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

Defendants.

No. 3:16-cv-00438-JR

RECEIVER'S MOTION TO ENFORCE RECEIVERSHIP INJUNCTION AND RECEIVERSHIP'S CLASSIFICATION OF THE AMERICAN STUDENT FINANCIAL GROUP, INC. CLAIM

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Page(s)

Cases

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Statutes

Other Authorities

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Local Rule 7-1 Certificate

Counsel for the Receiver certifies that he conferred with counsel for the liquidating trustee Larry S. Hyman in the case entitled *In re Tango Delta Financial, Inc*., Bankr. M.D. Fl. Case No. 8:20-bk-03672 (previously known as American Student Financial Group, Inc., referred to herein as "ASFG"), regarding the issues to be decided in this Motion.

MOTION

Ronald F. Greenspan, the duly appointed Receiver ("Receiver") for the Receivership Entity,[1] hereby moves this Court (1) to enforce the Receivership Injunction (defined below) against the liquidating trustee, Larry S. Hyman, and the liquidating trust in the case entitled *In re Tango Delta Financial, Inc*., Bankr. M.D. Fl. Case No. 8:20-bk-03672, and (2) for a determination that the Receiver's (Second) Motion to Approve Classification of Certain Claims (Administrative, Former-Employees, Convenience Class, Defrauded Investors, Creditors, Individual Defendants, and Pass-Through Investors, and Allow and Approve Distributions on Account of Certain Claims (Receivership Docket No. 848) (the "Second Classification Motion") properly classified ASFG's claim in this Receivership Case as a Creditor Claim and not in violation of the automatic stay in the above referenced bankruptcy (the "Motion"). Alternatively, the Receiver requests this Court classify ASFG's Proof of Claim as a Creditor Claim, pursuant to this Motion.

This Motion is supported by the Declaration of Ronald F. Greenspan ("Greenspan 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. No. 156) ("Final Receivership Order").

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MEMORANDUM IN SUPPORT

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Appointment of Receiver and Final Receivership Order

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 (the "Receivership Case"). On March 16, 2016, pursuant to the Stipulated Interim Order Appointing Receiver, Greenspan was appointed as Receiver for the Receivership Entity on an interim basis ("Interim Receivership Order"). (Dkt. No. 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. (Dkt. No. 156).

Among other items, the Final Receivership Order stays *all* Ancillary Proceedings, which include "[a]ll civil legal proceedings of any nature, including, but not limited to, bankruptcy proceedings…or other actions of any nature" that involve the Receiver, any Receivership Property,[2] and any of the entities comprising the Receivership Entity. (Final Receivership Order, ¶ 20.) The Court also enjoined parties to such proceedings "from commencing or continuing any such legal proceeding, or from taking any action, in connection with any such proceeding, including, but not limited to, the issuance or employment of process." (*Id*. at ¶ 21.) Moreover, all such proceedings were "stayed in their entirety, and all Courts having any jurisdiction thereof are enjoined from taking or permitting any actions until further Order of this Court." (*Id*. at ¶ 22.) The

[2] The Final Receivership Order defines Receivership Property broadly to include "all property interests of the Receivership entity, including, but not limited to monies, funds, securities, credits, effects, goods, chattels, lands, premises, leases, claims, rights and other assets…which the Receivership Entity own, possess, have a beneficial interest in, or control directly or indirectly…." (Final Receivership Order, ¶ 6.A.)

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Final Receivership Order also provides the Receiver with the power and duty to "pursue, resist and defend all suits, actions, claims and demands which may now be pending or which may be brought by or asserted against the Receivership Estates…." (Final Receivership Order, ¶ 6.J.)

Further, under the Final Receivership Order, all persons receiving notice of it are:

> [R]estrained and enjoined from directly or indirectly taking any action or causing any action to be taken, without the express written agreement of the Receiver, which would…
>
> A. Interfere with the Receiver's efforts to take control, possession, or management of any Receivership Property; such prohibited actions include but are not limited to, using self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any Receivership Property;
>
> * * * *
>
> C. Dissipate or otherwise diminish the value of any Receivership Property; such prohibited actions include but are not limited to, releasing claims or disposing, transferring, exchanging, assigning or in any way conveying any Receivership Property, enforcing judgments, assessments or claims against any Receivership Property or any Receivership Entity…."

(Final Receivership Order, ¶¶ 17.A and 17.C (referred to collectively with Final Receivership Order, ¶¶ 6.J, 20, 21, and 22, as the "Receivership Injunction").)

B. Litigation Involving American Student Financial Group, Inc.

1. *ASFG Case in the Southern District of California*

On October 5, 2012, prior to the SEC's 2016 filing of the Aequitas receivership complaint, American Student Financial Group, Inc. ("ASFG") and TRD Consulting, LLC ("TRD") filed a lawsuit against Aequitas Capital Management, Inc. ("ACM"), and others, in the United States District Court for the Southern District of California (the "S.D. Cal. Court"). (Greenspan Decl., ¶ 3, Ex. 1.) ACM is a Receivership Defendant and one of the companies included within the Receivership Entity. (Greenspan Decl., ¶ 4.)

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On June 17, 2014, the S.D. Cal. Court entered an order granting ASFG's and TRD's application for Writ of Attachment, and on July 25, 2014, entered an order granting the parties' "Stipulation For Order To Deposit Funds in the Court's Investment Registry System." (Greenspan Decl., ¶¶ 5, 6, Exs. 2, 3.) Pursuant to the July 25, 2014, order, on July 28, 2014, ACM deposited $2,483,403.38 into the S.D. Cal. Court registry. (Greenspan Decl., ¶ 7, Ex. 4.) On January 16, 2015, ACM and other defendants filed their Fourth Amended Answer, Affirmative Defenses, and Counterclaims to ASFG' Third Amended Complaint in that case, asserting four counterclaims, including fraud against ASFG, TRD, and others, as well as numerous affirmative defenses, including offset. (Greenspan Decl., ¶ 8, Ex. 5.) The matter initially was set for trial on March 14, 2016, but then stayed due to the injunction provisions set forth in the Interim and Final Receivership Orders entered in the Receivership Case. (Greenspan Decl., ¶ 9, Ex. 6.)

