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LLC; AEQUITAS COMMERCIAL FINANCE, LLC; AEQUITAS
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MANAGEMENT, LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

AEQUITAS MANAGEMENT, LLC;
AEQUITAS HOLDINGS, LLC;

No. 3:16-cv-00438-PK

RECEIVER'S MOTION FOR AN ORDER
APPROVING COMPROMISE OF
AEQUITAS COMMERCIAL FINANCE,
LLC'S CLAIMS AGAINST GERALD W.
FRANK AND GERALD W. FRANK
REVOCABLE LIVING TRUST



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

Defendants.

LR 7-1 CERTIFICATION

On January 26, 2018, the undersigned circulated to the approximately 73 counsel of record, via email, a version of this motion (and supporting declaration and proposed form of order) that is substantially the same as this filed version. The conferral requested that counsel respond by 12:00 noon (Pacific Time) on February 2, 2018, as to whether their clients object or consent to the motion. As of the time of filing this motion the undersigned had received one consent and no objections.

MOTION

Ronald F. Greenspan, the duly appointed Receiver (“Receiver”) for the Receivership Entity,¹ hereby moves (the “Motion”) this Court for the entry of an order (1) approving a compromise of the claims of Aequitas Commercial Finance, LLC (“ACF”) against Gerald W. Frank and the Gerald W. Frank Revocable Living Trust (the “Trust”), and (2) approving and authorizing the performance of the Settlement Agreement and Release of Claims between the Receivership Entity, ACF, the Trust, and Gerald W. Frank, dated as of January 8, 2018.

This Motion is supported by the Declaration of Brad Foster (“Foster Decl.”) submitted herewith, and the following memorandum.

¹ Capitalized terms not otherwise defined in this Motion shall have the meanings ascribed to them in the Order Appointing Receiver entered on April 14, 2016 (Dkt. 156) (the “Final Receivership Order”).

I. Procedural and Fact Background.

A. Appointment of the Receiver.

1. On March 10, 2016, the Securities and Exchange Commission (“SEC”) filed a complaint in this Court against the Receivership Defendants and three individuals, Robert J. Jesenik, Brian A. Oliver, and N. Scott Gillis.

2. On March 16, 2016, pursuant to the Stipulated Interim Order Appointing Receiver, Ronald Greenspan was appointed as Receiver for the Receivership Entity on an interim basis (“Interim Receivership Order”). [Dkt. 30]. On April 14, 2016, pursuant to the Final Receivership Order, Mr. Greenspan was appointed as Receiver of the Receivership Entity on a final basis. (Foster Decl., ¶ 2).

3. The Receivership Entity includes ACF, a Receivership Defendant.²

4. Pursuant to the Interim Receivership Order and the Final Receivership Order the Receiver has, among other things, undertaken to determine the nature, location and value of all Receivership Property. Receivership Property includes ACF’s claims under certain loan documents (described below) against Gerald W. Frank and the Trust (together, “Frank”). The Receivership Entity, including ACF, and Frank have settled ACF’s claims against Frank pursuant to the terms of a Settlement Agreement and Release of Claims dated January 8, 2018 (the “Settlement Agreement”), a copy of which is attached as Exhibit 1 to the Declaration of Brad Foster. The Settlement Agreement is subject to approval of this Court. (Foster Decl., ¶ 3, and Exhibit 1, at p. 3, ¶ 4).

B. Financing for Rock and Roll Restaurants, LLC and the Claims Against Gerald W. Frank and the Trust.

5. On or about July 5, 2007, Rock and Roll Restaurants, LLC (“Rock and Roll”), executed and delivered to Aequis Equipment Finance, LLC (“AEF”), a Master Equipment

² Final Receivership Order, at p. 2.

Lease Agreement, wherein AEF agreed to provide equipment financing and leasing to Rock and Roll (the “Equipment Lease”). (Foster Decl., ¶ 4).

6. On or about July 12, 2007, Gerald W. Frank and the Trust executed and delivered to AEF a Guaranty Agreement whereby they jointly and severally guaranteed the obligations of Rock and Roll under the Equipment Lease Agreement (the “Guaranty”). (Foster Decl., ¶ 5).

7. On or about January 29, 2008, Frank reaffirmed the Guaranty by executing and delivering to AEF a Reaffirmation of Guaranty agreement (the “Reaffirmation”). (Foster Decl., ¶ 6).

