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

Defendants.

No. 3:16-cv-00438-JR

**RECEIVER’S MOTION TO APPROVE
CLASSIFICATION, ALLOWANCE OF
THE AMOUNT OF CLAIMS FOR
CERTAIN CLAIMANTS
(ADMINISTRATIVE CLAIMS,
CONVENIENCE CLASS CLAIMS, AND
FORMER-EMPLOYMENT CLAIMS),
AND APPROVING DISTRIBUTIONS TO
THOSE CLAIMANTS**



LOCAL RULE 7-1 CERTIFICATE

On May 8, 2020, counsel for the Receiver circulated to all counsel of record in this action, via e-mail, copies of this motion and the accompanying declaration, both of which were substantially the same as the later filed version. The conferral requested that counsel respond by 5:00 p.m. (PST) on May 15, 2020, as to whether their clients object or consent to the motion. As of the time of filing this motion, the undersigned had received two (2) consents and no objections.

NOTICE

On May 8, 2020, the Receiver mailed notice to the last known mailing address of those Claimants whose claims are the subject of this motion. A copy of the Notice is attached as Exhibit 4 to the Declaration of Ronald F. Greenspan filed herewith.

MOTION

To further the distribution of funds pursuant to the Court-approved Distribution Plan,¹ the Receiver moves the Court to enter an order:

- (1) Approving the Receiver's classification of those Claimants whose Claims are the subject of this motion, as further identified in Exhibits 1 – 3 to the Declaration of Ronald F. Greenspan ("Specified Claimants")²;
- (2) Allowing the amounts of the claims of those Specified Claimants as listed in Exhibits 1 – 3; and

¹ Receiver's Motion to Approve Receiver's Distribution Plan and Determination of a Ponzi Scheme (the "Distribution Plan") [Dkt. 787]; Findings of Fact and Conclusions of Law ("FF&CL") [Dkt. 813] (approving same with minor clarifications and modification, as requested by Receiver).

² Capitalized terms not otherwise defined in this motion shall have the meanings ascribed to them in the Distribution Plan [Dkt. 787].

(3) Approving distributions to those Specified Claimants in the amounts set forth in Exhibits 1 – 3 in full satisfaction of the Allowed Claims of the Specified Claimants.³

By this motion, the Receiver is not currently seeking to adjudicate the rights of Claimants who are not identified as Specified Claimants in this motion.

POINTS AND AUTHORITIES

I. Factual and Procedural History

In March 2016, the U.S. Securities and Exchange Commission (“SEC”) filed the above-captioned action, alleging violations of federal securities law by Robert Jesenik, Brian Oliver, and N. Scott Gillis as well as entities that they controlled (the “Entity Defendants”),⁴ which were part of the broader Aequitas Enterprise and included over 57 affiliated and controlled entities.⁵ The Court conclusively determined that the Entity Defendants were operated as a Ponzi scheme no later than July 2014.⁶

A. Appointment of Receiver, Claims Procedure, and Approval of Distribution Plan

The Court appointed Ronald F. Greenspan as Receiver for the Entity Defendants and various affiliated entities—initially on an interim basis on March 16, 2016,⁷ and later, on

³ To the extent a Specified Claimant is also the holder of an Allowed Convenience Class Claim, classification, allowance and treatment of that Allowed Convenience Class Claim is also provided for in this motion.

⁴ Complaint [Dkt. 1]. In addition to the Entity Defendants, Jesenik, Oliver, and Gillis controlled various other Aequitas subsidiaries and/or majority-owned affiliates (or their predecessors in interest). For purposes of this motion and events that pre-date the Receivership, the Receivership Defendants and the entities set forth in Exhibit A and Exhibit B to the Order Appointing the Receiver [Dkt. 156], shall be referred to collectively as the “Aequitas Enterprise.”

⁵ FF&CL [Dkt. 813] at 5-6.

⁶ *Id.* at 14.

⁷ Stipulated Interim Order Appointing Receiver [Dkt. 30].