On June 6, 2016, in response to the Receiver's motion to disburse the $2,483,403.38 held in the Court's registry, the S.D. Cal. Court entered an order granting the Receiver's motion over ASFG's objection. (S.D. Cal. Dkt. No. 276.) In ordering release of the funds, the S.D. Cal. Court determined that the funds were Receivership property, with the Receiver having a vested right to possession. (Greenspan Decl., ¶ 10, Ex. 7.)

The Receiver, ASFG, and TRD subsequently entered into a "Stipulation to Transfer Venue and for Release of Funds Held in the Court Registry," pursuant to which ASFG, TRD, and the Receiver agreed to transfer venue of the S.D. Cal. Court Case to the Receivership Case in the Oregon District Court and further agreed to release the $2,483,403.38 to the control of the Receiver. (Greenspan Decl., ¶ 11, Ex. 8.) Pursuant to that stipulation, the S.D. Cal. Court entered an order on August 22, 2016, transferring the entire case to the Oregon district court and releasing the $2,483,403.38 to the custody and control of the Receiver. The funds were deposited by the

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Receiver into a segregated Receivership bank account, where the funds remain. (Greenspan Decl., ¶¶ 12, 13, Exs. 9, 10.) ASFG's claim and the Receivership's counterclaims and affirmative defenses set forth in the Defendants' Fourth Amended Answer, Affirmative Defenses, and Counterclaims to Plaintiffs' Third Amended Complaint remain pending with the Oregon district court in the Receivership Case. (Greenspan Decl., ¶ 14.)

The gravamen of ASFG's case against ACM in the Receivership Case—as well as a related case filed in California state court discussed below—is a claim by ASFG for moneys allegedly owed on account of a fraudulent scheme by which ASFG arranged for loans to be purchased by Aequitas from Corinthian Colleges. At the risk of oversimplifying a complex situation, these loans upon which ASFG is claiming a "profits participation" were the subject of a massive settlement between the Receiver and the federal Consumer Financial Protection Bureau and 14 States Attorneys General, which settlement cost the Receivership over $183 million[3] in principal and accrued and unpaid interest and fees. Moreover, as detailed in the Receiver's Forensic Report, these loans and the ASFG scheme were a significant factor in the financial failure of Aequitas and the need for the appointment of the Receiver. Apparently, ASFG's fraudulent conduct eventually caught up with it too, and, after a name change, ASFG filed bankruptcy with few remaining material assets, other than avoidance claims against ASFG's insiders and affiliates.

2. *ASFG's Case in the San Diego Superior Court*

After the filing of the S.D. Cal. Court case on January 2, 2013, ASFG filed an additional lawsuit against Campus Student Funding, LLC (a Receivership Entity that was formerly known as

[3] These amounts do not include future interest that would have been earned on the cancelled principal amount.

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ASFG, LLC) in the Superior Court for the County of San Diego ("San Diego Superior Court Case"). (Greenspan Decl., ¶ 15, Ex. 11.) ASFG's subsequent amendments to the complaint added claims against Aequitas Commercial Finance, LLC ("ACF"), ACM, and other Aequitas entities, most of which are entities within this Receivership Case. (Greenspan Decl., ¶¶ 16, 17, Exs. 12, 13.) On April 6, 2015, the defendants in that matter, including ACF and Campus Student Funding filed their Answer and Affirmative Defenses to ASFG's Second Amended Complaint. The answer includes numerous affirmative defenses, including the affirmative defenses of offset and recoupment. The San Diego Superior Court Case also was stayed pursuant to the Interim and Final Receivership Orders. (Greenspan Decl., ¶ 18, Ex. 14.)

C. ASFG's Proof of Claim

On August 1, 2019, ASFG and TRD filed a proof of claim ("Proof of Claim") in the Receivership Case noting that the basis of such claim was for "Services Performed" and "Contractual obligations, including any current, future, or contingent contractual or indemnity obligations arising from any contracts entered into by or on behalf of the Receivership Estate[.]" (Greenspan Decl., ¶ 19, Ex. 15.) The "Total Claim Amount" is listed as $27,381,251, estimated as of June 2019. The Proof of Claim includes a check mark asserting the claim is secured, but did not check the box asserting that it is an administrative claim. Although the Proof of Claim is largely illegible, it appears to include the following language on the Additional Information sheet:

> See Attachment to Claim Form. Note that ASFG, Inc.'s claim is for $16,655,136 pre-receiver[ship] (prior to 3/16/2016) and as administrative claim post-receivership of $4,496,850 (up to 6/19) for money that belonged to ASFG, Inc. but received by the Receiver as a constructive trustee for ASFG, Inc. plus attorney fees….

An attachment to the Proof of Claim further referred to both the S.D. Cal. and San Diego Superior Court Cases. (*Id.*) In the Proof of Claim, ASFG and TRD wrongly asserted that "ASFG,

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Inc. is entitled to an immediate release of [the $2,483,403.38] plus the accrued interest as part of its $27,281.251.00 claim which, if paid, would be a credit against that amount." (*Id*.) The attorney who filed the Proof of Claim on ASFG's behalf is the same attorney who is of record for ASFG in the S.D. Cal. and San Diego Superior Court Cases. The same attorney was and still is the attorney of record for ASFG in the Receivership Case.

D. Distribution Plan and Ponzi Scheme Determination

On December 31, 2019, the Receiver filed his Motion to Approve the Receiver's Distribution Plan and Determination of a Ponzi Scheme (the "Distribution Plan and Ponzi Scheme Motion"). (Receivership Dkt. No. 787.) Pursuant to Local Rule 7-1 conferral and the electronic case filing system, ASFG's attorney of record was provided notice of the Distribution and Ponzi Scheme Motion, notice of the hearing, the objection deadline, and the hearing date for consideration of that motion. (Greenspan Decl., ¶ 20, Receivership Dkt. Nos. 785, 787, and 790.) The Receiver's Distribution and Ponzi Scheme Motion outlined the factual basis upon which the Court determined that Aequitas operated as a Ponzi scheme. The Receiver also detailed his proposal for the classification of claims, the priority of each class, and the distribution of assets. (Receivership Dkt. No. 787.) On March 31, 2020, the Receiver's Distribution and Ponzi Scheme Motion was granted by the Receivership Court upon the entry of its Findings of Fact and Conclusions of Law (the "Court-approved Distribution Plan"). (Receivership Dkt. No. 813.) The Court-approved Distribution Plan includes the following defined terms:

