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Robert S. Banks, Jr., OSB No. 821862
Victoria Blachly, OSB No. 972805
Darlene D. Pasieczny OSB No. 124172
SAMUELS YOELIN KANTOR LLP
Attorneys at Law
111 SW 5th Ave., Suite 3800
Portland, Oregon 97204-3642
Telephone (503) 226-2966
Facsimile (503) 222-2937
bbanks@SamuelsLaw.com
vblachly@SamuelsLaw.com
darlenep@SamuelsLaw.com

Attorneys for Proposed Intervenors and Objecting Investors

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

CAROLYN HARRIS; et al.,

Proposed Intervenors.

CASE NO. 3:16-cv-00438-PK

OBJECTIONS OF PROPOSED INTERVENORS AND OTHER AEQUITAS INVESTORS TO INTERIM ORDER APPOINTING RECEIVER

The objecting parties are Aequitas investors who have pending motions to intervene. They file these objections pursuant to paragraph 50 of the Stipulated Interim Order Appointing Receiver ("Interim Order").

I. INTEREST OF MOVING PARTIES

The moving parties are among the Aequitas investors who have retained Robert S. Banks, Jr. and Samuels Yoelin Kantor, LLP ("Banks Clients") to pursue claims to recover the investment losses in various Aequitas investment products. The current Banks Clients represent approximately $11 million in Aequitas investments. The Banks Clients are individual investors, and many are senior citizens who invested retirement savings. Most of them were advised to invest in Aequitas products by their individual Registered Investment Advisory firms ("RIA") and broker-dealer financial advisors. The sales occurred as late as January, 2016 and December, 2015.

II. CLAIMS AFFECTED BY THE INTERIM ORDER

The Banks Clients retained their counsel to evaluate and file valid claims against four categories of defendants:

A. Customer v. Advisor Claims. These claims are against RIA firms, broker-dealers and their control people and salespeople who solicited and sold the Aequitas investments to the individual investors ("Customer v. Advisor Claims"). The Customer v. Advisor claims are distinct because jurisdiction and venue for them are often governed by provisions in the investors' customer agreements with their RIA firms and broker-dealers. Some specify arbitration before the American Arbitration Association ("AAA"), others identify Judicial Arbitration and Mediation Services ("JAMS"), and still others have venue provisions in specific courts.

Among the RIA and broker-dealer firms that counsel had intended to pursue are claims against RIA firms including Private Advisory Group ("PAG") in Washington and California;

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Fieldstone Financial Advisors in Massachusetts and it successor, Concert Wealth Management in California; Fusion Analytics Investment Partners in New York; and Ashton Thomas Wealth Management in Arizona.

The Customer v. Advisor claims are generally for (a) breach of fiduciary duty and negligence, and include violations of standards established in the FINRA rules, including the suitability standards in FINRA Rule 2111; and (b) violation of the applicable state securities law sections prohibiting the sale of securities through material misrepresentations and omissions. While several investors will join in the same filing in some of the individual RIA claims, these claims are unique to each individual investor. One such claim has already been filed in arbitration with JAMS in Seattle, and is titled *Harris, et al. v. Elite Wealth Management, Inc., et al.*, JAMS No. 1160021073. A courtesy copy of that claim was provided to the Securities and Exchange Commission ("Commission") at its request. That claim is not affected by the Interim Order.

Yet, other similar Customer v. Advisor claims are stayed by the Interim Order. That is because the Aequitas scheme involved acquiring interests in and/or making loans to RIA firms, who were then incentivized or required to offer and sell Aequitas products. The scheme was implemented by creating a complex web of interrelated companies, funds, investment advisors and broker-dealers who played various roles in the marketing and sale of Aequitas investment products around the nation. Consequently, some of the non-Receivership Entity defendants that the Banks Clients have investigated and intended to pursue are or may be partially owned by or under common control with a Receivership Entity listed in Exhibit A of the Interim Order. Because of these relationships, paragraphs 17C and 21 of the Interim Order prevent individual investors from bringing these individual claims, even though they will not affect the

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Receivership Property or the Receivership Entities, except to reduce the debts to these investors.

One example concerns PAG, the Washington RIA firm that the Banks Clients had intended to sue this week to recover more than $6 million in Aequitas note sales. PAG is not a defendant, Receivership Entity or Extended Entity under the Interim Order. But, defendant Aequitas Investment Management Inc.'s ("AIM") Form ADV filed with the Commission on July 13, 2015, states at page 13 that PAG is under common control with AIM. Due to the all-encompassing language used in paragraphs 6A (defining Receivership Property), 17 C and 21 of the Interim Order,[1] no claims can be brought against PAG, even though such claims will not dissipate assets of the Aequitas Defendants or Receivership Entities. Likely, other RIA firms and broker-dealers that sold Aequitas products to investors have similar connections.