April 14, 2016, on an enduring basis.⁸ Since then, consistent with that role and the powers authorized by the Court, the Receiver has, among other activities, operated the Receivership Estate, performed reporting obligations, made records available to Investors for use in litigation, and substantially monetized the assets of the Receivership Estate.⁹

On April 25, 2019, on the Receiver's motion, the Court fixed a Claims Bar Date of July 31, 2019; approved the manner of notice of the Claims Bar Date; and approved the Proof of Claim Form, the Claims Procedure, and associated exhibits and attachments.¹⁰ The Claims Bar Date operated as "the deadline for Claimants and Administrative Claimants to submit a completed and signed Proof of Claim Form under penalty of perjury, together with supporting documentation against one or more of the Aequitas Entities."¹¹

On December 23, 2019, the Court approved the creation of a Qualified Settlement Fund ("QSF"), over which it would retain jurisdiction and from which distributions would be made on Allowed Claims, including any distributions to the Specified Claimants who are the subject of this motion.¹²

On December 31, 2019, the Receiver moved the Court for a determination that the Aequitas Enterprise operated as a Ponzi scheme and approval of the Receiver's proposed

⁸ Order Appointing Receiver [Dkt. 156]. The Receivership Estate consisted of the Entity Defendants, as well as 43 other related entities. *Id.* at Ex. A (listing related entities). Nine Extended Entities in which Aequitas had a material investment were also required by Court order to cooperate with the Receiver. *Id.* at Ex. B.

⁹ *See generally* the Receiver's Quarterly Reports.

¹⁰ Order (1) Establishing Claims Bar Date, (2) Approving the Form and Manner of Notice, and (3) Approving the Proof of Claim Form, Procedures and Other Related Relief [Dkt. 683].

¹¹ *Id.* at ¶ 4.

¹² Order Granting Receiver's Motion for Order to Authorize, Approve, and Keep Continuing Jurisdiction over a Qualified Settlement Fund, and Related Relief [Dkt. 781].

distribution plan.¹³ That same day, the Receiver moved the Court to approve a notice procedure, briefing schedule, and hearing date.¹⁴

On January 14, 2020, the Court approved the Receiver's proposed means of providing interested parties notice of the Receiver's proposed distribution plan and Ponzi determination.¹⁵ The Court set briefing deadlines, including a February 20, 2020 deadline for interested parties to file objections.¹⁶ The Court additionally set March 31, 2020, as the hearing date on the Receiver's motion regarding a Ponzi determination and distribution plan.¹⁷

On March 31, 2020, following the scheduled hearing, this Court concluded that the Aequitas Enterprise operated as a Ponzi scheme.¹⁸ Relatedly, the Court approved the Receiver's proposed distribution plan, as modified.¹⁹

B. History Specific to Specified Claimants

1. Assertion of Claims by Specified Claimants

As noted above, the Court imposed a Claims Bar Date. Certain Claimants, however, had the option to be treated as having timely asserted claims without actually filing a proof of claim if they agreed with the Receiver as to their claim and the amount thereof. As stated in this Court's order:

¹³ Receiver's Motion to Approve Receiver's Distribution Plan and Determination of a Ponzi Scheme [Dkt. 787].

¹⁴ Receiver's Motion for Order (1) Approving Form and Manner of Notice Regarding Approval of Proposed Distribution Plan and Ponzi Determination, (2) Approving Procedures and Deadlines, (3) Setting a Hearing, and for Related Relief [Dkt. 785].

¹⁵ Order: (1) Approving Form and Manner of Notice Regarding Approval of Proposed Distribution Plan and Ponzi Determination, (2) Approving Procedures and Deadlines, (3) Setting a Hearing, and for Related Relief [Dkt. 790].

¹⁶ *Id.* at 2-3.

¹⁷ *Id.* at 3.

¹⁸ FF&CL [Dkt. 813] at 14.

¹⁹ *Id.* at 18.

The Receiver has determined in his sole and absolute discretion that certain [Claimants and Administrative Claimants] are entitled to an Allowed Claim and will receive a Notice of Receiver's Initial Determination, with attachments containing information and amounts, which together constitute the Receiver's initial determination of the Allowed Claim. [A Claimant or Administrative Claimant] who **AGREES** with the information and amounts in the attachments to the Notice of Receiver's Initial Determination need **NOT** submit a Proof of Claim. [A Claimant or Administrative Claimant] who **DISAGREES** with the information or amounts in the attachments to the Notice of Receiver's Initial Determination and wants to assert a Claim that is different, **MUST** timely and properly submit a Proof of Claim, including supporting documents in compliance with the Notice of Claims Bar Date and Procedures for Submitting a Proof of Claim.²⁰

Such initial determinations, which the Receiver refers to as "NODs" (as shorthand for "Notice of Determination"), form the basis for many of the Claims of the Specified Claimants addressed in this motion. To the extent that any Specified Claimant also adequately submitted a Proof of Claim before the Claim Bar Date, the exhibits to the Receiver's declaration include his explanation of the basis upon which the Claim amount should be determined.