> **Claim**. Any (i) potential or claimed right to payment, whether or not such right is based in equity or by statute, reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (ii) a potential or claimed right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

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> **Allowed Claim**. A Claim or a portion thereof based on a Proof of Claim, Notice of Receiver's Initial Determination, or agreement by the Receiver (or Trustee), which by a Final Order of the Court approves (i) the amount, (ii) Classification, and (iii) treatment of such Claim consistent with the Court-approved Distribution Plan * * *
>
> **Administrative Claim**. A Claim based on: (i) the provision of goods or services for the benefit of the Receivership Estate or the QSF or at the request of the Receiver or Trustee beginning on or after March 16, 2016, which remain unpaid, (ii) any taxes arising from or attributable to tax periods beginning on or after March 16, 2016, including those that may be asserted by federal, state, local or other governmental entities or authorities, which remain unpaid, (iii) an uncashed check issued on or after March 16, 2016, for refund on account of a healthcare account receivable overpayment, student loan account receivable overpayment, or other overpayment, or (iv) any current, future, or contingent contractual obligations (including indemnification obligations) arising from any contract entered into by or on behalf of the Receivership Estate or the QSF.
>
> **Creditor Claim**. A Claim against an Aequitas Entity, including but not limited to transactions based on, related to, arising from or in connection with: (i) any contract, lease, or other agreement entered into prior to March 16, 2016, for which payment has not been made in whole or in part or for which payment has or will become due prior to, on, or after March 16, 2016, (ii) goods or services provided prior to March 16, 2016 * * * To the extent that a Claim meets the definition of both a Creditor Claim and some other classification of Claim, each Claim shall be determined and treated based on the portion of the Claim that falls within each classification." Dkt. 787 at App. A, 5 (definition).

(Receivership Dkt. No. 787, Appendix A, pp. 1, 3, 4, and 5.)

Notably, the definition of "Administrative Claim" does not include any provision for funds held in a "constructive trust" or held by the Receiver as a "constructive trustee." (*Id*.) Moreover, the Receiver disputes that the Receivership received or holds any funds in a "constructive trust" for the benefit of ASFG. The Court-approved Distribution Plan also sets forth the priority and source of payment for each Allowed Claim, which is to be determined according to its classification. (Receivership Dkt. No. 787, pp. 62-67.) Pursuant to the Court-approved Distribution Plan, Allowed Administrative Claims and Allowed Defrauded Investor claims are higher in priority than Creditor Claims. (*Id*. at 65-66.)

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ASFG did not object to the manner in which the Receiver proposed that claims would be allowed, classified, and paid from Receivership assets, nor to this Court's findings of fact and conclusions of law, which were entered prior to the filing of ASFG's bankruptcy proceeding. ASFG did not object to any of the three classification and distribution motions that resulted in the Receivership distributing $105 million to defrauded investors and other claimants. (Greenspan Decl., ¶ 21.) The March 31, 2020, Order, Findings of Fact and Conclusions of Law granting the Court-approved Distribution Plan is a final order.

E. ASFG's Bankruptcy Proceeding.[4]

On May 11, 2020, Tango Delta Financial, Inc. fdba ASFG[5] filed a Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the Middle District of Florida. *In re Tango Delta Financial, Inc*., Bankr. M.D. Fl. Case No. 8:20-bk-03672 (the "Florida Bankruptcy").

ASFG's bankruptcy petition was filed shortly after Chief Bankruptcy Judge Ronald B. King for the Texas Bankruptcy Court issued findings of fact and conclusions of law finding that ASFG was the recipient of fraudulent transfers and that its entire financing program (which appears to be similar to the one it utilized with respect to Aequitas) was designed to defraud the U.S. Department of Education and the 90/10 financing rule. The findings of fact and conclusions of law were in relation to the twenty-nine causes of action brought against ASFG and certain related entities in October, 2018 by the Chapter 7 Trustee of Dickenson of San Antonio, Inc. d/b/a Career Point College. John Patrick Lowe serves as the Chapter 7 Trustee (the "Texas Trustee").

[4] The facts set forth in this section were obtained entirely from a recent review of ASFG's bankruptcy docket and were not otherwise known to the Receiver.

[5] Although ASFG changed its name to Tango Delta Financial, Inc. prior to filing bankruptcy, this Motion will continue to refer to the debtor as "ASFG".

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ASFG's bankruptcy schedules do not list Aequitas as a creditor and do not include the Receiver on the Master Mailing list, precluding the Receiver from receipt of any notices related to the ASFG bankruptcy proceeding. The schedules and statement of financial affairs, however, are replete with references to the Receivership Case. Examples include the listing of the Securities and Exchange Commission as the holder of one of the 20 largest unsecured claims against ASFG, in an unknown amount. The claim is listed as contingent, unliquidated, and disputed—and in both places where the claim is listed, ASFG included a citation to the Receivership Case No. 16-cv-438-JR.[6] In the asset section of the schedules, ASFG lists two causes of action against "Aequitas Management, LLC," one in the amount of $2,483,403.38 for "Writ of Attachment", which also includes a citation to the Receivership Case number and a second asset based on "Money Owed" (unknown value).[7] In the "Legal Actions or Assignments" section of the statement of financial affairs, ASFG references the Receivership Case as "Pending" in the United States District Court District of Oregon and further discloses that ASFG is an "Intervenor" in the Receivership Case.[8] (Greenspan Decl., ¶ 22, Ex. 16.) Despite these facts, ASFG failed to provide notice to the Receiver of ASFG's bankruptcy filing. (Greenspan Decl., ¶ 23.)

On July 15, 2020, Jeffrey W. Warren, was appointed as the Chapter 11 Trustee to oversee ASFG's bankruptcy and business operations (the "Florida Trustee"). A review of the ASFG docket reveals that the Texas Trustee and the Florida Trustee have had a contentious relationship,

[6] *See*, ASFG's Voluntary Petition, Dkt. #1, p. 6 and ASFG's bankruptcy schedules and statement of financial affairs, Dkt. #45, p. 16, which are attached as Exhibit 16 to the Greenspan Declaration.

[7] *See*, ASFG bankruptcy Schedules, Dkt. #45, p. 6, which is attached as Exhibit 16 to the Greenspan Declaration.

