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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 REPLY IN SUPPORT OF 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** TELEPHONIC ORAL ARGUMENT 11/30/2017 AT 10:00 A.M. [ECF NO. 553]

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INTRODUCTION

This motion asks for nothing but a fair opportunity to seek appellate review of a dispositive decision that has devastating consequences for secured creditors. The Ninth Circuit will have to consider the threshold issue of Weider's and Forman's interests in the sale of CarePayment receivables at some point, either now—before Weider's and Forman's security interests are destroyed and critical assets are dissipated—or after this Court hears a host of issues unrelated to Weider and Forman—when irreparable harm will have been inflicted on them. The Ninth Circuit's inquiry will include *both* the issue of whether Weider and Forman have "security interests" in the CarePayment receivables—which this Court addressed in its June 9, 2017 order, *and more broadly*, whether Weider and Forman have "interests" in the CarePayment receivables that, even if they are not "security interests," are nonetheless "interests" requiring adequate protection—an issue briefed, but never addressed by this Court. There is simply no reason to deny Weider's and Forman's request for entry of partial judgment, or alternatively, certification for interlocutory appeal, which will facilitate a direct appeal now.

The Receiver resists this result by espousing what the Ninth Circuit has called an "outdated and overly restrictive view of … Rule 54(b)" (Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 797–98 (9th Cir. 1991)), insisting that a Rule 54(b) judgment is improper because it will not "dispose" of a "wholly discrete" claim. But a partial final judgment under Federal Rule of Civil Procedure 54(b) is appropriate, because "a district court's order determining the rights and liabilities of some, but not all, claimants with claims to receivership assets" is a partial final order that "fall[s] squarely within Rule 54(b)." SEC v. Capital Consultants LLC, 453 F.3d 1166, 1169, 1174 (9th Cir. 2006). The Receiver does not dispute that there is no just reason to delay appeal. Instead, he argues that later developments might possibly obviate the need for the Ninth Circuit to consider adequate protection at all. This is incorrect, as the Ninth Circuit will need to decide the threshold issue of Weider's and Forman's interests at some point, and the suggestion that speculative postulations about future litigation events can overcome the straightforward

Rule 54(b) analysis exposes the weakness of the Receiver's arguments and underscores the appropriateness of an entry of judgment.

The Receiver fares no better in opposing certification under 28 U.S.C. § 1292(b). His argument that the questions presented are not "controlling" because they are "collateral" ignores the Ninth Circuit's conclusion that collateral issues can still be "controlling" for purposes of section 1292(b). Kuehner v. Dickinson & Co., 84 F.3d 316, 319 (9th Cir. 1996). And while the Receiver argues that whether Weider and Forman have interests in CarePayment receivables is not novel, this is not the inquiry; the inquiry is whether the controlling questions of law are novel. There can be no dispute they are. Lastly, the Receiver contends that immediate review will not materially advance the termination of the litigation, but he fails to explain why. Therefore, if this Court does not enter a partial final judgment, it should certify the orders approving the free-and-clear sale, but denying adequate protection, for interlocutory review.

Because novel questions of law loom and irreparable harm is imminent, this Court should stay the order dissolving interim adequate protection pending appeal to preserve the status quo during the appeal. The Receiver resists the obvious fairness of this, claiming that Weider and Forman failed to show that their irreparable injuries are "probable" while ignoring the injuries that have already occurred: the orders have extinguished their liens, denied them adequate protection, and allow the value of proceeds from the sale of CarePayment receivables to dissipate. The novelty of the issues presented and the probability that the Ninth Circuit will reach a different result trumps the Receiver's claim that Weider and Forman offered nothing to "upend" this Court's ruling. The Receiver's professed concern of copycat motions for adequate protection is far too speculative to warrant denying a stay. And the Receiver's inflammatory and unfounded allegations of fraud-on-the-court cannot warrant denying a stay.

For these reasons, the Court should grant Weider's and Forman's motion.

ARGUMENT

I. The Court Should Enter A Partial Final Judgment Under Rule 54(b)

The Court should enter a partial final judgment on the order denying adequate protection because: (1) the order is a final judgment for purposes of Rule 54(b); (2) Weider's and Forman's claims are sufficiently severable so as to prevent piecemeal appeals; and (3) there is no just reason to delay an appeal. Mot. 3-5, ECF No. 552. The Receiver does not dispute that the order is a final judgment for purposes of Rule 54(b), or that the equities weigh heavily in favor of immediate appeal. See generally Opp'n, ECF No. 558. He insists only that piecemeal appeals may result. Id. at 4-11. Yet the relief Weider and Forman seek does not burden the Court, and ultimately advances the termination of litigation and administration of justice.