B. Financial Services Industry Claims. These individual investor claims are against persons and entities in the financial services industry who were involved in the sale of Aequitas investments to some of the Banks Clients ("Financial Services Industry Claims"). These are claims against persons and entities that are neither Defendants nor Receivership Entities. The identified defendants include:

- Persons and entities, including SAS Capital Management, Inc., that created portfolio management platforms for the RIA firms that directed client money into Aequitas products;

[1] Paragraph 17C of the Interim Order prohibits anyone from enforcing any claims or judgments against any Receivership Property or Receivership Entity. "Receivership Property" is broadly defined to include any property that the Receivership Entity *owns, controls, or has a beneficial interest in*. Interim Order, para. 6A (emphasis added). Paragraph 20 is equally broad, and stays "All civil legal proceedings of any nature . . . involving Receivership Property . . . the Receivership Entity . . . or any of the Receivership Entity's *past or present officers, directors, managers, agents, or general or limited partners.*" (emphasis added).

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- Investment Advisory Firms, including TD Ameritrade, that referred its clients to the selling RIAs to allow them to purchase Aequitas investments, and received compensation for doing so;
- Control persons and salespersons of now dissolved RIA firms, including Strategic Capital Group, that sold Aequitas products within applicable statutes of limitations;
- RP Capital, a firm with close ties to Private Advisory Group that served as the broker-dealer for SAS Capital Management and profited from the Aequitas purchases; and
- Integrity Bank & Trust, Inc., which held Aequitas notes after TD Ameritrade refused to do so, purportedly performed due diligence on the notes, and was paid a percentage of the interest payments made.

The Interim Order as written has stayed some of Financial Services Industry Claims as well, including SAS Capital Management. That firm provided back office support to RIA firms. SAS's services included providing an Advisory Model Platform that, the Banks Clients allege, steered managed money into Aequitas products. Those Banks Clients affected by the SAS model intended to bring claims against SAS for participating in the unlawful sales to them. But, SAS reports on its Form ADV Part 2A filed on September 24, 2015, pages 6 and 12 that Aequitas Management is an affiliate whose investments SAS used in its "model portfolio." The SAS Form ADV also states that Aequitas Capital Opportunities Fund, LP (which is a Receivership Entity) is a controlling owner of an affiliate of SAS known as SCA Holdings, LLC, and as such indirectly receives a share of SAS's net annual revenue. SAS Form ADV Part 2A,

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pages 28, 31. As a result of that relationship, the Interim Order at least arguably prevents the Banks Clients from pursuing these claims.

The Banks Clients are also stayed from bringing Financial Services Industry Claims against individuals in the financial services industry who are neither defendants nor Receivership Entities. Among others, they have identified Gary Price, Ronald Robertson and Tim Feehan as persons who provided substantial assistance to the process of creating and using Advisory Model Platforms that steered money to Aequitas, and profited from doing so. Each of those individuals is reported to be a minority owner of Aspen Grove Equity Solutions (a Receivership Entity) by the SAS Form ADV Part 2, p 32. Since they are minority owners of a Receivership Entity, the Interim Order appears to shield them from liability and prohibit the filing of claims against them.

C. Claims Against Non-Securities Industry Participants and Material Aiders. These claims are against third parties who were participants and material aiders under Oregon law[2] for their roles in the Aequitas offerings, including attorneys, accountants and other professionals who materially assisted in the Aequitas offerings ("Non-Securities Industry Participant Claims").

D. Claims Against Aequitas Direct Seller Insiders. Some of the Banks Clients have direct seller claims against individual officers and employees at Aequitas who directly sold the investments of up to $1 million to individual investors ("Aequitas Direct Seller Claims"). These are individual claims belonging to the purchasers, and are distinct from the potential

[2] See, e.g., *Prince v. Brydon*, 307 Or 146, 150-51 (1988) (*en banc*); *Black & Co. v. Nova-Tech, Inc.*, 333 F. Supp. 468 (D. Or. 1971); *Ainslie v. First Interstate Bank of Oregon, N.A.*, 148 Or. App. 162, 184 (1997); *Adams v. American Western Securities, Inc.*, 844, 265 Or. 514, 529 (1973)

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claims for the role of these individuals in a general scheme to defraud.

III. OBJECTIONS TO INTERIM ORDER

A. Objection 1. The Banks Clients object to Paragraphs 6A (defining Receivership Property), 17C and 20 to the extent that they stay the Customer v. Advisor Claims, the Financial Service Industry Claims, the Non-Securities Industry Participant Claims, and the Aequitas Direct Seller Claims.

The Receiver has no standing or right to pursue the Customer v. Advisor Claims, the Financial Service Industry Claims, or the Aequitas Direct Seller Claims. Those are all individual claims belonging to the investors, and not the Receiver, the Defendants, or the Receivership Entities. They have no right to bring these claims, and they should have no right to prevent these investors from pursuing them. Even if the Receiver did have standing to bring those claims on behalf of the defendants or Receivership Entities, there could well be *in pari delicto* or unclean hands defenses that would not apply to the Banks Clients' claims.