2. *Resolution and Waiver of Objections*

In formulating his proposed distribution plan, the Receiver received numerous inquiries (and a few potential objections to some provisions). The Receiver responded to all of these and ultimately all parties were satisfied with the merits and equity of the Receiver's proposed distribution plan and did not file objections. Only one party filed an objection and did so without first communicating with the Receiver. Upon becoming aware of this objection, the Receiver considered the information provided by the objecting party, conducted further research, and resolved the objection by modifying the definition of Non-Officer Former Employee Claim.²¹

²⁰ Order (1) Establishing Claims Bar Date, (2) Approving the Form and Manner of Notice, and (3) Approving the Proof of Claim Form, Procedures and Other Related Relief [Dkt. 683] at ¶ 10 (emphasis in original).

²¹ See Receiver's Reply ISO the Distribution/Ponzi Determination Motion [Dkt. 807] (pursuant to Brett M. Brown's Objection [Dkt. 799], the following individuals were omitted from the list of
(continued on next page)

No other objections were asserted before the Court-approved deadline of February 20, 2020 and, as such, all objections to the Distribution Plan have been resolved or waived.²²

3. *The Court-approved Distribution Plan's Treatment of Specified Claimant Classes*

The Court-approved Distribution Plan establishes, among other classes, the following classes of Claimants (which definitions are reiterated in later sections) and related treatments that are pertinent to this motion:

- Allowed Administrative Claims. Each such claim shall be paid the full amount of the Allowed Claim from the QSF.²³
- Allowed Non-Officer Former Employee Claims. Each such claim shall be paid the full amount of the Allowed Claim (which shall not exceed \$12,850) from the QSF.²⁴
- Allowed Convenience Class Claims. Each such claim shall be paid an amount equal to twenty percent (20%) of the Allowed Convenience Class Claim from the QSF.²⁵

Based on the Receiver's reasonable investigation, the distributions proposed in this motion are consistent with the Court-approved Distribution Plan and, following these distributions, the QSF will have sufficient funds to make distributions to other Claimants with Allowed Claims

individuals precluded from holding a Non-Officer Former Employee Claim: Brett Brown; Patricia Brown; Bill Malloy; and Thomas Szabo); *see also* FF&CL [Dkt. 813] (approving same).

²² *See Garvin v. Cook Invs. NW, SPNWY, LLC*, 922 F.3d 1031, 1034 (9th Cir. 2019) (bankruptcy trustee waived objection by failing to raise it in conjunction with plan confirmation); *see also* FF&CL [DKT 813] at 18-19 ("All objections to the Receiver's Distribution/Ponzi Determination Motion that have not been withdrawn, waived, settled, or expressly reserved pursuant to the terms of this Order are overruled.").

²³ Distribution Plan [Dkt. 787] at 65. *See also* FF&CL [Dkt. 813] (approving same).

²⁴ Distribution Plan [Dkt. 787] at 65. *See also* FF&CL [Dkt. 813] (approving same).

²⁵ Distribution Plan [Dkt. 787] at 65-66. *See also* FF&CL [Dkt. 813] (approving same). The amount of an Allowed Convenience Class Claim cannot exceed \$20,000.

estimated, pursuant to the priority provisions of the Court-approved Distribution Plan, to receive distributions.²⁶

II. This Court Should Approve the Receiver's Classification and Allowance of Specified Claims and Authorize the Receiver's Proposed Distribution.