[8] *See*, ASFG bankruptcy Statement of Financial Affairs, Dkt. #45, p. 24, which is attached as Exhibit 16 to the Greenspan Declaration.

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including, for example, fee application objections, a motion to transfer venue from Florida to Texas, multiple discovery disputes, and the filing of competing liquidation plans, to name a few.

The Texas Trustee filed his proposed Plan of Liquidation for ASFG on March 19, 2021. On April 21, 2021, the Florida Trustee filed his competing Plan of Liquidation for ASFG.

An Order Conditionally Approving Disclosure Statements, Fixing Time To File Objections to the Disclosure Statements, Fixing Time to File Applications for Administrative Expenses, Setting Hearing on Confirmation of Competing Plans, and Setting Deadlines With Respect to Confirmation Hearing, was entered on July 1, 2021 (the "Disclosure Statement Order").

Pursuant to the Disclosure Statement Order, copies of the Disclosure Statement Order, the competing Disclosure Statements, competing Plans, and a ballot for accepting or rejecting each plan were mailed on July 6, 2021, by the Florida Trustee to those parties-in-interest on the Master Mailing list. A certificate of service regarding such mailing was filed by the Florida Trustee. Neither the Receiver nor the Receivership are included on the Master Mailing list and neither received the Bankruptcy Court's order, the competing disclosure statements, the competing plans, or the ballot. (Greenspan Decl., ¶ 24, Ex. 17.)

August 18, 2021 was fixed by the Bankruptcy Court as the last date for the filing of Ballots accepting or rejecting the competing plans. August 19, 2021 was fixed as the last date for the filing of written objections to the competing disclosure statements and confirmation of the competing plans and August 26, 2021, was fixed as the date for the Confirmation Hearing. The Receiver did not receive the Bankruptcy Court order establishing these deadlines. (Greenspan Decl., ¶ 25, Ex. 18.)

Pursuant to its own motion, the Bankruptcy Court, on July 1, 2021 entered an amended order directing the Florida Trustee, the Texas Trustee and certain ASFG related parties to

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mediation.[9]

On September 23, 2021, the Notice of Filing Mediation Results Report[10] was filed by the Florida Trustee advising the Court that a majority of the disputes among the parties had been resolved and incorporated into the "Mediated Joint Amended Plan of Liquidation." The Mediated Joint Amended Plan Of Liquidation was filed on September 22, 2021. (Greenspan Decl., ¶ 26, Ex. 19.)

On September 23, 2021, the Florida Trustee also filed a "Motion for Entry of Order Conditionally Approving the Settlement Among Warren-Trustee, on Behalf of the Debtor, TRD, the Duoos Parties, and Lowe-Trustee" (the "Mediated Settlement Motion").[11]

According to the "Certificate of Service," the "Notice of Preliminary Hearing" to conditionally approve the Mediated Settlement Motion, set for hearing on October 28, 2021, was mailed on September 29, 2021, to the parties contained on the mailing matrix. (Greenspan Decl., ¶ 27, Ex. 20.) An Amended Certificate of Service was filed on October 1, 2021 to add that an email was sent to the Receiver's counsel, Troy Greenfield, Lawrence Ream and Andrew Lee, with an attached copy of the "Notice of Preliminary Hearing." The email and Notice of Preliminary Hearing were received by Receiver's counsel on October 1, 2021. No documents, other than the Notice of Preliminary Hearing, were attached to the email. The email with the attached Notice of Preliminary Hearing is the first and only notice received regarding the ASFG bankruptcy. (Greenspan Decl., ¶ 28, Ex. 21.)

On October 28, 2021, the Bankruptcy Court entered its Hearing Proceeding Memo granting

[9] ASFG bankruptcy Dkt. # 304.

[10] ASFG bankruptcy Dkt. # 372.

[11] ASFG bankruptcy Dkt. # 373.

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the Mediated Settlement Motion. (Greenspan Decl., ¶ 29, Ex. 22.) Three (3) court days later, on November 2, 2021, the Bankruptcy Court entered its "Order Approving Disclosure Statement for Plan of Liquidation for . . . , Debtor . . . [and] Confirming Mediated Joint Amended Plan of Liquidation for . . . Debtor . . . ." (Greenspan Decl., ¶ 30, Ex. 23.)

Pursuant to the Mediated Joint Amended Plan of Liquidation (the "Liquidating Plan"), ASFG's estate is to be liquidated through the creation of a "Liquidating Trust," as defined in the Liquidating Plan.[12] The Liquidating Plan designated John Patrick Lowe as the liquidating trustee, but he subsequently was replaced by Larry S. Hyman (the "Liquidating Trustee"). (Greenspan Decl., ¶ 31, Ex. 24.) "Liquidating Trust Assets means collectively (i) all Assets of the Debtor not distributed under the Plan and (ii) Liquidating Trust Claims."[13] Liquidating Trust Claims include "Any and all claims or Causes of Action involving the receivership of Aequitas."[14] The Liquidating Plan defines Causes of Action as:

> [A]ny and all actions, causes of action, suits, accounts, controversies, agreements, promises, rights to legal remedies, rights to equitable remedies, rights to payment and claims, whether know[n], unknown, reduced to judgment, not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured and whether asserted or assertible directly or derivatively, in law, equity or otherwise, including Avoidance Actions, and any and all other claims or rights of the Debtor or the Estate of any value whatsoever, at law or in equity, against any Creditor or third party.
>
> * * *

(Liquidating Plan at p. 5, ¶ 1.19.)

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[12] Liquidating Plan, Article XII, pp. 26-28.

[13] Liquidating Plan at p. 8, ¶ 1.50.

[14] Liquidating Plan at p. 9, ¶ 1.51(d). Aequitas is defined as "Aequitas Capital Management, Inc" Liquidating Plan at ¶ 1.4. Aequitas Capital Management, Inc. is a named defendant in the SEC's complaint against the Aequitas entities and the Individual Defendants in the Receivership Case).