There is no danger of piecemeal appeals because, after deciding whether Weider and Forman are entitled to adequate protection in this appeal, the Ninth Circuit will never have to consider it again, even if there are subsequent appeals. Mot. 4, ECF No. 552. Tellingly, the Receiver fails to acknowledge that the Ninth Circuit has squarely decided that a Rule 54(b) judgment is appropriate under the circumstances presented here. In SEC v. Capital Consultants LLC, the Ninth Circuit held that an "order determining the rights and liabilities of some, but not all, claimants with claims to receivership assets" is a partial final order, appropriate for entry of judgment under Rule 54(b). 453 F.3d 1166, 1169, 1174 (9th Cir. 2006), cited Mot. 3-4, ECF No. 552. The Ninth Circuit explained that a claimant's claims to receivership assets may comprise merely a small piece of the merits of the SEC case, but resolution of the claims "directly affect[s] the ongoing litigation" in that, "[i]f the claims succeed, the pool of assets the receiver controls will be smaller, [and] … the receiver will have fewer resources to distribute to other claimants." Id. at 1172. Weider and Forman are claiming rights to receivership assets; the Court's order denies them those rights; and thus, entry of a partial final judgment is necessary to enable a direct appeal.

This rule is so fundamental that the Rutter Guide, citing Capital Consultants, instructs practitioners that "[a] party wishing to appeal immediately from [an order resolving fewer than all

claims to receivership assets] must obtain a FRCP 54(b) certification from the district court." Christopher A. Goelz, et al., Rutter Group Practice Guide: Fed. Ninth Cir. Civ. Appellate Prac. Ch. 2-C ¶ 2:493.5 (Mar. 2017). That is what Weider and Forman request here. The Court need look no further to enter a partial judgment.

The Receiver cites Capital Consultants for the proposition that a Rule 54(b) judgment is proper only *after* entry of a distribution plan (Opp'n 4, ECF No. 558), but there is nothing in Capital Consultants to suggest as much. In Capital Consultants, the Receiver determined sums to be distributed to a "first set of claimants," and the district court entered an order on that determination. 453 F.3d at 1170. Certain of these "first set of claimants" sought Rule 54(b) judgments on the order "as it applied to them." Id. The receiver was *not* finished determining all sums that would be distributed to all claimants, but entry of a partial final judgment was nevertheless appropriate. Id. Although the court's order concerned events that occurred after the court adopted an amended distribution plan, the presence or absence of the distribution plan was not dispositive; what was dispositive was the fact that the order-to-be-appealed "determin[ed] the rights and liabilities of some, but not all, claimants with claims to receivership assets." Id. at 1169-70, 1174.

Here, the order denying adequate protection strips Weider and Forman of their rights, and forecloses their ability to seek recovery ahead of any distribution plan—a result championed by the Receiver himself. The Court has determined that Weider and Forman will receive *no* sums from the sale of CarePayment receivables, despite the Receiver's recognition that Weider and Forman *are secured creditors of CarePayment Holdings, LLC* (Sept. 14, 2016 Report 54, ECF No. 246), and despite the Receiver's previous offer to settle the Receivership's debt *out of this very sale* (Feb. 3, 2017 Forman Decl., Ex. A, ECF No. 375). Remarkably, the Receiver has *never* identified where any funds to settle the Receivership's debt to Weider and Forman will come from if not from the sale of CarePayment receivables. Thus, as in Capital Consultants, the order denying adequate protection, "as applied" to Weider and Forman, determines the receivership sums (or lack thereof) that will be distributed to them, and entry of a partial final judgment is appropriate.

The Receiver's citation to In re Agric. Research & Tech. Group, Inc., 916 F.2d 528, 531 (9th Cir. 1990) (Opp'n 4, 10, ECF No. 558) supports Weider and Forman, as the case acknowledges that a Rule 54(b) judgment is appropriate even when "the judgments entered d[o] not dispose of all claims."

