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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: (1) FOR ENTRY OF JUDGMENT; (2) TO CERTIFY THE JANUARY 23, 2017, JANUARY 25, 2017, JUNE 9, 2017, AND OCTOBER 12, 2017 ORDERS [ECF NOs. 357, 362, 465 & 549] FOR APPEAL; AND (3) TO STAY THE JUNE 9, 2017 AND OCTOBER 12, 2017 ORDERS [ECF NOs. 465 & 549] PENDING APPEAL

REQUEST FOR EXPEDITED HEARING AND ORAL ARGUMENT

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7-1

In compliance with Local Rule 7-1, counsel for Weider Health & Fitness (Weider) and Bruce Forman (Forman) conferred with the Receiver's counsel, on October 24 and 25, 2017, by email, in a good faith effort to resolve this dispute, but were unable to do so. The Receiver does not consent to the relief requested herein, or expedited consideration.

MOTION

Weider and Forman respectfully move this Court for: (1) an entry of judgment under Federal Rule of Civil Procedure 54(b) on the district court's October 12, 2017 order denying adequate protection (ECF No. 549); (2) certification for appeal under 28 U.S.C. § 1292(b) of the orders approving the Receiver's free-and-clear sale of CarePayment receivables, over secured creditors Weider's and Forman's objection, on the basis of a bona fide dispute, without providing adequate protection (ECF Nos. 357, 362, 465, 549); and (3) a stay pending appeal of the orders dissolving interim adequate protection (ECF Nos. 465 & 549).

INTRODUCTION

The Court has made a final determination that Weider and Forman are not secured creditors and have no direct or indirect interests in CarePayment receivables that warrant adequate protection. This decision demoted Weider and Forman from one of this receivership's only secured creditors—whose loans the Receiver acknowledged were "substantially over-collateralized and validly perfected"—into mere creditors with no priority whatsoever.

Weider and Forman believe that the orders at issue—the decision on June 9, 2017 denying Weider and Forman's request for adequate protection and the decision affirming that order on October 12, 2017—are rooted in significant legal errors. Among those errors are a failure to follow precedent requiring adequate protection and a full reserve when approving a sale free and clear based on a bona fide dispute, a mistaken premise that security interests are the only interests that warrant adequate protection, and the orders' failure to follow the plain language of the contracts establishing Weider's and Forman's security interests.

The impact of the two orders is devastating for both Weider and Forman. They loaned large sums of money to receivership entities based upon valid security interests. There is no dispute that Weider and Forman's loan documentation provides them with valid, perfected security interests in receivership assets—the dispute is only over the reach of those interests. Those interests entitled Weider and Forman to have foreclosed on the entities and collected the substantial amounts owed to them—which they could have done, absent the receivership stay. But the Court's orders abruptly and finally eviscerated those security interests, which even the Receiver valued at more than $10.5 million and offered to settle for $8.5 million.

Weider and Forman seek to appeal this sweeping and final decision. But to obtain direct appellate review, they must have a final judgment or permission for an interlocutory appeal. To that end, Weider and Forman ask this Court to certify the orders denying adequate protection orders as final under Rule 54(b) of the Federal Rules of Civil Procedure. The prerequisites of Rule 54(b) are easily satisfied here:

(i) the orders are final in the sense that their effect is to eliminate all potential security interests or other claims to priority from the free-and-clear sale;

(ii) the orders are severable from the remaining issues to be tried in this case; and

(iii) there is no just reason for delaying an appeal.

Alternatively or contemporaneously, the Court may certify the orders for appeal under 28 U.S.C. § 1292(b) because the orders involve controlling questions of law, the orders present novel and difficult questions of first impression, and immediate review may materially advance the termination of the litigation by resolving entitlement to certain receiverships assets.

In light of the Receiver's indication that the sale proceeds to fund the Receivership could be exhausted by the receivership, and the Ponzi-scheme nature of the underlying litigation, Weider and Forman also respectfully request that the Court stay enforcement of the orders dissolving adequate protection pending appeal, and rule on this motion on an expedited basis.[1]

[1] Weider and Forman set forth an extensive background of this dispute in their objection to the June 9, 2017 order. Objection to Order 2-10, ECF No. 466.