This motion is accompanied by the Declaration of Ronald F. Greenspan, which includes Exhibits 1 – 3, setting forth for each of the Specified Claimants:

- Name(s). This field specifies the name or names associated with a Claim, or if the Receiver intends to consolidate multiple Claims as allowed by the Court-approved Distribution Plan, each unique name associated with such Claims.
- Receiver's Classification. This field specifies how the Receiver has classified the Claim.
- NOD Claim Amount. This Field contains the amount specified in any NOD(s) for the Claimant.
- Proof of Claim Amount. This field contains the amount specified in any Proof of Claim(s) submitted by or on behalf of the Claimant.
- Proposed Allowed Claim Amount. The amount that the Receiver proposes be determined as the Claimant's Allowed Claim.
- Proposed Distribution. The amount that the Receiver proposes be distributed on the Claimant's Allowed Claim as approved pursuant to the Court-approved Distribution Plan.
- Notes. This field contains information regarding some component of or treatment of the Claim.

A. Specified Administrative Claimants

In Exhibit 1, the Receiver identifies certain Specified Claimants that the Receiver has concluded are appropriately classified as Administrative Claimants, allowance of their claim in specified amounts, and for whom the Receivership should be authorized to make a distribution from the QSF. Under the terms of the Court-approved Distribution Plan, an Administrative Claim is:

²⁶ Declaration of Ronald F. Greenspan ¶ 8.

An Allowed Claim based on: (i) the provision of goods or services for the benefit of the Receivership Estate or at the request of the Receiver beginning on or after March 16, 2016, or related to the administration of the QSF, 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.²⁷

As noted above, under the terms of the Court-approved Distribution Plan, Allowed Administrative Claims are paid in full from the QSF.²⁸

B. Specified Non-Officer Former Employee Claims

In Exhibit 2, the Receiver identifies certain Specified Claimants that are appropriately classified as Non-Officer Former Employees, allowance of their claim in specified amounts, and for whom the Receivership should be authorized to make a distribution from the QSF. Under the terms of the Court-approved Distribution Plan, Non-Officer Former Employee Claims are:

Claims that accrued on behalf of a Non-Officer Former Employee prior to the Aequitas Enterprise being placed in receivership for services provided in accordance with the terms of employment, including for the amount of paid time off that accrued and was unused as of the separation date (“Accrued PTO”); amounts owing under the provisions of the Worker Adjustment and Retraining Notification Act (“Warn Act”); and amounts owing pursuant to contract, including but not limited to severance pay, retirement pay, expense reimbursement, and relocation or other bonus as of the separation date.²⁹

²⁷ Distribution Plan [Dkt. 787] at 62-63. *See also* FF&CL [Dkt. 813] (approving same).

²⁸ Distribution Plan [Dkt. 787] at 65. *See also* FF&CL [Dkt. 813] (approving same).

²⁹ Distribution Plan [Dkt. 787] at 63. *See also* FF&CL [Dkt. 813] (approving same).

Certain individuals are expressly excluded from the definition of a Non-Officer Former Employee.³⁰ As noted above, under the terms of the Court-approved Distribution Plan, Non-Officer Former Employee Claims are paid the full amount of their Allowed Non-Officer Former Employee Claim (in an amount, which shall not exceed \$12,850) from the QSF.³¹

C. Specified Convenience Class Claimants

In Exhibit 3, the Receiver identifies certain Specified Claimants that are appropriately classified as Convenience Class Claimants, allowance of their claim in specified amounts, and for whom the Receivership should be authorized to make a distribution from the QSF. A Convenience Class Claim is:

An Allowed Creditor Claim (i) equal to or less than \$20,000, or (ii) an Allowed Creditor Claim in excess of \$20,000, where the holder elects to reduce the Allowed Creditor Claim to \$20,000 and waive the balance of the Allowed Creditor Claim.³²

Under the terms of the Court-approved Distribution Plan:

A Creditor Claim is 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, (other than Defrauded Investors or Pass-through Investors), (ii) goods or services provided prior to March 16, 2016, (iii) an uncashed

³⁰ The definition of “Non-Officer Former Employee Claims” excludes the past officers and directors of the Aequitas-affiliated companies, including without limitation, Robert Jesenik, Brian Oliver, Craig Froude, Scott Gillis, Andrew MacRitchie, Olaf Janke, Brian Rice, William Ruh, Steve Hedberg, and Tom Goila. Distribution Plan [Dkt. 787] at 57-58 n. 174; Receiver’s Reply ISO the Distribution/Ponzi Determination Motion [Dkt. 807] (pursuant to Brett M. Brown’s Objection [Dkt. 799], the following individuals were omitted from the list of individuals precluded from holding a Non-Officer Former Employee Claim: Brett Brown; Patricia Brown; Bill Malloy; and Thomas Szabo); FF&CL [Dkt. 813] 8-9, 18 (approving same).