Sidestepping Capital Consultants, the Receiver raises two sets of arguments for why entry of judgment would create piecemeal appeals, but neither is persuasive.

First, the Receiver cites Wood v. GCC Bend, LLC, 422 F.3d 873 (9th Cir. 2005), for the proposition that an issue that *might* be mooted by later events should not be the subject of an entry of judgment. Opp'n 7, ECF No. 558. He argues that later developments in this case "may" obviate the need for the Ninth Circuit to consider adequate protection at all, making entry of judgment inappropriate. Id. at 6-7, 9. This ignores the fact that the Ninth Circuit will have to decide the threshold issue of Weider's and Forman's interests and whether those interests are sufficient to trigger the adequate protection requirement at some point—whether on appeal now or later. The Ninth Circuit's inquiry will include *both* the issue of whether Weider and Forman have "security interests" in the CarePayment receivables—which this Court addressed (June 9, 2017 Order 7, ECF No. 465), *and more broadly*, whether Weider and Forman have an "interest" in the CarePayment receivables that, even if it is not a "security interest," is nonetheless an "interest" requiring adequate protection—an issue that Weider and Forman briefed, but which this Court never addressed (compare id., with Weider/Forman Resp. to Mot. to Set Reserve Hr'g 17, 22-23, ECF No. 391, and Weider/Forman Sur-Reply To Mot. To Set Reserve Hr'g 7-8, ECF No. 451, and Weider/Forman Obj. to June 9, 2017 Order 15-18, ECF No. 466).

The Receiver's argument also mischaracterizes Wood by incorrectly elevating one factor in a Rule 54(b) analysis above all others. Wood noted that courts consider *several* factors in a Rule 54(b) analysis (422 F.3d at 878 n.2) and cited the United States Supreme Court's decision of Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1 (1980), in support. Curtiss-Wright, in turn, listed several factors that the district court properly can consider, but held that a district court ultimately need only "find a sufficiently important reason for … granting [Rule 54(b)] certification." 446 U.S. at 8 & n.2.

Particularly relevant here, Curtiss-Wright explained that, in evaluating the potential for piecemeal appeal, a district court should consider whether an appellate court will "have to decide *the same issues* more than once *even if there were subsequent appeals*." 446 U.S. at 8. Here, once the Ninth Circuit considers the issue of adequate protection for Weider and Forman on appeal from this Court's order, there is no danger that it will ever have to address adequate protection for them again; the matter will be decided.

This critical fact distinguishes this case from Wood. Wood was a routine employment discrimination case against a single defendant, in which the Ninth Circuit held that it was inappropriate for the district court to enter a Rule 54(b) judgment on an order granting summary judgment on constructive discharge claims, but not retaliation and age discrimination claims. 422 F.3d at 879. Although the claims were technically distinct, they were so factually and legally related, that "the practical effect of certifying the constructive discharge issues … [was] to deconstruct [the] age discrimination action so as to allow piecemeal appeals with respect to the same set of facts." Id. at 880. That is simply not the case here—Weider's and Forman's interest in the sale of CarePayment receivables (whether "secured" or otherwise), along with adequate protection, are wholly distinct from the defenses of fraudulent transfer and equitable subordination, let alone any issue facing any other interested party. Moreover, in Wood, when the Ninth Circuit noted that it might never have to decide the constructive discharge claim absent a Rule 54(b) judgment (i.e., that the issue might become moot), it was because the district court was already going to have a trial on the same set of facts for the retaliation and age discrimination claims, so the district court might revisit its own constructive discharge ruling. Id. at 882. Despite Weider's and Forman's efforts, this Court and the district court have declined to re-visit adequate protection, so now it is up to the Ninth Circuit to consider the question of adequate protection.

When it does weigh in, the Ninth Circuit will likely note, as it did in Wood, that claims with overlapping facts *are* appropriate for entry of judgment when—as here—"the case is complex and there is an important or controlling legal issue that cuts across (and cuts out or at least curtails) a number of claims," or the party seeking relief stands to "gain or lose a significant

amount of money unless the appeal is heard now rather than at the end of trial." Id. at 881-82. This case *is* complex; there *are* several controlling legal issues (Mot. 6-7, ECF No. 552); and Weider and Forman *stand to lose* a significant amount of money unless the appeal is heard now, given the nature of the allegations (a Ponzi scheme) and the Receiver's threats to spend the sale proceeds representing the value of Weider's and Forman's collateral (id. at 5).