8. On or about May 12, 2008, Frank executed and delivered to AEF a Collateral Agreement and Guaranty Modification (the “Modification”). (Foster Decl., ¶ 7).

9. On or about May 14, 2010, Frank executed and delivered to AEF a Letter Agreement further clarifying and modifying the terms of the Guaranty (the “Letter Agreement”). (Foster Decl., ¶ 8).

10. On or about January 30, 2013, the Trust executed and delivered to ACF a Membership Interest Sale Agreement (the “Sale Agreement”). Under the terms of the Sale Agreement, the Trust pledged certain stock in CarePayment Technologies, Inc. (“CPYT”) as collateral to secure its remaining obligations under the Guaranty. Presently the Trust holds a total of 111,573 shares of Class A Common Stock in CPYT (the “CPYT Stock”) represented by share certificate nos. 00000159ZQ and 00000183ZQ (the “CPYT Stock Certificates”). (Foster Decl., ¶ 9).

11. ACF holds all of the rights, remedies and entitlements under the Equipment Lease, Guaranty, Reaffirmation, Modification, Letter Agreement and the Sale Agreement (collectively, the “Rock and Roll Transaction”). (Foster Decl., ¶ 10).

12. The Receiver asserts that Gerald Frank and the Trust are jointly and severally liable to the Receiver under the terms of the Guaranty in the principal amount of \$205,690.00,

plus interest and fees that have accrued on this amount. Frank denies that they are obligated to the Receiver, and have asserted certain defenses to the Receiver's claims. (Foster Decl., ¶ 11).

C. Compromise of ACF's Claims Under the Rock and Roll Transaction.

13. In order to avoid the costs and risks of litigation regarding the amounts due under the Rock and Roll Transaction, Frank and the Receiver, on behalf of ACF and the Receivership Entity, have agreed to compromise the dispute on the terms set forth in the Settlement Agreement. The Settlement Agreement includes the following principal terms:

- Frank shall transfer and assign ownership of the CPYT Stock to the Receiver.
- Frank shall pay ACF \$61,365 within thirty (30) days from the date of Court approval of the Settlement Agreement.
- The parties to the Settlement Agreement release each other from claims that are based on the Rock and Roll Transaction.
- The Settlement Agreement is conditioned on Court approval.

(Foster Decl., ¶ 12).

14. The terms outlined above and as set forth in the Settlement Agreement are the result of good faith negotiations at arm's length with Frank after diligent investigation into the Rock and Roll Transaction by the Receiver and, in the exercise of the Receiver's business judgment, are in the best interests of the creditors of, and investors in, the Receivership Entity. (Foster Decl., ¶ 13).

15. Gerald W. Frank and the Trust have no known relation to the Receiver or the Receivership Entity. (Foster Decl., ¶ 14).

II. Points and Authorities.

16. Pursuant to the Final Receivership Order, the "Receiver may, without further Order of this Court...compromise...Receivership Property, other than real estate, in the ordinary course of business, on terms and in the manner the Receiver deems most beneficial to

the Receivership Entity....” (Receivership Order, ¶ 26). Here, the compromise of the claims under the Rock and Roll Transaction are outside of the ordinary course of business, and the Settlement Agreement is conditioned on Court approval. Accordingly, the Receiver seeks this Court’s approval of, and authority to perform, the Settlement Agreement.

The Receiver’s compromise with Frank is comparable to a bankruptcy trustee’s compromise of claims in a bankruptcy proceeding under Federal Rule of Bankruptcy Procedure 9019. That rule authorizes a bankruptcy trustee to seek court approval of a settlement, after notice and a hearing. FRBP 9019(a). A trustee is entrusted to “proceed in settling [an estate’s] accounts on whatever grounds he, in his informed discretion, believes will net the maximum return for the creditors.” *In re Mailman Steam Carpet Cleaning Corp.*, 212 F3d 632, 635 (1st Cir.), *cert. denied*, 531 US 960, 120 SCt 2661 (2000). Here, the Receiver has investigated the claims against Frank, and believes, in the exercise of his discretion and business judgment, that the recovery of the CPYT Stock and \$61,365 in exchange for a release represents a fair compromise that is in the best interests of the Receivership Entity and its creditors.

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III. Conclusion.

For the foregoing reasons, the court should enter an order (1) approving the compromise of the claims of ACF against Gerald W. Frank and the Trust, and (2) approving and authorizing the performance of the Settlement Agreement.

Dated this 2nd day of February, 2018.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

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