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ASFG's claims and causes of action involving the Aequitas Receivership were transferred to the Liquidating Trust and then, in direct and knowing violation of the Receivership Injunction, the Liquidating Plan purports to extinguish all of the Receivership's counterclaims and affirmative defenses, including the affirmative defenses of setoff and recoupment initially set forth in the S.D. Cal. and San Diego Superior Court Cases. The Liquidating Plan states, in relevant part:

> All Claims marked or otherwise designated as "contingent, unliquidated or disputed" on the Debtor's Schedules and for which no proof of claim has been timely filed, shall be deemed disallowed and such claim may be expunged without the necessity of filing a claim objection and without any further notice to, or action, order or approval of the Bankruptcy Court.

(Liquidating Plan, p. 23, ¶ 9.9.)

> The rights afforded in the Plan and the treatment of all Claims[15] … herein shall be in exchange for and in complete satisfaction, and release of all Claims … of any nature whatsoever against the Debtor or its Estate, its assets, properties, or interests in property. Except as otherwise provided herein, on the Effective Date, all Claims against … the Debtor shall be satisfied, and released in full. The Liquidating Trust, nor any of its successors or assigns, including any assets, properties or interests of the Liquidating Trust and their successors and assigns, shall be responsible for any pre-Effective Date obligations of the Debtor, except those expressly set forth in the Plan. Except as otherwise provided herein, all Persons and Entities shall be precluded and forever barred from asserting against the Debtor, the Liquidating Trust, their respective successors or assigns, or their estate, assets, properties, or interests in property any event, occurrence, condition, thing, or other or further Claims or Causes of Action based upon any act, omission, transaction, or other activity of any kind or nature that occurred or came into existence prior to the Effective Date, whether or not the facts of or legal bases therefore were known or existed prior to the Effective Date.

(Liquidating Plan, p. 30, ¶ 14.2.)

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[15] The Joint Plan adopts the broad definition of "Claim(s)" found in 11 U.S.C. § 101(5), which defines "claim" as a "(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." *See* Joint Plan, p. 3, ¶ A.

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> In no event shall any holder of Claims…be entitled to setoff any Claim…against any claim, right, or cause of action, except as set forth in the Plan, of the Liquidating Trust, as applicable, unless such holder has filed a motion with the Bankruptcy Court requesting the authority to perform such setoff on or before the Confirmation Date, and notwithstanding any indication in any Proof of Claim or otherwise that such holder asserts, has, or intends to preserve any right of setoff pursuant to section 553 of the Bankruptcy Code or otherwise.

(Liquidating Plan, p. 31, ¶ 14.5.) And further,

> In no event shall any holder of Claims…be entitled to recoup any Claim…against any claim, right, or Cause of Action of the Liquidating Trust, as applicable, unless such holder actually has performed such recoupment and provided notice thereof in writing to the Liquidating Trust on or before the Effective Date, notwithstanding any indication in any Proof of Claim…or otherwise that such holder asserts, has, or intends to preserve any right of recoupment.

(Liquidating Plan, p. 31, ¶ 14.6.)

Given the broad definition of Claims as provided in the Liquidating Plan, those paragraphs violate the Receivership Injunction because they would operate to discharge the Receiver's counterclaims and affirmative defenses, which under the Final Receivership Order constitute Receivership Property. (Final Receivership Order, ¶ 6.A (defining Receivership Property to include claims, rights, and other assets).)

Moreover, the Receiver was not provided notice of the Liquidating Plan or any confirmation hearing associated with it. Further, neither ASFG nor any bankruptcy trustee connected to that proceeding appeared in this Court to obtain leave to discharge the Receivership's counterclaims and affirmative defenses or dispose of Receivership Property. (Greenspan Decl., ¶ 32.)

F. Classification of ASFG's Claim in the Receivership Case

On October 21, 2020, the Receiver filed the Second Classification Motion. (Receivership Dkt. No. 848.) In an exhibit to that motion, the Receiver included his proposed classification of

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ASFG's and TRD's claim as a "Creditor Claim," the asserted "Proof of Claim Amount" as $27,381,251, and the "Proposed Allowed Claim Amount" as "TBD." (Receivership Dkt. No. 849, p. 157.) Pursuant to Local Rule 7-1 conferral and the electronic case filing system, the Second Classification Motion, the Receiver's supporting declaration and attached exhibits were served on ASFG's counsel of record in the Receivership Case. (Greenspan Decl., ¶ 33, Receivership Dkt. Nos. 848, 849, and 861.) ASFG did not object to the Second Classification Motion or the classification of its claim as a "Creditor Claim." (Greenspan Decl., ¶ 34.) The Second Classification Motion was granted on October 21, 2020, and is a final order. (Receivership Dkt No. 861.) By definition as set forth in the Court-approved Distribution Plan, a Creditor Claim is expressly not an Administrative Claim.

II. POINTS AND AUTHORITIES

A. The Court Should Enforce the Receivership Injunction Against the Liquidating Trust and Liquidating Trustee.

This Court possesses "extremely broad" power when "determin[ing] the appropriate action to be taken in the administration" of this receivership. *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986). That "authority derives from the inherent power of a court of equity to fashion effective relief," and the exercise of that power is particularly appropriate "where a federal agency seeks enforcement in the public interest." *SEC v. Wencke*, 622 F.2d 1363, 1369, 1371 (9th Cir. 1980). The Ninth Circuit has recognized that those powers include the issuance of blanket stays that broadly prohibit the commencement, continuation, enforcement or other action against receivership entities or property, including in other courts, against parties and non-parties, except by leave of court. *Id*. at 1368-1371. "Once assets are placed in receivership, a district court's equitable purpose demands that the court be able to exercise control over claims brought against

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those assets. The receivership court has a valid interest in both the value of the claims themselves and the costs of defending any suit as a drain on receivership assets." *Liberte Capital Group, LLC v. Capwell*, 462. F.3d 543, 551 (6th Cir. 2006)(Citing, *SEC v. Universal Fin.*, 760 F.2d 1034, 1038 (9th Cir. 1985)("As the Wenke I court noted, the interests of the Receiver are very broad and included not only protection of the receivership *res*, but also protection of defrauded investors and considerations of judicial economy." *Id*.). "To this extent, the receivership court may issue a blanket injunction, staying litigation against the named receiver and the entities under his control unless leave of that court is first obtained." (Citing, *Barton v. Barbour*, 104 U.S. 126, 128, 26 L. Ed. 672 (1881) ("It is a general rule that before suit is brought against a receiver leave of the court by which he was appointed must be obtained."). "It is especially appropriate in an action like this one [an SEC Enforcement action] that the federal courts have the power, if necessary, to take control over an entity and impose a receivership free from interference in other court proceedings." *SEC v. Wencke*, 622 F.2d at 1372. This is especially important because "[t]here is a strong federal interest in insuring effective relief in SEC actions brought to enforce the securities laws." *Id*. at 1372.