To the extent the Receiver attempts to argue that this is not a complex case (Opp'n 7 n.6, ECF No. 558), one need only look to the over-550 docket entries and over-100 interested parties listed on the docket to recognize that this is blatantly false; it is nothing like the routine employment dispute against a single defendant in Wood. And to the extent the Receiver argues that the Court should consider settlement prospects, Wood held that the Court should consider "the upside of finding that *appellate resolution* of the certified claims might facilitate settlement of the remaining claims." Wood, 422 F.3d at 878 n.2 (emphasis added). Certainly, if the Ninth Circuit agrees with Weider and Forman that they have interests in the sale of CarePayment receivables that require adequate protection, it will prompt the Receiver to *re*-engage in settlement negotiations to satisfy the debt that the Receivership indisputably owes to them.

Second, the Receiver cites Morrison-Knudsen Co. v. Archer, 655 F.2d 962 (9th Cir. 1981) for the proposition that "[w]here severance cannot dispose of a wholly discrete claim, entry of a Rule 54(b) partial judgment is generally improper." Opp'n 9, ECF No. 558. But the Ninth Circuit rejected this very argument. In Texaco, Inc. v. Ponsoldt, a litigant cited Morrison-Knudsen for the same proposition—i.e., that a Rule 54(b) judgment is inappropriate when claims involve "the same factual determinations," because then the partial judgment will not dispose of a wholly discrete claim. 939 F.2d 794, 797 (9th Cir. 1991). The Ninth Circuit rejected this argument, and made clear that "Rule 54(b) claims do *not* have to be separate from and independent of the remaining claims;" the key is to "prevent piecemeal appeals in … cases which should be reviewed only as single units;" and "Morrison–Knudsen Co. … is an outdated and overly restrictive view of the appropriateness of Rule 54(b) certification." Id. at 79798 (emphasis added). Unsurprisingly, "disposing of a wholly discrete claim" is not a Rule 54(b) factor identified in the Receiver's own

caselaw. Wood, 422 F.3d at 878 n.2. And regardless, the order denying adequate protection *did* dispose of Weider's and Forman's discrete claims by denying them recourse to the value of their collateral and failing to recognize the import of their status as secured creditors. Appellate resolution *would* resolve their wholly discrete claims, by cementing their rights as secured creditors and preventing the Receiver from spending the value of their collateral.

The Receiver's discussion of Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC, 548 F.3d 738, 747 (9th Cir. 2008) (Opp'n 9-10, ECF No. 588) is inapposite, as that case merely explains the historic antipathy towards piecemeal appeals. Again, there is no danger of piecemeal appeals here, because adequate protection for Weider and Forman is a wholly distinct issue from anything else pending before this Court in this case.

Lastly, the Receiver argues that Weider's and Forman's claims are inappropriate for entry of judgment because they are factually and legally intertwined with the Receiver's "unadjudicated defense[s]" of fraudulent transfer and equitable subordination. Opp'n 4, 9-10, ECF No. 558. The problem with this argument is that there is now no reason for the Court to reach these issues because it has found there is no threshold security interest. This means that, without entry of judgment, Weider's and Forman's claims will languish until the end of the entire case, while assets diminish, and while this Court litigates issues wholly distinct from anything concerning Weider and Forman. In addition, it is inaccurate to characterize fraudulent transfer and equitable subordination as "unadjudicated defenses," because this Court has mooted any need to present these defenses—i.e., this Court: (1) appears to have determined that there was some form of fraudulent transfer, by stating that there was no consideration for the $6 million October 2014 CarePayment Holdings, LLC's loan;[1] and (2) de facto subordinated Weider's and Forman's claims,

[1] The only other basis for this statement would be a finding that Weider and Forman did not actually transfer the $6 million in loan principal, which is demonstrably false. Supp. Forman Decl. Ex. A, ECF No. 368 (wire transfer receipts), id. Ex. B (letter agreement describing transfer of $6 million outstanding debt); Forman Decl. Ex. E ¶ 3, ECF No. 345 (same).

by stating that Weider and Forman are merely like all other creditors of Aequitas Management, LLC (not just CarePayment Holdings, LLC).[2] June 9, 2017 Order 3-4, 6, ECF No. 346.