ARGUMENT

I. The Court Should Enter A Partial Final Judgment On The District Court's Order Denying Adequate Protection Under Federal Rule Of Civil Procedure 54(b)

A. Governing Law

This Court "may direct entry of a final judgment as to one or more … claims or parties" when "an action presents more than one claim for relief … or when multiple parties are involved." Fed. R. Civ. P. 54(b). "[I]ssuance of a Rule 54(b) order is a fairly routine act that is reversed only in the rarest instances." James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1068 n.6 (9th Cir. 2002).

To issue a judgment under Rule 54(b), "[a] district court must first determine that it is dealing with a 'final judgment.'" Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 7 (1980). After that, entry of judgment under Rule 54(b) "is a two-step process." SEC v. Platforms Wireless Int'l Corp., 617 F.3d 1072, 1084 (9th Cir. 2010). First, courts consider severability, meaning "the interrelationship of the claims so as to prevent piecemeal appeals." Id. Second, consider whether there is any just reason to delay appeal by assessing the equities. Id.

This case involves multiple claims and parties and, as discussed below, all elements exist to warrant the entry of judgment under Rule 54(b).

B. The Order Is A Final Judgment Within The Meaning Of Rule 54(b)

The October 12, 2017 order affirming the June 9, 2017 order denying Weider and Forman's request for adequate protection is a final judgment within the meaning of Rule 54(b). Orders that "finally resolve all the claims of only some of the parties . . . fall squarely within Rule 54(b)." SEC v. Capital Consultants LLC, 453 F.3d 1166, 1169 (9th Cir. 2006). In fact, entry of judgment under Rule 54(b) is the *only* means to secure a *direct* appeal from such an order because the collateral order doctrine is unavailable; "distributing [receivership] assets equitably is one of the central purposes of the receivership and, correspondingly, of the SEC's litigation." Id. at 1172.

Here, Weider and Forman are "claimants with claims" to certain receivership assets. The Court's order denies them those rights—indeed, the district court's order acknowledges that the June

9, 2017 order was "dispositive," requiring de novo review of Weider's and Forman's objection. October 12, 2017 Order 2, ECF No. 549. Therefore, the October 12, 2017 order affirming the June 9, 2017 order is final for purposes of Rule 54(b), as explained in Capital Consultants.

C. Weider's and Forman's Claims Are Severable

Weider's and Forman's claims are severable from the remaining litigation. The key to severability is not whether the claims-to-be-appealed are wholly "separate from and independent of the remaining claims," but whether entry of judgment would create "piecemeal appeals." Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 797-98 (9th Cir. 1991). Courts consider "whether the nature of the claims already determined [is] such that no appellate court [will] have to decide the same issues more than once even if there [are] subsequent appeals[.]" Curtiss-Wright Corp., 446 U.S. at 8 & n.2.

This test is clearly met here. An order denying adequate protection to a secured creditor after a free-and-clear sale is severable, and does not create a danger for piecemeal appeals. See, e.g., In re TWL Corp., 2008 WL 5246069, at *4-5 (Bankr. E.D. Tex. Dec. 15, 2008) (approving free-and-clear sale, denying adequate protection, and entering partial final judgment under Rule 54(b)). The appeal of the district court's order does not create a danger of piecemeal appeals because it addresses issues unique to Weider and Forman—whether *they* have interests in the sale proceeds and whether *they* are entitled to adequate protection. Once this issue is appealed and resolved, no appellate court will be asked to determine the issue again. There is no danger of duplicative effort.

D. There Is No Just Reason To Delay Appeal

The equities here weigh heavily in favor of an immediate appeal. Absent entry of judgment under Rule 54(b) (or certification under section 1292(b) discussed below), Weider and Forman will suffer hardship and injustice because they will have no other means to obtain *direct* appellate review of the June 9, 2017/October 12, 2017 orders that purport to determine their interests (or lack thereof) in the sale proceeds, their status vis-à-vis other Aequitas creditors, and the validity and voidness of their 2014 loans to CarePayment Holdings, LLC. June 9, 2017 Order at 3-7, ECF No. 465; October 12, 2017 Order, ECF 549. The longer it takes to appeal, the more

Weider and Forman risk diminution in the value of their collateral. This is particularly true here, because the Receiver expressly suggested that the receivable sale proceeds representing the value of their collateral could be spent. Jan. 17, 2017 Forman Decl. ¶¶ 23-24, ECF No. 345; Jan. 18, 2017 Mandler Decl. ¶¶ 8-9, ECF No. 346. As explained below, without relief, Weider and Forman will suffer irreparable harm because the order effectively extinguishes their liens on the subsidiary companies, effectively extinguishes their interests in the subsidiaries' receivables, and allows the subsidiary companies' assets to dissipate.