In addition to the "extremely broad" power as a court sitting in equity, the All Writs Act further grants this Court wide latitude to issue orders necessary to effectuate previous orders entered by this Court. 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.") As the United States Supreme Court has stated, "[t]his Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained…." *U.S. v. New*

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York Tel. Co., 434 U.S. 159, 172 (1977). Further, "[t]he power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice." *Id.* at 174. *See also Nat'l Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 544 (9th Cir. 1987) (holding that the All Writs Act authorizes a court to issue orders "necessary to ensure the integrity of orders previously issued" and upholding order appointing a special master necessary to monitor compliance with a previously issued injunction). That authority has extended to the issuance of enforcement orders against specific parties in possession of assets subject to a freeze order. *See Fed. Trade Comm'n v. Am. for Fin. Reform*, 720 Fed. Appx. 380, 383 (9th Cir. 2017).

In the *Federal Trade Commission* matter, for example, the Federal Trade Commission ("FTC") brought suit to enjoin unlawful lending and collection practices. The district court hearing the matter granted the FTC's motion for a preliminary injunction and issued an asset freeze generally applicable to all non-parties in possession of assets owned or partially owned by the defendants. After issuance of the freeze order, the district court issued another order enforcing the freeze specifically against certain non-parties in possession of an asset subject to the freeze. On appeal, citing to *New York Tel. Co.* and *Mullen*, the Ninth Circuit found that the district court had jurisdiction to issue the enforcement order pursuant to the All Writs Act. *Id.*

The broad latitude granted to this Court as a court sitting in equity and through the All Writs Act thus empowers this Court to enforce the Receivership Injunction against the Liquidating Trust and the Liquidating Trustee. The provisions of the Liquidating Plan that purport to extinguish the Receiver's affirmative defenses and counterclaims involving ASFG but preserve all such causes of action *against* the Receiver (by transfer of such causes of action into the Liquidating

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Trust) unquestionably violate the Receivership Injunction. Only an order enforcing the Receivership Injunction specifically against ASFG, the Liquidating Trustee and the Liquidating Trust will "effectuate and prevent the frustration" of the Receivership Injunction as it applies to ASFG. *New York Tel. Co.*, 434 at 159. For those reasons, this Court's determination of ASFG's claim, whether held by the Liquidating Trust (or any successor) against the Receivership Estate and Receivership property must also include a determination of the Receivership's counterclaims and affirmative defenses to that claim.

B. Neither The Provisions Of The Liquidating Plan Nor The Bankruptcy Discharge Injunction Are Binding On The Receivership Based On The Lack Of Due Process Afforded To The Receiver.

Inexplicably, the Receiver was not listed as a creditor, was not included on the Master Mailing list, and did not receive notice or other pleadings related to the ASFG bankruptcy[16] despite: (1) the stipulated change in venue of the S.D. Cal. Court Case to the Oregon district court; (2) ASFG's contention that it has an interest in Receivership property held by the Receiver; (3) the filing of ASFG's Proof of Claim in the Receivership Case; (4) ASFG's counsel of record receiving and continuing to receive conferral and ECF notice of all actions in the Receivership Case; and (5) the content of ASFG's schedules listing claims and causes of action related to the Receivership Case.

Based on ASFG's glaring failure to comply with well-established due process requirements, the Court should determine that the Liquidating Plan and the discharge injunction do not bind the Receiver because the Receiver had no notice of the process or contents of the

[16] On October 1, 2021, Receiver's counsel received an email with an attached copy of a "Notice of Preliminary Hearing." No documents, other than the Notice of Preliminary Hearing, were attached to the email.

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disclosure statements or the liquidating plans or their consideration and approval in the Florida Bankruptcy. In a Chapter 11 proceeding, the debtor is obligated to file a list of all creditors whose identity and claim is known, together with a schedule of its liabilities and assets. 11 U.S.C. § 521(1). *See also, In re Maya Const. Co.*, 78 F3d 1395, 1398 (9th Cir 1996) ("[I]t is the debtor's knowledge of a creditor, not the creditor's knowledge of his claim, which controls whether the debtor has a duty to list that creditor."). Creditors must be given formal notice of the first meeting of creditors. Fed. R. Bankr. P. 3002. The bankruptcy rules further specify that known creditors must receive: (1) notice of deadlines for filing proofs of claims (bar date), Fed. R. Bankr. P. 2002(a)(7); (2) a copy of the competing plans, Fed. Bankr. 3017; (3) notice of the time fixed for filing objections and the hearing to consider approval of the competing disclosure statements, Fed. R. Bankr. P. 2002(b); (4) the time fixed for filing objections and the hearing to consider confirmation of the competing plans, Fed. R. Bankr. P. 2002(b); (5) notice of the confirmation hearing, Fed. R. Bankr. P. 3017; and (6) the confirmation order, Fed. R. Bankr. P. 2002(f). See generally, *In re Arch Wireless, Inc.*, 534 F.3d 76, 82 (1st Cir. 2008).[17] ASFG did not comply with any of these fundamental bankruptcy code provisions and rules, and the Receiver did not receive any of these notices or a copy of the competing liquidating plans or the confirmation order. (Greenspan Decl., ¶ 35.)

The burden is on the debtor to cause formal notice to be given; "the creditor who is not given notice, even if he has actual knowledge of reorganization proceedings, does not have a duty to investigate and inject himself into the proceedings." *In re Maya Const. Co.*, 78 F.3d 1395, 1399

[17] The same duties are imposed upon the Chapter 11 Trustee pursuant to the provisions of 11 U.S.C. § 1106.