³¹ Distribution Plan [Dkt. 787] at 65. *See also* FF&CL [Dkt. 813] (approving same). To the extent a Non-Officer Former Employee is also the holder of an Allowed Convenience Class Claim, classification, allowance and treatment of that Allowed Convenience Class Claim is also provided for in this motion.

³² Distribution Plan [Dkt. 787] at 65-66. *See also* FF&CL [Dkt. 813] (approving same).

check issued prior to March 16, 2016, for refund on account of a healthcare account receivable overpayment, student loan account receivable overpayment, or any other overpayment, (iv) unpaid wages, compensation, or other employment benefits, that accrued prior to March 16, 2016, that exceed the priority wage claim cap of \$12,850, or (v) taxes payable by an Aequitas Entity arising from or attributable to tax periods beginning prior to March 16, 2016, even if due and payable subsequent to March 16, 2016, including those that may be asserted by federal, state, local or other governmental entities or authorities. 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.³³

As noted above, under the terms of the Court-approved Distribution Plan, Allowed Convenience Class Claims are paid an amount equal to twenty percent (20%) of that allowed amount from the QSF.³⁴ For this motion, the Receiver has only included Convenience Class Claims where the amount included in the NOD is equal to or less than \$20,000.00 or a portion of the otherwise eligible unpaid wages, compensation, or other employment benefits, that accrued prior to March 16, 2016, exceeds the Non-Officer Former Employee cap of \$12,850 by \$20,000 or less and therefore no election by any of the Specified Claimants to reduce their Creditor Claim to \$20,000.00 was necessary.

D. Recipients of Distribution Payments

As set forth in the Court-approved Distribution Plan and the FF&CL, “[a]ccount and claim ownership shall be ... determined as of the Claims Bar Date.”³⁵ Where a Specified Claimant informed the Receiver in writing prior to the filing of this motion that the ownership of the Claim had been transferred, the Receiver will make a good faith effort to direct payment to the last known owner of the claim.

³³ Distribution Plan [Dkt. 787] at 64. *See also* FF&CL [Dkt. 813] (approving same).

³⁴ Distribution Plan [Dkt. 787] at 65-66. *See also* FF&CL [Dkt. 813] (approving same). The amount of an Allowed Convenience Class Claim cannot exceed \$20,000.

³⁵ Distribution Plan [Dkt. 787] at 55 n. 170; FF&CL [Dkt. 813] (approving same).

The Court-approved Distribution Plan provides that the Receiver is not required to pay de minimis claims that would result in a distribution of less than \$50.00.³⁶ For the purposes of this motion, the Receiver proposes to make distributions on allowed claims where the distribution will be \$25 or greater. No distribution will be made on allowed de minimis claims where the distribution is less than \$25 as the cost of handling the distribution, including such items as printing, postage, returned checks, and inquiries is disproportionate to the benefit.

E. Release and Satisfaction

Also as set forth in the Court-approved Distribution Plan and the FF&CL, receipt of payment is a release and satisfaction in full of the Claim.³⁷

CONCLUSION

By this motion the Receiver does not purport to adjudicate rights of Claimants other than the Specified Claimants identified in Tables 1 – 3. The Receiver respectfully requests that this Court enter an order:

- (1) Approving the Receiver’s classification of Specified Claimants;
- (2) Allowing of the amounts of the claims of those Specified Claimants as listed in Exhibits 1 – 3; and

³⁶ Distribution Plan [Dkt. 787] at 67. *See also* FF&CL [Dkt. 813] (approving same).

³⁷ Distribution Plan [Dkt. 787] at 65 (“Distributions on Allowed Claims is governed by, and subject to the terms of the Court-approved Distribution Plan as implemented through the QSF and shall be in full and complete satisfaction, settlement, and release of all such claims.”); FF&CL [Dkt. 813] (approving same).

(3) Approving distributions to those Specified Claimants in the amounts set forth in Exhibits 1 – 3 in full satisfaction of the Allowed Claims of the Specified Claimants.

Dated this 15th day of May, 2020.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

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