By contrast, there is little downside for the Receiver to an immediate appeal. Although he may have to file additional briefing, an appeal would provide him comfort "at the earliest opportunity" concerning adequate protection, so that he "can stop worrying about and preparing for further proceedings" on it. Cont'l Cas. Co. v. Anderson Excavating & Wrecking, Inc., 189 F.3d 512, 517-18 (7th Cir. 1999). Without that certainty, these issues will re-arise throughout the claims process. For these reasons, Weider and Forman respectfully request that the Court enter a partial final judgment on the October 12, 2017 order.

II. The Court Also Should Certify For Appeal Under 28 U.S.C. § 1292(b) The Orders Approving The Free-And-Clear Sale, But Denying Adequate Protection

A. Governing Law

The Court should also certify for appeal the orders approving the free-and-clear sale but denying adequate protection as an alternative basis to facilitate direct appeal.[2] "A non-final order may be certified for interlocutory appeal where it 'involves a controlling question of law as to which there is substantial ground for difference of opinion' and where 'an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" Reese v. BP Expl. (Alaska) Inc., 643 F.3d 681, 687–88 (9th Cir. 2011) (quoting 28 U.S.C. § 1292(b)). All three conditions exist here.

[2] This occurred in four orders: (1) the January 23, 2017 minute order overruling Weider's and Forman's objections to the free-and-clear sale and deferring consideration of adequate protection, ECF No. 357; (2) the January 25, 2017 order to the same effect, ECF No. 362; (3) this Court's order denying adequate protection, ECF No. 465; and (4) the district court's order overruling Weider's and Forman's objection, ECF No. 549.

B. The Orders Involve Controlling Questions Of Law

First, the orders involve controlling questions of law. "[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." In re Cement Antitrust Litig. (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir. 1981). "'Issues collateral to the merits' may be the proper subject of an interlocutory appeal,'" because certified issues need not be outcome-determinative. Kuehner v. Dickinson & Co., 84 F.3d 316, 319 (9th Cir. 1996). Relevant here, controlling questions of law exist when a party seeks to challenge aspects of a court's approval of a free-and-clear sale, including the court's interpretation of the term "interest" and the sufficiency of "adequate protection." In re Leckie Smokeless Coal Co., 99 F.3d 573, 578-79, 582 (4th Cir. 1996) (exercising section 1292(b) jurisdiction over two challenges to a free-and-clear sale, and defining "interest" to include "rights to collect premium payments"); Prudential Ins. Co. of Am. v. Boston Harbor Marina Co., 159 B.R. 616, 617, 623 (D. Mass. 1993) (certifying order segregating rents as cash collateral, and limiting debtor's use of rents, for interlocutory review).

Here, the orders involve several controlling questions of law that could materially affect the outcome of the litigation—i.e., they could affect the parties who receive assets and the amount of assets they receive. These questions include:

- Whether the "interests" that require adequate protection in a free-and-clear sale are limited to "security interests" in the assets being sold;
- Whether, having obtained approval for a free-and-clear sale, over objections, on the basis of a "bona fide dispute," a Receiver is required to provide adequate protection for the objecting party's interests;
- Whether, in the situation described above, the entire value of the objecting party's interest must be reserved pending resolution of the "bona fide dispute;"
- Whether courts should look to the Bankruptcy Code for guidance in approving free-and-clear sales in the SEC receivership context; and
- Whether the Fifth and Fourteenth Amendments require a Court to provide notice and a meaningful opportunity to be heard before deciding that a secured creditor:
    - has no security interest in an asset being sold,
    - whether there was sufficient consideration for a transaction,
    - whether a transaction is voidable based on fraudulent transfer, and

- whether a secured creditor's interests should be subordinated to that of an unsecured creditor's or investor's interests.

