Docket #0336 Date Filed: 1/9/2017

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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.

3:16-CV-438-PK

FINDINGS AND RECOMMENDATION

PAPAK, Magistrate Judge:

Plaintiff the Securities and Exchange Commission (the "SEC" or the "Commission") filed this securities fraud action against defendants Aequitas Management, LLC ("Aequitas Management"), Aequitas Holdings, LLC ("AH" or "Aequitas Holdings"), Aequitas Commercial Finance, LLC ("ACF"), Aequitas Capital Management, Inc. ("ACM"), Aequitas Investment Management, LLC ("AIM" and, collectively with Aequitas Management, AH, ACF, and ACM, the "Aequitas companies" or the "entity defendants"), Robert J. Jesenik, Brian A. Oliver, and N.

Scott Gillis (collectively with Jesenik and Oliver, the "individual defendants") on March 10, 2016. By and through its complaint, the SEC alleges that the entity defendants, with the knowledge and under the direction of the individual defendants (Aequitas Management CEO Jesenik, Aequitas Management executive vice-president Oliver, and former Aequitas Management CFO and COO Gillis), defrauded over 1,500 individual and entity investors nationwide into investing their assets in Aequitas business ventures with the promise of lucrative returns, when in reality defendants used the great majority of the funds they received from such investors to pay corporate expenses, including executive salaries, bonuses, and perquisites, actually investing only 15-25% of the proceeds received. Arising out of the foregoing, the SEC alleges (i) all defendants' liability under Sections 17(a)(1) and 17(a)(3) of the Securities Act of 1933 (the "Securities Act"), (ii) the liability of the individual defendants for aiding and abetting the entity defendants in their violation of Sections 17(a)(1) and 17(a)(3) of the Securities Act, (iii) all defendants' liability for violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and of Rules 10b-5(a) and 10b-5(c) promulgated under the Exchange Act, (iv) the liability of the individual defendants for aiding and abetting the entity defendants in their violation of Section 10(b) of the Exchange Act and of Rules 10b-5(a) and 10b-5(c) promulgated under the Exchange Act, (v) defendants ACF and Jesenik's liability for violation of Section 17(a)(2) of the Securities Act, (vi) the liability of the individual defendants for aiding and abetting ACF in its violation of Section 17(a)(2) of the Securities Act, (vii) defendants ACF and Jesenik's liability for violation of Section 10(b) of the Exchange Act and of Rule 10b-5(b) promulgated under the Exchange Act, (viii) the liability of the individual defendants for aiding and abetting ACF in its violation of Section 10(b) of the Exchange Act and of Rule 10b-5(b)

promulgated under the Exchange Act, (ix) defendants ACM and AIM's liability for violation of Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 (the "Advisers Act"), (x) the liability of the individual defendants for aiding and abetting defendants ACM and AIM in their violation of Sections 206(1) and 206(2) of the Advisers Act, (xi) defendants ACM and AIM's liability for violation of Section 206(4) of the Advisers Act and of Rule 206(4)-8 promulgated under the Advisers Act, and (xii) the liability of the individual defendants for aiding and abetting defendants ACM and AIM in their violation of Section 206(4) of the Advisers Act and of Rule 206(4)-8 promulgated under the Advisers Act. The SEC seeks disgorgement of the fraudulently solicited investment funds with prejudgment interest, imposition of civil monetary penalties against all defendants, and injunctive relief to prevent the individual defendants from serving as officers or directors of any public company and to prevent any of the defendants from soliciting investments or participating in securities transactions. This court has subject-matter jurisdiction over the SEC's action as expressly provided in the Securities Act, the Exchange Act, and the Advisers Act, and pursuant to 28 U.S.C. § 1331.

Ronald F. Greenspan was appointed to serve without bond as receiver of the Aequitas companies (and their subsidiaries and/or majority-owned affiliates) on an interim basis effective March 16, 2016. On April 14, 2016, I confirmed Greenspan's interim appointment as receiver of the Aequitas companies on a permanent basis. Judge Hernandez entered judgment of permanent injunctive relief as to the entity defendants, with their stipulation and consent, on June 15, 2016, enjoining each of them, together with their officers, agents, servants, employees, and attorneys, from violating federal securities laws, from soliciting any person or entity to purchase or sell any security (other than in connection with the receiver's fulfillment of his responsibilities under the

court's receivership order), and from opposing any argument that they violated applicable securities laws in connection with any motion brought by the SEC seeking disgorgement of profits made from the foredescribed sales of securities to Aequitas investors.