For these and the reasons set forth in the motion, this Court should enter a partial judgment on the October 12, 2017 order denying adequate protection (ECF No. 549).

II. Alternatively, The Court Should Certify The Orders Approving The Free-And-Clear Sale, But Denying Adequate Protection, For Immediate Appeal

Alternatively, the Court should certify the orders approving the free-and-clear sale, but denying adequate protection, for interlocutory appeal because: (1) the orders involve controlling questions of law; (2) there are substantial grounds for differences of opinion on the controlling questions of law; and (3) immediate review may materially advance the termination of the litigation. Mot. 5-8, ECF No. 552. The Receiver's arguments in response are unavailing.

A. The Orders Involve Controlling Questions Of Law

The orders at issue involve eight controlling questions of law. Mot. 6-7, ECF No. 552. The Receiver argues that the identified questions are not "controlling" questions because they are collateral to the merits (Opp'n 13, ECF No. 558), but this is factually and legally incorrect.

The argument is factually incorrect because the eight questions of law are not collateral to Weider's and Forman's claim to $10.5 million plus interest; they are prerequisites to the claim. That is, if Weider and Forman have "interests" in the sale of CarePayment receivables (whether

[2] Indeed, until the end, the Receiver acknowledged that Weider and Forman are secured creditors of CarePayment Holdings, LLC; the Receiver merely disputed whether the collateral included only equity interests in subsidiary companies, or equity interests and the receivables too, and used this as a basis to justify a free-and-clear sale of the receivables, which destroyed the value of the subsidiary companies without adequate (or any) protection. Receiver's Reply re Mot. to Set Reserve Hr'g 4-5 & n.1, ECF No. 418. This Court then went beyond the Receiver's argument, stating that Weider and Forman "are in all material respects similarly situated to the great majority of creditors of the receivership entities." June 9, 2017 Order 3, ECF No. 465; see also id. at 7 n.1. Weider and Forman respectfully submit that, as secured creditors, they are not similarly situated to other creditors, let alone creditors of other receivership entities. SEC v. Capital Consultants, LLC, 397 F.3d 733, 752 (9th Cir. 2005) ("[T]he '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.") (Fletcher, J., concurring and dissenting).

secured or otherwise), the Receiver cannot spend the $10.5 million plus interest; if approval of a free-and-clear sale, over objections, on the basis of a "bona fide dispute" requires adequate protection, the Receiver should have provided adequate protection for the $10.5 million plus interest, without any need for a so-called "reserve hearing" on amount; if this Court should have looked to the Bankruptcy Code for guidance, then its analysis would have been different and the Receiver would have been required to provide adequate protection for the $10.5 million plus interest; and if the Fifth and Fourteenth Amendments require notice and a meaningful opportunity to be heard before deciding the four issues listed in the motion on pages 6-7, then this Court's order must be reversed.

The Receiver's argument is also legally incorrect because, as Weider and Forman explained, (1) to be a "controlling" question of law, an issue need only "*affect* the outcome of litigation," and (2) the issue *can* be "collateral to the merits." Mot. 6, ECF No. 552 (quoting In re Cement Antitrust Litig. (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir. 1981) (emphasis added), and Kuehner v. Dickinson & Co., 84 F.3d 316, 319 (9th Cir. 1996)). Indeed, the Receiver fails to distinguish or even discuss two cases directly on point, which hold that controlling questions of law exist when a party challenges a court's approval of a free-and-clear sale, including interpretation of the term "interest" and the sufficiency of "adequate protection." Id. (citing In re Leckie Smokeless Coal Co., 99 F.3d 573, 578-79, 582 (4th Cir. 1996), and Prudential Ins. Co. of Am. v. Boston Harbor Marina Co., 159 B.R. 616, 617, 623 (D. Mass. 1993)).

The Receiver states, without discussion, that the eight identified questions are fact issues rather than legal issues (Opp'n 13-14, ECF No. 558), but this is incorrect. A question of law "concern[s] the application or interpretation of the law," whereas a question of fact is "[a]n issue that does not involve what the law is on a given point." Black's Law Dictionary (10th ed. 2014). There can be no question that the eight issues identified in the motion on pages 6-7 are purely legal issues that do not depend on the underlying facts; answers to these questions would guide not only this Court, but all courts. Thus, the orders involve controlling questions of law.