C. There Is A Substantial Ground For Difference Of Opinion

Second, the orders involve novel issues over which reasonable jurists may differ. "A substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution, not merely where they have already disagreed." Reese, 643 F.3d at 688.

Here, the Receiver cited *no* binding authority for its arguments (i) that "interests" requiring adequate protection are limited to "security interests;" (ii) that the Court had authority to approve a free-and-clear sale on the basis of a "bona fide dispute" without providing adequate protection; (iii) that the Court could reserve less than the disputed amount pending resolution of the "bona fide dispute;" (iv) that the Court should not look to the Bankruptcy Code for guidance in this free-and-clear sale; (v) and that the Court could resolve issues concerning the extent, validity, and priority of claims without a full investigation and claims process. This point is underscored by the fact that the Court cited only one, unpublished district court opinion in its order—and only for the proposition that the Bankruptcy Code does not apply in this SEC receivership. June 9, 2017 Order 7, ECF No. 465. The issues identified above involve novel and difficult questions of first impression, on which lower courts could use further guidance, which makes the orders particularly appropriate for appeal.

D. Immediate Review May Materially Advance Termination Of The Litigation

Immediate review may materially advance termination of the litigation. "[N]either § 1292(b)'s literal text nor controlling precedent requires that the interlocutory appeal have a final, dispositive effect on the litigation, only that it 'may materially advance' the litigation." Reese, 643 F.3d at 688. This element is satisfied when an appeal may remove claims or parties from the case. Id. It is satisfied when appeal may affect recovery. See, e.g., In re Yankah, 514 B.R. 159, 164 (E.D. Va. 2014); Lucero v. Regents of Univ. of Cal., 1993 WL 341287, at *15 (N.D. Cal. Aug. 23, 1993); Stong v. Bucyrus-Erie Co., 476 F. Supp. 224, 225 (E.D. Wis. 1979). And it is satisfied when appeal may "'avoid protracted and expensive litigation,' saving both the court and the parties

'unnecessary trouble and expense.'" Cooper v. Tokyo Elec. Power Co., Inc., 166 F. Supp. 3d 1103, 1143 (S.D. Cal. 2015), aff'd, 860 F.3d 1193 (9th Cir. 2017) (citations omitted).

Here, an appeal will materially advance termination of the litigation by resolving entitlement to the receivership assets, eliminating or confirming Weider and Forman as claimants to the proceeds of the free-and-clear sale, providing clarity on whether a so-called reserve hearing is either necessary or appropriate to determine the amount of adequate protection, and whether it is logistically or procedurally proper for the Receiver to attempt to litigate fraudulent transfer allegations through a so-called reserve hearing. As explained above, without certification under section 1292(b) (or entry of judgment under Rule 54(b)), Weider and Forman will have no means to obtain *direct* appellate review of the Court's dispositive order. For these reasons, Weider and Forman respectfully request that the Court certify the orders listed in footnote 2 for appeal.

III. Entry Of Judgment, With Certification As An Alternative, Is Appropriate

Weider's and Forman's request for entry of judgment under Rule 54(b), with certification under section 1292(b) as an alternative, is proper. It is true that "Rule 54(b) and section 1292(b) provide alternative, non-overlapping bases for appeal." Braun-Salinas v. Am. Fam. Ins. Group, 665 Fed. App'x 576, 579 (9th Cir. 2016) (quoting James, 283 F.3d at 1068 n.6). Yet courts treat entries of judgment under Rule 54(b) as section 1292(b) certifications, and vice versa, when it is later discovered that one section was more appropriate than the other because, "[t]hough the mechanics of the two procedures are different, their primary purposes are identical: to accelerate appellate review of select portions of a litigation." Loc. P-171, Amalgamated Meat Cutters & Butcher Workmen of N.A. v. Thompson Farms Co., 642 F.2d 1065, 1071 (7th Cir. 1981). "Even learned commentators are of two minds" on whether Rule 54(b) and section 1292(b) are mutually exclusive, with the better view being that they are not." Id. at 1069 n.4 (collecting authority). The most conservative approach here is to enter judgment under Rule 54(b), and alternatively certify the district court's order for immediate interlocutory review, which will prevent Weider and Forman from suffering irreparable harm and prejudice by lack of any means to obtain direct appellate review.