Now before the court is individual defendant Gillis' motion (#172) to dismiss the SEC's claims against him or, in the alternative, for a more definite statement of those claims. I have considered the motion, oral argument on behalf of Gillis and the SEC, and all of the pleadings and papers on file. For the reasons set forth below, Gillis' motion (#172) should be denied in its entirety.

LEGAL STANDARDS

I. Motion to Dismiss for Failure to State a Claim

To survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint must contain more than a "formulaic recitation of the elements of a cause of action;" specifically, it must contain factual allegations sufficient to "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To raise a right to relief above the speculative level, "[t]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.*, *quoting* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004); *see also* Fed. R. Civ. P. 8(a). Instead, the plaintiff must plead affirmative factual content, as opposed to any merely conclusory recitation that the elements of a claim have been satisfied, that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *citing Twombly*, 550 U.S. at 556. "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable

inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009), *citing Iqbal*, 556 U.S. at 678.

"In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). In considering a motion to dismiss, this court accepts all of the allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *See Kahle v. Gonzales*, 474 F.3d 665, 667 (9th Cir. 2007). Moreover, the court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 256 (1994), *quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The court need not, however, accept legal conclusions "cast in the form of factual allegations." *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

II. Motion for More Definite Statement

Federal Civil Procedure Rule 12(e) provides, in relevant part, as follows:

> A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired.

Fed. R. Civ. P. 12(e). Motions for more a definite statement are disfavored and are "proper only where the complaint is so indefinite that the defendant cannot ascertain the nature of the claim being asserted." *Sagan v. Apple Computer, Inc.*, 874 F. Supp. 1072, 1077 (C.D. Cal.1994). Where a responsive pleading can reasonably be framed, a motion for more definite statement

should be denied. *See, e.g., Bureerong v. Uvawas*, 922 F. Supp. 1450, 1461 (C.D. Cal. 1996); *see also* Fed. R. Civ. P. 12(e). Similarly, where the detail sought by a motion for more definite statement is available through discovery, the motion should be denied. *See Beery v. Hitachi Home Elecs. (Am.)*, 157 F.R.D. 477, 480 (C.D. Cal. 1993).

FACTUAL BACKGROUND

I. The Aequitas Companies

Aequitas Management owns an 84% ownership stake in Aequitas Holdings, which is the sole owner and sole member of ACF and also the sole shareholder of ACM. ACF is the entity defendant which issued promissory notes to Aequitas investors in exchange for their investments. ACM is the manager of ACF and is also the sole owner and member of AIM. AIM manages the various business ventures (the "Aequitas funds") in which the Aequitas investors were at material times told their assets would be invested.

Jesenik is the founder of the Aequitas companies, the 35% owner of Aequitas Management, the CEO and President of each of the Aequitas companies, and the Chief Investment Officer of ACM and of AIM. Oliver is a 25% owner of Aequitas Management, and an executive vice president of each of the Aequitas companies.

Gillis is alleged to be a 10% owner of Aequitas Management.[1] From January 2015 through January 2016, Gillis was an executive vice president of each of the Aequitas companies and was COO of ACF, ACM, and AIM, and from April 2015 through January 2016 was also the CFO of ACF, ACM, and AIM.

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[1] Gillis asserts that this allegation is false, but at this stage of these proceedings I assume, as I am obliged to do, the truth of the SEC's allegations.