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(9th Cir 1996). Instead, "any creditor whose claims are known to the debtor is entitled to receive actual, formal notice of the claims bar date." *Wand v. Roman Cath. Archbishop of Portland in Or.*, No. CV 10-29-PK, 2010 WL 5678689, at *5 (D. Or. Dec. 1, 2010) (citing *In re Maya*, 78 F.3d at 1399). "In the absence of such notice, a known creditor is not bound by a bankruptcy court's order discharging the debtor's obligations, even if the known creditor had actual knowledge of the bankruptcy proceedings." *Wand*, 2010 WL 5678689, at *5; *See also In re Maya*, 78 F.3d at 1399 ("The fact that a creditor has actual knowledge that a Chapter 11 bankruptcy proceeding is going forward involving a debtor does not obviate the need for notice."); *In re Arch Wireless, Inc.*, 534 F.3d at 87 ("[A] known creditor's general awareness of a pending Chapter 11 reorganization proceeding is insufficient to satisfy the requirements of due process and render the discharge injunction applicable to the creditor's claims."); 8 Collier on Bankruptcy P 1141.06 (16th 2021) ("Indeed, even a creditor that had actual knowledge of the bankruptcy may not be bound by the provisions of the confirmed plan if the creditor did not receive notice of the bar date or the confirmation hearing.").

Here, as an initial matter, it cannot be disputed that the Receivership was a known creditor with pending claims against ASFG. *Tulsa Prof'l Collection Servs. Inc. v. Pope*, 485 U.S. 478, 490 (1988) (a known creditor is one whose claims and identity are actually known or "reasonably ascertainable" by the debtor"). Prior to its bankruptcy, ASFG initiated and actively pursued both the S.D. Cal. and San Diego Superior Court Cases and is aware that Aequitas had asserted counterclaims and affirmative defenses, including setoff and recoupment. ASFG was further aware that both actions were stayed due to the Final Receivership Order. Moreover, ASFG was actively involved in the Receivership Case, stipulating to the transfer of venue of the S.D. Cal. Court Case, the transfer of Receivership property from the Court Registry to the Receiver, and submission to

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the jurisdiction of the Oregon District Court, both by stipulation and through the filing of its Proof of Claim.

Despite the Receivership being a known creditor, ASFG failed to include the Receivership as a creditor or include the Receiver on the Master Mailing list.[18] As a result, ASFG knowingly failed to provide the Receiver with notice of the bankruptcy, the bar date, the competing disclosure statements and competing plans (including the Liquidating Plan), or any notice of the objection deadlines or hearing dates relative to those disclosure statements and confirmation hearings. In the absence of formal notice, which the Receiver did not receive, and the lack of due process, the Receiver is not bound by the provisions of the Liquidating Plan or the discharge provisions of 11 U.S.C. § 1141(d). *See, In re Arch Wireless, Inc.*, 534 F.3d at 83 ("Thus, because the Code and Rules themselves do not provide an exception to the discharge injunction when notice rules are violated, we must look to due process principles to evaluate the claim of a known-but-unnoticed creditor that the discharge injunction does not bar the creditor's claims."); *In re Spring Valley Farms, Inc.* 863 F.2d 832, 835 (11th Cir. 1989) ("In affirming the district court, we hold that *11 U.S.C. §1141(d)* does not discharge the debt of a creditor who was known to an individual corporate debtor and failed to receive notice under *Bankruptcy Rule 2002(a)(8)*, even if the creditor had actual knowledge of the general existence of the bankruptcy proceedings. (Footnote omitted)"). In the absence of actual, formal notice of the claims bar date, a known creditor is not bound by a bankruptcy court's order discharging the debtor's obligations, even if the known

[18] It is hard to imagine that the failure was other than strategic, especially in light of the fact that ASFG's claims against Aequitas are listed in the schedules and statement of financial affairs and the Securities and Exchange Commission is listed on the Master Mailing list and purportedly having a claim based on the Receivership.

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creditor had actual knowledge of the bankruptcy proceedings. *See, Wand*, 2010 WL 5678689, at *5 (citing, *In re Maya,* 78 F.3d at 1399).

The Receiver is not bound by any provisions of the Liquidating Plan or the bankruptcy discharge injunction that purport to alter the Receivership's counterclaims and affirmative defenses to ASFG's claim, whether transferred to the Liquidating Trust or any other successor, against the Receivership Estate or Receivership property. Notwithstanding ASFG's bankruptcy and the transfer of its claim to the Liquidating Trust, this Court's determination of ASFG's claim against the Receivership Estate and Receivership property (whether held by ASFG, the Liquidating Trust or any successor in interest) must also include a determination of the Receivership's counterclaims and affirmative defenses to such claim.

C. The Prior Classification of ASFG's Proof of Claim Was A Ministerial Act Not In Violation of the Automatic Stay.

ASFG petitioned for bankruptcy protection on May 11, 2020, without providing any notice to the Receiver and after ASFG already had filed its Proof of Claim in the Receivership Case and after this Court already had approved the Distribution Plan. Without knowledge of ASFG's bankruptcy filing, the Receiver subsequently filed his Second Classification Motion, wherein he requested this Court classify ASFG's claim as a "Creditor Claim" consistent with the already Court-approved Distribution Plan. (Receivership Dkt. No. 849, p. 157, Exhibit 5 ("Declaration of Ronald F. Greenspan In Support of Receiver's (Second) Motion To Approve Classification of Certain Claims (Administrative, Former-Employees, Convenience Class, Defrauded Investors, Creditors, Individual Defendants, and Pass-through Investors), And Allow and Approve Distributions on Account of Certain Claims").) Pursuant to Local Rule 7-1 conferral and the electronic case filing system, the Second Classification Motion, the Receiver's supporting

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declaration and attached exhibits were served on ASFG's counsel of record in this proceeding. (Greenspan Decl., ¶ 33.) After receiving notice of the Second Classification Motion, ASFG raised no objections to the classification of its claim. ASFG also never asserted that the classification of its claim under the already Court-approved Distribution Plan was a violation of the automatic stay—indeed, ASFG still never alerted either this Court or the Receiver about its five month-old bankruptcy filing. (Greenspan Decl., ¶ 34.)

Although ASFG acted improperly in failing to provide notice of its bankruptcy, ASFG's bankruptcy filing did not impact this Court's action of classifying ASFG's claim as a "Creditor Claim" pursuant to the already Court-approved Distribution Plan.