IV. The Court Should Stay Enforcement Of The Orders Denying Adequate Protection Pending Consideration Of This Request And Pending Appeal

In order to preserve the status quo during the pendency of this motion and the appeal, Weider and Forman also request that this Court stay enforcement of the orders denying adequate protection.[3] The effect would be to continue the adequate protection measures that were in place before—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.

The Receiver has already twice agreed to the very same stay pending the district court's consideration of this Court's June 2017 order. Stipulations, ECF Nos. 473, 537.

This Court can "stay the enforcement of a judgment pending the outcome of an appeal." Nken v. Holder, 556 U.S. 418, 421 (2009). 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.

All four factors strongly favor a stay here.

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

Weider and Forman will suffer irreparable injury absent a stay for three reasons, which weighs heavily in favor of a stay. First, the orders effectively extinguish Weider's and Forman's lien on both the receivables and the subsidiary companies. "[A]n extinguishment of a first-

[3] These are: (1) the Court's order dissolving interim adequate protection, ECF No. 465; and (2) the district court's order overruling Weider's and Forman's objection, ECF No. 549.

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). 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 orders extinguish 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. June 9, 2017 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.

Second, denial of adequate protection alone constitutes 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, of course, the orders approve a free-and-clear sale but *deny* Weider and Forman recourse against the proceeds of that sale, so they *will* suffer irreparable harm. Orders, ECF Nos. 465, 549. 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 affected the "adequate protection" of secured creditors. 820 F.2d 700, 710, 711-15 (5th Cir. 1987). The Fifth Circuit reasoned that the order, which had granted super priority status to one creditor thereby subordinating the interests of all others, "displaces liens on which creditors have relied in extending credit, [and] a court that is

asked to authorize such [super priority] financing must be particularly cautious when assessing whether the creditors so displaced are adequately protected." Id. at 710.

Third, the orders allow the subsidiaries' assets to dissipate. 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). 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 is a "significant downside risk" for expected recovery for unsecured creditors. Sept. 14, 2016 Report 82, ECF No. 246. And, the Receiver's statements that unless Weider and Forman take a "haircut" now, the proceeds representing the value of their secured interests could dissipate, 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.

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

Weider and Forman respectfully submit that they are likely to succeed on the merits, which weighs heavily in favor of a stay. The reasons for Weider and Forman's belief are set forth in detail in the Objection to the June 2017 Order. Objection to Order, ECF No. 466.

C. The Balance of Equities Favors A Stay

The balance of equities weighs heavily in favor of 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's loan documentation provides them with valid, perfected security interests in receivership assets—the dispute is only over the reach of those interests. Mot. to Set Reserve Hearing 2, 9, ECF No. 383; Reply 21, ECF No. 418. 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, on the other hand, voluntarily agreed to a stay for the past five months (Stipulations, ECF Nos. 473, 537), which suggests that it would not be harmed by a stay during an expedited appeal. McDaniel v. U.S. Dist. Ct. for the Dist. of Nev., 127 F.3d 886, 889 (9th Cir. 1997) ("implicit consent to the terms of the order undermine any claim of irreparable injury"). In fact, the Receiver has represented that the claims and distribution process will take three years, which means that the Receiver has no need to disburse the funds representing the value of Weider's and Forman's interests for at least three years. Mot. for Reserve Hr'g 1, 30, ECF No. 383.

Moreover, none of the three potential harms the receiver identified justifies denying 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. Yet as to the first two potential harms, Weider and Forman *are part of the pool of creditors*—and indeed, are major 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. As to the last potential harm, 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).

D. The Public Interest Favors A Stay

Lastly, the public interest weighs heavily in favor of 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 Ninth Circuit can resolve the controlling questions of law; 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 pending appeal.

CONCLUSION

Weider and Forman respectfully request that the Court: (1) enter a partial final judgment on the October 12, 2017 order denying adequate protection; (2) certify the orders approving the free-and-clear sale but denying adequate protection for appeal (ECF Nos. 357, 362, 465, and 549); and (3) stay enforcement of the orders dissolving interim adequate protection pending appeal (ECF Nos. 465 & 549).

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Respectfully submitted by,

/s/ Matthew Donald Umhofer

Matthew Donald 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