One primary vehicle by and through which the Aequitas companies solicited and received investments from investors was the issuance of promissory notes through what the Aequitas companies apparently referred to internally as the "Private Note Program." The notes, which as noted above were issued specifically by ACF, typically had terms of 1-4 years and offered returns ranging from 5-15%, with a weighted average of approximately 10%. Interest was typically either paid monthly or quarterly, or otherwise automatically reinvested in an ACF note. The private placement memorandum dated November 2013 (the "PPM") that issued in connection with investments in the Private Note Program made in 2014 and 2015 indicated that proceeds would be used "from time to time" to pay off prior investors, but that prior investors would "generally" be paid out of proceeds from investments and/or the sale of ACF assets. The PPM identifies five specific uses to which Private Note Program proceeds would be put: "(1) funding or financing the purchase of student loan receivables; (2) funding or financing the purchase of healthcare receivables; (3) funding or financing the purchase of other receivables and loan portfolios; (4) engaging in other debt transactions and equity investments in third party private credit strategies; and (5) providing working capital and operating lines of credit to ACF affiliates." Complaint, ¶ 26. The PPM also contained cautionary language that "[a]ctual future conditions may require actions that differ from those contemplated" as of the date the PPM issued, Declaration (#173) of Ashley Simonsen ("Simonsen Decl."), Exh. A (the PPM) at ii, that "[n]either the delivery of th[e PPM] nor any sale made [t]hereunder creates, under any circumstances, any implication that there has been no change on the affairs of [ACF] since" the date the PPM issued, *id.* at iii, that "all statements made [in the PPM] are made as of the date [it issued]," *id.*, and that "[ACF] does not undertake any obligation to update or revise the forward-

looking statements contained [in the PPM] . . . to reflect circumstances occurring after the date [the PPM issued] or to reflect the occurrence of unanticipated events," *id.* at iv.

In addition to raising money through the Private Note Program administered by ACF, the Aequitas entities also raised money from investors by offering and selling notes issued by the Aequitas funds managed by AIM. By the end of 2015, the largest such fund was known as the Income Opportunity Fund II ("IOF II"). Proceeds from IOF II were to be used "to invest, directly or indirectly, in a portfolio of receivables in various sectors," and additionally were permitted to be used "to make loans to ACF, to be secured by the assets of ACF, for the purpose of investing in receivables." *Id.*, ¶ 31; *see also* Simonsen Decl., Exh. E (the "IOF II Memorandum") at 2 (listing the receivables in which IOF II proceeds could be invested), Apx. D (same). Private placement memoranda issued in connection with the other, smaller Aequitas funds contained substantially similar representations. *See* Complaint, ¶ 31.

In addition to stating that IOF II investment proceeds would be used to purchase specified receivables, the IOF II Memorandum states, in an appendix, that ACF "expects to use the proceeds from the sale of Senior Notes to acquire Portfolio Assets [*i.e.*, receivables], to pay obligations with respect to Senior Notes and for Organizational Expenses and Operating Costs." *See* IOF II Memorandum, Appx. A at 19. Moreover, the IOF II Memorandum contains cautionary language that "[n]either the delivery of th[e] Memorandum nor any sale made [t]hereunder creates. . . any implication that there has been no change in the affairs of [ACF]" since October 2014, when the IOF II Memorandum issued, IOF II Memorandum at iii, that all statements made therein were made as of October 2014, *see id*, and that ACF did not "undertake any obligation to update or revise the forward-looking statements contained [therein] . . . to

reflect circumstances occurring after the date [the IOF II Memorandum issued] or to reflect the occurrence of unanticipated events," *id.* at iv.

II. Overview of the Parties' Dispute

It appears that, prior to 2013, the Aequitas companies, the Private Note Program, and the Aequitas funds may have been profitable. *See* Complaint, ¶ 3. However, by the end of 2013, the ACF companies had concentrated a large proportion of their investments into Corinthian Colleges, a for-profit education company that shortly thereafter was the target of numerous criminal and civil lawsuits and investigations by both federal and Californian authorities. *See id.*, ¶¶ 3, 36-43. Corinthian Colleges began shutting down its schools in 2014, and ultimately closed all of its operations and filed for bankruptcy in 2015. *See id.*, ¶¶ 36-43. Over the course of 2014, the Aequitas companies' investment in Corinthian Colleges began performing increasingly poorly, causing the Aequitas companies to lose money rapidly. *See id.*