B. There Are Substantial Grounds For Differences Of Opinion

There are substantial grounds for differences of opinion on the controlling legal questions because each one is novel. Mot. 7, ECF No. 552. The Receiver responds that issues concerning Weider's and Forman's interests in the CarePayment receivables are not novel. Opp'n 14, ECF No. 558. This obfuscates the issue, as the relevant inquiry is whether jurists might disagree on resolution of the identified *controlling questions of law*, not on factual findings in the order raising those controlling questions of law. 28 U.S.C. § 1292(b) ("When a district judge … shall be of the opinion that such order involves a controlling question of law *as to which there is substantial ground for difference of opinion* and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order") (emphasis added). "[C]ourts traditionally will find that a substantial ground for difference of opinion exists where ... novel and difficult questions of first impression are presented." Reese v. BP Expl. (Alaska) Inc., 643 F.3d 681, 688 (9th Cir. 2011) (citations omitted). Indeed, "courts *should not hesitate* to certify an interlocutory appeal" in cases involving "new legal question[s]." Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 111 (2009) (emphasis added). The novelty of the issues presented here is underscored by the absence of Ninth Circuit (or any) guidance. Mot. 7, ECF No. 552.

The Receiver asserts that, just because a court is the first to rule on an issue, does not necessarily mean that it is an issue on which there is substantial ground for difference of opinion. Opp'n 14, ECF No. 558. This may be true, but the fact that this Court took an unprecedented approach to adequate protection after the free-and-clear sale underscores that this *is* a case with substantial grounds for differences of opinion; certainly, courts that follow the Bankruptcy Code in free-and-clear sales in SEC receiverships would have reached a different result.

C. Immediate Review May Materially Advance Termination Of The Litigation

Immediate appeal may materially advance the 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. Mot. 7-8, ECF No. 552. The Receiver's response is fairly inscrutable. Mot. 15-16, ECF No. 558. He disputes that immediate review may materially advance the termination of litigation without really explaining why. Id. He also confusingly states that Weider's and Forman's questions relate to "procedural issues" rather than the "amount and viability of their claims" (id.), but this is incorrect because four of the eight identified questions of law are not procedural, and the remaining four questions of law do affect the amount and viability of the claims. In the end, "neither § 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. As the Ninth Circuit explained in Capital Consultants, resolution of claims to SEC receivership assets "directly affect[s] the ongoing litigation" in that, "[i]f the claims succeed, the pool of assets the receiver controls will be smaller, [and] … the receiver will have fewer resources to distribute to other claimants." 453 F.3d at 1172. There is no question that the appellate benefits identified above will materially advance the litigation.

For these reasons, immediate appeal is appropriate and, if this Court does not enter a partial final judgment, it should certify the orders approving the free-and-clear sale, but denying adequate protection, for interlocutory appeal.

III. The Court Should Stay Enforcement Of The Orders Denying Adequate Protection Pending Appeal

Weider and Forman respectfully request that this Court stay enforcement of the orders denying interim adequate protection pending appeal. Mot. 9-14, ECF No. 552. Weider and Forman will suffer irreparable injury absent a stay; they are likely to succeed on the merits of

their appeal; the balance of equities favors a stay; and the public interest favors a stay. Id. In fact, the Receiver offers no valid reason to deny a stay.

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

Weider and Forman will suffer irreparable injury absent a stay because: (1) the orders effectively extinguish their liens; (2) denial of adequate protection is irreparable as a matter of law; and (3) the orders denying adequate protection allow Weider's and Forman's secured interests to dissipate. Mot. 9-11, ECF No. 552. The Receiver argues that Weider and Forman failed to show that these injuries are "probable to occur" (Opp'n 17-18, ECF No. 558), but these injuries *have already occurred*—the orders *do* extinguish their liens on the receivables; the orders *do* deny adequate protection; and the orders *do* allow the value of the proceeds from the CarePayment receivables to dissipate. Mot. 9-11, ECF No. 552.