Under the automatic-stay statute, "all proceedings against the debtor or the debtor's property are stayed during the pendency of the bankruptcy proceedings." *Carver v. Carver*, 954 F.2d 1573, 1576 (11th Cir. 1992). That is true even where, as in this case, there is a complete lack of any notice of the commencement of bankruptcy proceedings. *Elbar Invs., Inc. v. Prins (In re Okedokun)*, 968 F.3d 378, 387 (5th Cir. 2020). Importantly, however, purely ministerial acts—that is, acts that are essentially clerical in nature and do not involve the exercise of discretion—are not subject to the automatic stay. 3 COLLIER ON BANKRUPTCY ¶ 362.03 (16th ed. 2021); *In re Rugroden*, 481 B.R. 69, 78 (N.D. Cal. 2012) ("The automatic stay does not bar purely ministerial acts."). The exception applies here, as the act of classifying ASFG's claim under the already Court-approved Distribution Plan was purely ministerial in nature and did not violate the stay.

Courts have recognized that ministerial acts exempt from the automatic stay are ones that involve "obedience to instructions or laws instead of discretion, judgment, or skill." *Rugroden*, 481 B.R. at 78 (internal citation omitted); *see also* 4 COLLIER ON BANKRUPTCY, ¶ 362.03[3][e] (16th ed. 2012). In *Rugroden*, for example, the court held that the automatic stay did not prohibit

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execution of deeds to real property after expiration of the redemption period because the governing statute required such execution, and no exercise of discretion was involved in the act. *Id*. at 79. Similarly, in *In re Stewart*, 2006 Bankr. LEXIS 4224 (D. Or. Bankr. May 18, 2006), the court held that entering a judgment on a previous judicial decision was a ministerial act that did not violate the automatic stay because the action was merely taken to follow a prior decision made before the stay. *See Id*. at 10 ("Such action--taken in obedience to the judge's peremptory instructions or otherwise defined and nondiscretionary--are ministerial and, consequently, do not themselves violate the automatic stay even if undertaken after an affected party files for bankruptcy.").

The same reasoning applies here. Prior to ASFG's bankruptcy filing, this Court already had approved—with notice to and without objection by ASFG—the Distribution Plan that clearly defined the manner in which claims are to be classified. From that point forward, there was no uncertainty about what type of claim each claimant, including ASFG, held. Court approval of the subsequent classification motions, each of which contained multi-page schedules listing claims, allowed claim amounts, showing their classification and approving distributions (including the exhibit to the Second Classification Motion listing ASFG's claim as a "Creditor Claim" page 157 of Exhibit 5 of Receivership Dkt. No. 849), was a purely ministerial act applying the Court-approved Distribution Plan. The classification motions were submitted by the Receiver so there was an unambiguous evidentiary record upon which the Receiver would distribute tens of millions of dollars. The classification motions are an extension of the Court-approved Distribution Plan, which defined and resolved the manner in which claims are to be classified and which was approved and final ***prior to*** ASFG's bankruptcy filing. Rather than involve any discretion, the Second Classification Motion merely identified the correct classification for ASFG's claim under

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the existing Court-approved Distribution Plan based on the information that ASFG itself provided in its Proof of Claim.

Through conferral and the ECF system, ASFG received notice of the Second Classification Motion and presumably agreed that it was a ministerial act exempt from the stay because ASFG never alerted the Receiver or this Court about the bankruptcy filing or argued that the classification of its claim violated the automatic stay. Similarly, none of the other claimants or creditors, whose claims were classified in the schedules to the Classification Motions objected to such classifications or that such motions were anything other than a listing of the inevitable result of the classification system prescribed by the Distribution Plan.

Because there was no discretion in the classification of ASFG's claim as a Creditor Claim, that action was a purely ministerial act outside of the scope of the stay. As a result, although it was improper for ASFG to fail to provide notice of its bankruptcy filing, it ultimately had no effect on the classification of ASFG's claim in this proceeding.

D. Alternatively, This Court May Re-Approve The Classification Of ASFG's Claim Because The Automatic Stay In The Bankruptcy Case Is No Longer In Effect.

The automatic stay no longer is in effect in ASFG's bankruptcy proceeding because: (1) all ASFG estate property has been transferred to the Liquidating Trust, resulting in termination of the automatic stay, *see* 11 U.S.C. § 362(c)(1) (providing same); and (2) the automatic stay terminated as of November 22, 2021, the effective date of the Liquidating Plan, under Article 16.3 of Liquidating Plan. (Greenspan Decl., ¶ 36, Ex. 25.) Given the fact that the automatic stay is no longer in effect, this Court may re-approve the classification regardless of whether the prior classification under the Court-approved Distribution Plan was a ministerial act or may have violated the automatic stay.

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Other courts have recognized that, where an automatic stay in bankruptcy is expired or no longer effective, a court may act to re-approve a prior action as a "simple solution" to fix an earlier innocent violation of the automatic stay. *In re Confidential Investigative Consultants (CIC)*, 178 B.R. 739, 734 (N.D. Ill. 1995). In the *CIC* case, for example, the court noted that once a "potential problem had been recognized" with a possible violation of a now-expired automatic stay, "a simple solution could have been to refile the same case post-confirmation" to ask for the same relief and, thus, "any defect in the first filing could have been mooted." *Id*. at 743-44. In other words, without the automatic stay, a court is free to take the same action that it previously took if there are concerns about possible innocent stay violations.

Although the Receiver submits that re-classification is unnecessary because the act of classifying ASFG's Creditor Class Claim under the Court-approved Distribution Plan was a ministerial act exempt from the stay, the automatic stay is no longer in effect, and this Court may simply re-adopt its prior classification regardless of any impact of ASFG's un-noticed bankruptcy filing on the prior classification.

III. CONCLUSION

For the above reasons, the Court should enforce the Final Receivership Order against ASFG, the Liquidating Trustee and the Liquidating Trust by including a determination of the Receivership's counterclaims and affirmative defenses when this Court determines ASFG's claim against the Receivership Estate and Receivership property, as the Receivership's counterclaims and affirmative defenses were not extinquished in the Florida Bankruptcy. The Court should also conclude that the classification of ASFG's Proof of Claim as a Creditor Claim did not violate the

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automatic stay. Alternatively, the Receiver requests this Court classify ASFG's Proof of Claim as a Creditor Claim, pursuant to this Motion.

Dated this 23rd day of February, 2022.

Respectfully submitted,

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