Between January 2014 and January 2016, the Aequitas companies concealed the deteriorating financial condition of the Aequitas companies generally and the growing insolvency of ACF and AH in particular from the companies' current and prospective investors, and continued soliciting investments through the Private Note Program. *See id.*, ¶¶ 44-52. In 2014 and 2015, the Aequitas companies raised tens of millions of dollars from their investors, of which all but a small percentage was expressly required to be invested in the Aequitas funds. *See id.*, ¶¶ 41-53. In reality, 75% of the investment funds received in 2014 and 85% of the funds received in 2015 were loaned by ACF to AH by and through a loan instrument referred to by the parties as the "Holdings Note," the proceeds of which were used to pay Aequitas corporate expenses, including payments to investors holding more senior ACF notes. *See id.*, ¶¶ 46-54.

These expenses also included millions of dollars in salaries and bonuses to the individual defendants (collectively, approximately 2.5 million), as well as expensive perquisites to those persons. *See id.*, ¶¶ 54-55. During this same time period, the Aequitas companies regularly prepared misleading and inaccurate accounting statements to hide the true state of the companies' finances from their investors. *See id.*, ¶¶ 57, 59-68.

By November 2015, the Aequitas companies could no longer maintain what the SEC has characterized as a Ponzi scheme, and stopped paying out redemptions of the ACF notes. *See id.*, ¶¶ 77-79. In February 2016, the Aequitas companies laid off two thirds of their employees and hired a new Chief Restructuring Officer. *See id.*

III. Gillis' Alleged Involvement in, Responsibility for, and/or Contemporaneous Knowledge of the Defendants' Complained-of Conduct

The SEC alleges Gillis' personal knowledge of and involvement in the foredescribed conduct as follows. As noted above, Gillis first began work at Aequitas as Executive Vice President and Chief Operating Officer of ACF, ACM, and AIM in January 2015, and additionally became Chief Financial Officer of those three companies in April 2015. *See* Complaint, ¶¶ 1, 14. Gillis remained in all three of those positions for all three of those companies until January 2016, when he ceased working for Aequitas in any capacity. *See id.*, ¶ 14. During his tenure at Aequitas, Gillis presided over and/or participated in Asset-Liability meetings on a regular basis, *see id.*, ¶ 52, and met with other executives on a monthly basis to determine what trade receivables were available as collateral in connection with the Private Note Program and the Aequitas funds, *see id.*, ¶¶ 64-65. In addition, Gillis received internal cash models and projections on a daily basis, *see id.*, ¶ 38, received collateral analyses on a regular basis, *see id.*,

¶¶ 49-50, and received Aequitas' "Product Menu," which indicated the value of ACF's subsidiaries' receivables and what proportion thereof had been pledged as collateral, on a regular basis, *see id.*, ¶¶ 25, 65. In 2014 and 2015, those analyses and other reports consistently showed that AH lacked sufficient assets to meet its obligations to ACF on the Holdings Note, and that AH and ACF were therefore effectively insolvent. *See id.*, ¶¶ 49-50. In addition, Gillis approved the financial information contained within quarterly updates provided to the investors in the ACF funds and the audited and unaudited financial statements (including audited financial statements for 2014) to be provided to Aequitas investors and potential investors and to their investment advisors, with knowledge that the audited and unaudited financial statements would be provided to the investors and potential investors. *See id.*, ¶¶ 5, 28, 33.

"Gillis . . . acted to conceal the insolvency of the [Aequitas] companies through . . . the [] Holdings Note[]" with knowledge that the Holdings Note's "collectability was essential for the solvency of ACF and the entire Aequitas enterprise." *Id.*, ¶ 46. In its accounting records, for which Gillis was responsible, ACF listed the Holdings Note as an asset – by the end of 2015, ACF's single largest asset – despite the fact that it was owed to ACF by its corporate parent, AH, which at all material times lacked sufficient assets to repay it. *See id.*, ¶¶ 46-52. Gillis knew that the Holdings Note could not in fact be repaid, and nevertheless allowed the Aequitas companies to raise money from investors on the basis of financial statements suggesting that the Holdings Note was a valuable asset, without disclosing AH's inability to repay the note and without disclosing that the proceeds from such investors' investments would be used either to repay prior investors or to fund the Aequitas companies' operating losses rather than be invested in the Private Note Program or the Aequitas funds as stated in the applicable Aequitas private

placement memoranda. *See id.*, ¶¶ 44, 46, 52, 53, 56, 58.