The Receiver argues that Weider and Forman cannot reconcile their claims of irreparable injury with their claims that the Receivership received millions of dollars from the sale of CarePayment Technologies, Inc. Opp'n 18-19, ECF No. 558. This is nonsensical because it does not matter how much money the Receivership has if it is unwilling to recognize and satisfy Weider's and Forman's full, first-priority, secured interests. The Receiver's statement that the Court returned this case to the status quo (id. at 19) is simply incorrect, as the status quo was the Receiver's recognition of Weider's and Forman's interests in the sale of CarePayment receivables, as evidenced by his acknowledgement of their secured creditor status and offer to settle the Receiver's debt out of this very sale. Sept. 14, 2016 Report 54, ECF No. 246; Feb. 3, 2017 Forman Decl., Ex. A, ECF No. 375.

The Receiver attempts to distinguish Weider's and Forman's cited cases by asserting that they involved situations in which the party to be enjoined "would intentionally and wrongfully dissipate funds." Opp'n 19, ECF No. 558. But that is exactly what the Receiver will be doing if he spends the sale proceeds representing the value of Weider's and Forman's collateral, knowing that he should not. Sept. 14, 2016 Report 54, ECF No. 246; Feb. 3, 2017 Forman Decl., Ex. A,

ECF No. 375 (acknowledging Weider's and Forman's interests); see also Weider/Forman Obj. to June 9, 2017 Order, ECF No. 466 (explaining why adequate protection is required for Weider's and Forman's interests).

The Receiver is mistaken in stating that Weider and Forman have identified no misconduct on his part; he is supposed to act in the interests of *all* creditors and investors (Booth v. Clark, 58 U.S. 322, 331 (1854)), but he has threatened to spend that which he knows he should not spend (Mot. 6-7, ECF No. 552), and has dragged Weider and Forman through tortuous and unnecessary briefing since January. Case in point, for months, the Receiver has argued to this Court that it should have a hearing on fraudulent transfer *before* the full investigation and claims process, but now admits that such a hearing is not appropriate until "after completing his investigation." Opp'n 1, ECF No. 558.

For reasons set forth above and in the motion, there is no question that, absent a stay, Weider and Forman will suffer irreparable harm if forced to wait years to obtain appellate review of the adequate protection orders.

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

Weider and Forman will succeed on the merits for reasons set forth in their Objection to the June 2017 Order. Weider/Forman Obj. to June 9, 2017 Order, ECF No. 466. The Receiver states that Weider and Forman "offer nothing new to upend this Court's sound analysis" (Opp'n 17, ECF No. 558), but he fails to acknowledge that the Ninth Circuit may very well reach a different result on the eight novel and controlling questions of law. Weider and Forman acknowledge that this factor in the stay analysis places this Court in the "awkward position of assessing the success of an appeal of its own decision." Raffington v. Cangemi, 2004 WL 2414796, at *1 (D. Minn. Oct. 22, 2004). Nevertheless, given the gravity of the irreparable injuries, the fact that the final claims and distribution process is years away, and the fact that there are substantial grounds for differences of opinion on the controlling legal issues, Weider and Forman respectfully submit that the better course is to stay dissolution of interim adequate

protection pending appeal to avoid irreparable harm. Id. (granting stay despite having to find some likelihood of success on the merits of appeal court's own decision).

C. The Balance of Equities Favors A Stay

The balance of equities strongly favors a stay because, in addition to the irreparable harms above, Weider and Forman will suffer the following harms without a stay: (1) when the subsidiaries' assets are sold, it will destroy the value of Weider's and Forman's collateral; (2) they will be denied any right of recourse to the collateral; (3) they will face delay and uncertainty concerning protection for their secured interests; and (4) their claims will impermissibly become subordinate to those with lower priority. Mot. 12, ECF No. 552. The Receiver, by contrast, will suffer no harm, as evidenced by his prior agreement to a stay, especially given his admissions that the claims and distribution process will take years. Id. at 12-13.

As expected, the Receiver argues that there may be copy-cat motions for adequate protection if the Court issues a stay. Opp'n 20-23, ECF No. 558. This cannot weigh against a stay because it is speculative: the Receiver has never identified another party who is entitled to, but who has been denied, adequate protection following the free-and-clear sale of CarePayment receivables (or indeed, following any of the Receiver's actions). Golden Gate Rest. Ass'n v. City & Cty. of San Fran., 512 F.3d 1112, 1126 (9th Cir. 2008) (granting stay pending appeal because possible harm to public interest without stay was "highly speculative"). Moreover, the potential for copycat motions cannot weigh against a stay because it would impermissibly punish Weider and Forman for asserting their rights. In re Enron Corp. Secs., Derivative & ERISA Litig., 2003 WL 25508889, at *6 & n.8, *9 (S.D. Tex. Mar. 25, 2003) (granting stay despite argument there might be copycat motions, and noting no other defendant filed a similar motion).