Moreover, the Banks Clients pursuit of those claims will not dissipate the assets of the Receiver Entities, and in fact successful prosecution of the claims will reduce the liabilities of the Defendants and the Receivership Entities.

The Interim Order also results in inconsistent treatment of the Customer v. Advisor Claims and the Financial Service Industry claims. Some claims can be brought against RIA and broker-dealers, and others cannot. Perhaps more significantly, while the Interim Order stays actions against some RIAs and broker-dealers, it does not stay actions against most of the individual salespersons at the RIA firms. This disparity is likely to result in filing multiple claims – first against the individual salespersons and then, if and when the stay expires, a second case against the firms themselves.

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Additionally, the Interim Order imposes a tolling of applicable statutes of limitation in paragraph 22, but there can be no assurances that the tolling provision would successfully defeat a statute of limitations defense raised by a defendant outside of this Court's jurisdiction who is not a party to this proceeding. Of immediate concern is that some of the state securities law claims are governed by a three year from sale limitations period. *See* ORS 59.115(6)(imposing a three year to claims brought under ORS 59.115(1)(a) for the non-registration of securities).

Finally as a matter of fairness and equity, it is unfair to prohibit the Banks Clients, some of whom are facing life-changing circumstances as a result of their Aequitas investments, from pursuing their individual claims as quickly and efficiently as possible.

The Banks Clients recognize that the Non-Securities Industry Participant Claims may apply to many Aequitas purchasers, depending upon what they purchased and when they did so. The Banks Clients request permission to pursue those claims, but do not object to an Order that establishes a procedure among the various parties and counsel that would prevent duplication of time and expense while permitting each investor group the opportunity to participate in the prosecution of those claims.[3]

Based on these objections, the Banks Clients request that the court amend the Interim Order or grant them relief from the stay to permit them to:

(a) Pursue their claims against any RIA firm, broker-dealer, and representatives and control persons who are not defendants or Receivership Entities;

(b) Pursue claims against any employee of Aequitas Capital Management, Inc. who

[3] Among other things the Banks Clients would like to be heard on issues relating to the application of the Oregon Securities Laws to those claims, the potential effects of the Securities Litigation Uniform Standards Act, 15 USC section 78bb(f), and whether those claims could or should be pursued as class action cases.

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Portland, OR 97204-3642
Telephone (503) 226-2966
Facsimile (503) 222-2937

directly sold an Aequitas investment to an investor;

(c) Pursue claims against any person or entity in the financial services industry who is not a defendant or Receivership Entity; and

(d) In cooperation with other counsel and the Receiver, pursue claims against non-securities industry participants.

B. Objection 2. The Interim Order was negotiated between the Commission and the Defendants, with no input from the actual victims, and no apparent pre-filing input from Oregon lawyers or receivers. While the Banks Clients do not question the qualifications or credentials of the Receiver or the out-of-state counsel that he has retained, those individuals are from areas of the country with pay scales and costs of living that are much higher than they are in Portland, Oregon. The approved billing rates in the Interim Order for the Receiver and the senior partners in the law firms that he has hired start at $825 per hour. There are receivers and lawyers for receivers in this region who are well-qualified to perform the contemplated duties, at lower rates and without the necessary travel costs. The Banks Clients have an interest in minimizing the liquidation costs and maximizing the return for all Aequitas investors, and request that the Court modify the third sentence in paragraph 1 of the Interim Order to provide as follows:

> Mr. Greenspan (the "Receiver") is authorized to retain FTI Consulting, Inc., and the law firms of Pepper Hamilton LLP ("Pepper Hamilton") and Pachulski Stang Ziehl & Jones, LLP ("Pachulski") in connection with his appointment, and such other qualified and cost-effective law firms, receivers, liquidators and others as may be necessary to complete his duties, provided that the Receiver shall consider the billing rates and travel costs of any individual or firm before hiring and assigning work. (proposed language underlined)

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IV. CONCLUSION

The Banks Clients have suffered losses of approximately $11 million from their Aequitas investments. They have what appear to be valuable individual claims to pursue, and those claims cannot effectively be pursued by the Receiver. Such attempts may ultimately benefit the Receiver by reducing liabilities from any third party recoveries. They respectfully request the Court's permission to allow them to pursue those claims as quickly as possible.

Dated this 18th day of March, 2016.

SAMUELS YOELIN KANTOR LLP

By: */s/ Robert S. Banks, Jr.*

ROBERT S. BANKS, JR., OSB No. 821862
VICTORIA BLACHLY, OSB No. 972805
DARLENE D. PASIECZNY, OSB No. 124172
Telephone: 503-226-2966
Facsimile: 503-222-2937
BBANKS@SamuelsLaw.com

Attorneys for Proposed Intervenors

SAMUELS YOELIN KANTOR LLP
Attorneys at Law
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Portland, OR 97204-3642
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Facsimile (503) 222-2937