In addition, Gillis acted to defraud investors and potential investors in the Aequitas funds "by misrepresenting the trade receivables available as collateral for the notes issued by ACF." *Id.*, ¶ 59. Specifically, the "ACF quarterly [financial] updates for the first and second quarters of 2015 listed ACF's trade receivable assets with a book value in excess of $200 million, without disclosing that only a fraction of that value was supported by actual receivables as collateral." *Id.*, ¶ 60. At the time Gillis approved the ACF quarterly updates for the first and second quarters of 2015 to be provided to investors and potential investors in the Aequitas funds, Gillis knew that "the vast majority of those trade receivable assets were already pledged as security for lines of credit with financial institutions or other senior debt issued by various Aequitas entities." *Id.* Moreover, rather than use Aequitas fund proceeds for the direct or indirect purchase of trade receivables, Gillis transferred such proceeds "directly to ACF and then used the money either to pay redemptions and interest to prior investors or to continue paying the operating expenses of the entire [Aequitas] enterprise with no documented note or loan agreement between ACF and IOF II." *Id.*, ¶ 63. At the end of each month during this period, Gillis met with other Aequitas executives, including Jesenik and Oliver, to conceal this practice through the issuance of notes from ACF subsidiaries to IOF II, such notes to be collateralized by unpledged trade receivables owned by such subsidiaries. *See id.*, ¶¶ 63-65. In fact, as Gillis was contemporaneously aware, the subsidiaries lacked sufficient unpledged receivables to collateralize the notes. *See id.*, ¶ 63.

In July 2015, one of Aequitas' banks required ACF to provide a legal opinion that ACF was not required to register with the SEC as an investment company under the Investment Company Act of 1940 (the "ICA") as a condition of the bank's agreement to provide an ACF

subsidiary with a line of credit. *See id.*, ¶ 69. Gillis was aware at the time that registration as an investment company would restrict ACF's ability to make intercompany loans (such as the Holdings Note) and prevent Aequitas from investing in registered investment advisors that recommended Aequitas investments. *See id.*, ¶ 70. In order to obtain such a legal opinion, Aequitas relied on an exemption from ICA registration that required at least 55% of its assets to be of a qualifying type; the Holdings Note, ACF's largest asset, was not qualifying and in consequence only 49% of ACF's assets were qualifying. *See id.*, ¶¶ 71-72. In order to obtain the required legal opinion, Gillis instructed an ACF accountant to prepare an internal report that valued the Holdings Note at its "fair value" – the value of AH's assets that were potentially available to repay the note ($65 million) – rather than at the value recorded for the note on ACF's own books ($147 million, or $82 million more than was in fact available to repay it). *See id.*, ¶¶ 73-74. On that basis, Gillis signed a certification stating that at least 55% of ACF"s assets were qualifying, but he did not disclose that to reach that figure he had valued the Holdings Note at $82 million less than the valuation provided to Aequitas investors and potential investors. *See id.* Gillis specifically advised the ACF accountant who prepared the internal report that "the value [of the Holdings Note] used for the legal opinion could not be reflected on ACF's books because recognition of an impairment [in the value of the Holdings Note] of that magnitude would have a massive impact on the solvency of the entire Aequitas enterprise." *Id.*, ¶ 76. Gillis knew that Aequitas continued thereafter to raise money from investors on the basis of financial statements recording the face value of the Holdings Note, without disclosing that material discrepancy. *See id.*

ANALYSIS

Gillis moves the court to dismiss all of the SEC's claims against him, and in the alternative moves for a more definite statement of those claims. The claims at issue are as follows. The SEC alleges Gillis' liability:

- under Sections 17(a)(1) and 17(a)(3) of the Securities Act for employing a scheme to defraud in connection with the sale of securities ("Claim 1") and for aiding and abetting the entity defendants in the course of such fraud ("Claim 2"),
- under Section 10(b) of the Exchange Act and Rules 10b-5(a) and 10b-5(c) promulgated under the Exchange Act for knowingly or recklessly employing a scheme to defraud in connection with the sale of securities ("Claim 3") and for aiding and abetting the entity defendants in the course of such fraud ("Claim 4"),
- under Section 17(a)(2) of the Securities Act for aiding and abetting ACF in fraudulently obtaining money or property by means of untrue statements of material fact or failure to disclose material facts in the absence of which affirmative statements were misleading when made ("Claim 6"),
- under Section 10(b) of the Exchange Act and Rule 10b-5(b) promulgated under the Exchange Act for aiding and abetting ACF in knowingly or recklessly making untrue statements of material fact or failing to disclose material facts in the absence of which affirmative statements were misleading when made in connection with the sale of securities ("Claim 8"),
- under Sections 206(1) and 206(2) of the Advisers Act for aiding and abetting ACM and AIM in knowingly or recklessly employing a scheme to defraud or engaging in fraud

while engaged in the business of advising others regarding investments for compensation ("Claim 10"), and

- under Section 206(4) of the Advisers Act and Rule 206(4)-8 promulgated under the Advisers Act for aiding and abetting ACM and AIM in knowingly or recklessly employing a scheme to defraud or engaging in fraud while engaged in the business of advising a pooled investment vehicle regarding investments for compensation ("Claim 12").

Gillis' lead argument both in support of dismissal and in support of a more definite statement of the claims against him is that the SEC's complaint is an impermissible "shotgun" pleading that fails to specify what conduct underlies each of the claims. As to the SEC's "aiding and abetting" claims against him (the claims enumerated with even numbers), Gillis argues in the alternative that the SEC's averments of fraud are in all cases insufficient to satisfy the pleading standard of Federal Civil Procedure Rule 9(b), and that in most cases the omissions or misstatements at issue are alleged to have been made by others, without Gillis' involvement. As to the SEC's "scheme liability" claims against him (the claims enumerated with odd numbers), Gillis argues in the alternative that the SEC has failed adequately to allege the existence of a scheme beyond the alleged misrepresentations and omissions, and/or that the SEC failed adequately to allege Gillis' involvement in furthering such schemes. I address Gillis' arguments, and the SEC's opposing arguments, below.

I. Particularity of the SEC's Pleading

All of the SEC's claims against Gillis sound in fraud. Federal Civil Procedure Rule 9(b) provides, in relevant part, that "[i]n alleging fraud or mistake, a party must state with particularity

the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). The Rule 9(b) particularity requirement is satisfied if the pleading "identifies the circumstances constituting fraud . . . so that the defendant can prepare an adequate answer from the allegations." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). That is, the allegations must be sufficiently specific "to give defendants notice of the particular misconduct which is alleged to constitute the fraud . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidener*, 780 F.2d 727, 731 (9th Cir. 1985).

Some courts have held that so-called "shotgun pleading," in which all allegations are incorporated by reference without particularity into every claim for relief, generally do not satisfy the pleading requirements of Rule 9(b). *See, e.g.*, *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279-1280 (11th Cir. 2006) (holding that the proper remedy, where factual allegations are not connected in a meaningful way to the claims they are purported to support, is to order the plaintiff to replead its complaint *sua sponte*; further holding that to dismiss under such circumstances is reversible error). However, courts that have considered the question have found that (as here) where each claim for relief is supported by all common factual allegations, but not by allegations specifically made in support of other claims for relief, the pleading is not impermissible "shotgun" pleading, and can be considered as though each claim is supported by all common allegations. *See, e.g.*, *SEC v. City of Miami*, 988 F. Supp. 2d 1343, 1354-1355 (S.D. Fla. 2013).