The Receiver's reference to other investors and their promissory notes (Opp'n 21-22 & nn.14-16, ECF No. 558) is incorrect and irrelevant, as discussed fully in Weider's and Forman's Sur-Reply To The Receiver's Motion To Set Reserve Hearing at pages 18-21, ECF No. 451.

The Receiver's concern of a stay pending a "lengthy" appeals process (Opp'n 1 n.1, 21-22 & n.15, ECF No. 558) rings hollow, given that, by the Receiver's own admission, the claims and distribution process will take just as long. Id. (estimating 3.5 years/43 months for appeal); Mot. for Reserve Hr'g 1, 30, ECF No. 383 (estimating at least 3 years for claims and distribution process). This means that the Receiver should not do anything with the bulk of the Receivership assets while this case is on appeal anyway, so a stay pending appeal imposes no real burden on the Receivership. More importantly, the Receiver is incorrect in estimating that an appeal will take 3.5 years/43 months, because the Ninth Circuit's own 2016 Annual Report states that the median time for an appeal is closer to *one-third* of that time:

> In the Ninth Circuit in FY 2016, the median time interval from filing of a notice of appeal to final disposition was 15.2 months…. Once an appeal [is] fully briefed, Ninth Circuit judges decide all types of cases fairly quickly. In FY 2016, the median time interval for panel decisions was 1.1 months for a case in which oral argument was held and about 6 days for cases submitted on briefs.

See Ninth Circuit 2016 Annual Report 45, available at https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2016.pdf.

Thus, because an appeal should only take 15 months (id.), the issues involved in Weider's and Forman's appeal will be resolved *well before* the claims and distribution process in this case.

The Receiver's characterization of Weider's and Forman's request as one of "siloing of assets on an entity-by-entity basis" (Opp'n 23, ECF No. 558) is inaccurate; Weider and Forman ask only for adequate protection of *their* interests following a free-and-clear sale that destroys the value of their collateral, which is a mere $20 million out of the $122 million generated from the CarePayment Technologies, Inc. sale (which is only one of Aequitas' many assets). Weider/Forman Sur-Reply To Mot. To Set Reserve Hr'g 22-23, ECF No. 451 (discussing same). If the Receiver needs access to the $20 million, nothing would prevent him from returning to Court and explaining why he should be allowed access to it.

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

D. The Public Interest Favors A Stay

The public interest strongly favors a stay because it would: (1) preserve the value of Weider's and Forman's collateral until the Ninth Circuit can resolve controlling questions of law; (2) honor their contracts while the Ninth Circuit examines the extent of those contracts; (3) protect their ability to litigate the validity of their claims *after* full notice, investigation, and an opportunity to be heard; and (4) preserve the status quo pending appeal. Mot. 13-14, ECF No. 552. Effectively conceding this truth, the Receiver begins his argument by repeating his inflammatory and unfounded allegations of fraud-on-the-court. Opp'n 23-26, ECF No. 558. There has been, and is, no fraud-on-the-court as explained in Weider's and Forman's Sur-Reply To The Receiver's Motion To Set Reserve Hearing at pages 1-10, ECF No. 451.

The Receiver argues that dissolving interim adequate protection restores the status quo, citing the Order Appointing Receiver. Opp'n 24, ECF No. 558. The Order Appointing Receiver has nothing to do with the status quo; it allows the Receiver to use money from any entity to pay receivership expenses in the ordinary course of discharging its duties, but does *not* allow the Receiver to consolidate money from any source into a general pool for the benefit of all claimants. Order Appointing Receiver ¶ 6(D), ECF No. 156; see also Weider/Forman Sur-Reply To Mot. To Set Reserve Hr'g at pages 21-22, ECF No. 451.

Lastly, the Receiver attempts to distinguish Weider's and Forman's cited caselaw based on the facts (Opp'n 25, ECF No. 558), but these cases were cited for legal propositions, not facts. The Receiver does not dispute the legal propositions. Thus, the public interest strongly favors a stay.

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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) or, alternatively, 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).

Dated: November 21, 2017

Respectfully submitted by,

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