va. 2009)). Here, the stay: preserves the value of Weider's and Forman's collateral until the district court can rule on the objection; honors their contracts; protects their ability to litigate the validity of their claims *after* full notice, investigation, and an opportunity to be heard; and preserves the status quo.

For these reasons, the public interest weighs heavily in favor of a stay.

CONCLUSION

Weider and Forman respectfully request that the Court stay enforcement of the Order, and continue the interim adequate protection measures that were in place before the Order, pending the district court's review of the concurrently-filed objection.

Dated: June 23, 2017

Respectfully submitted by,

/s/ Matthew Donald Umhofer

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Defendants.

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

[PROPOSED] ORDER GRANTING SECURED CREDITORS WEIDER HEALTH & FITNESS' AND BRUCE FORMAN'S MOTION TO STAY ORDER PENDING OBJECTION

The Court, having considered Secured Creditors Weider Health & Fitness's And Bruce Forman's Motion to Stay The June 9, 2017 Opinion and Order (ECF No. 465) Pending District Court's Review of The Objection, and for good cause shown, hereby **GRANTS** the Motion. **IT IS HEREBY ORDERED THAT** the June 9, 2017 Opinion and Order is **STAYED** pending the District Court's review of the objection.

SO ORDERED.

Dated: _____, 2017

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United States Magistrate Judge Paul Papak