Because, here, the SEC incorporates by reference into each of its claims only those common factual allegations (set forth at Paragraphs 1-79 of the SEC's complaint) that support all

of its claims, and not those allegations (Paragraphs 80*ff.*) that support particular claims for relief, the complaint is clearly not an impermissible "shotgun" pleading. *See Wagner*, 464 F.3d at 1279-1280; *City of Miami*, 988 F. Supp. 2d at 1354-1355. Moreover, the SEC's allegations of Gillis' involvement in the complained-of conduct (discussed *supra*) are brief, concise, and clear, such that Gillis is not required to speculate as to which complained-of conduct he is alleged to have participated in directly and which complained-of conduct he is alleged to have had indirect responsibility for effecting or allowing to take place. Finally, Gillis' own filings in support of his motion to dismiss tend to establish clearly that Gillis had no substantial difficulty in understanding the gravamen of the complaint's averments of fraud, but rather accurately identified the misstatements and/or omissions of material fact the SEC attributes to him. In consequence of the foregoing, I find that the SEC's complaint satisfies the pleading requirements of Rule 9(b). Accordingly, Gillis' motion to dismiss and alternative motion for a more definite statement should be denied to the extent premised on deficiencies in the particularity of the SEC's pleading.

II. The Adequacy of the SEC's Pleading to State Claims against Gillis Premised on Aiding and Abetting the Entity Defendants' Alleged Misstatements or Omissions

Claims 2, 4, 6, 8, 10, and 12 are all premised in whole or in part on the theory that Gillis actionably aided and abetted ACF, AIM, and/or ACM in making actionable misstatements or omitting to make necessary material disclosures in violation of the security laws. Gillis argues that the SEC has failed to state a claim against him for aiding and abetting any actionable misstatements or omissions attributable to any of the entity defendants.

To state a claim for a primary violation (that is, not an aiding and abetting violation) of

the Securities Act or of the Exchange Act premised on misstatement or omission, the SEC must allege "a material misstatement or omission in connection with the offer or sale of a security by means of interstate commerce," with scienter (which may be satisfied by allegations of recklessness). *See SEC v. Glt Dain Rauscher, Inc.*, 254 F.3d 852, 855-856 (9th Cir. 2001).

> In order to be actionable under Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5, the alleged misstatements or omissions must be false or misleading. **A statement or omission is misleading if it "affirmatively creates an impression of a state of affairs that differs in a material way from the one that actually exists."** *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002). A statement, although literally true, can be misleading. *See In re Convergent Technologies Sec. Litig.*, 948 F.2d 507, 512 (9th Cir. 1991) (quotations and citation omitted) ("[T]he disclosure required by the securities laws is measured not by literal truth, but by the ability of the material to accurately inform rather than mislead prospective buyers.").
>
> In addition, in order to be actionable, the statement or omission must be material. "It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant." *Basic Inc. v. Levinson*, 485 U.S. 224, 238, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988). **A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision.** *See id.* at 231-32. Further, "to fulfill the materiality requirement 'there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" *See id.* (*quoting TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976)).
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> **Both the materiality and misleading nature of a misstatement or omission are usually questions for the trier of fact.** *See Fecht v. Price Co.*, 70 F.3d 1078, 1081 (9th Cir. 1995) ("[W]hether a public statement is misleading, or whether adverse facts were adequately disclosed is a mixed question to be decided by the trier of fact."); *id* (*quoting TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976)) ("Whether an omission is 'material' is a determination that 'requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.'"); *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167, 2009 U.S. App. LEXIS 23716, 2009 WL 3448282, at *9 (9th Cir. 2009) (quotations and citations omitted) ("Questions of materiality . . . involv[e] assessments peculiarly within the

> province of the trier of fact."). "Therefore, **only if the adequacy of the disclosure or the materiality of the statement is so obvious that reasonable minds could not differ are these issues appropriately resolved as a matter of law.**" *Fecht*, 70 F.3d at 1081 (quotations and citations omitted).

SEC v. Mozilo, Case No. CV 09-3994, 2009 U.S. Dist. LEXIS 104689, *23-25 (D. Cal. No. 3, 2009) (emphasis supplied; internal modifications original).

Similarly, to state a claim for a primary violation of the Advisers Act premised on fraudulent or deceptive misstatements or omissions, the SEC must allege that an investment adviser used the mails or any other instrumentality of interstate commerce either "to employ any device, scheme, or artifice to defraud any client or prospective client," "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client," or "to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." 15 U.S.C. § 80b-6(1), (2), and (4); *see also, e.g.*, *Vernazza v. SEC*, Case Nos. 01-7857, 02-70016, 2003 U.S. App. LEXIS 14351`, *13 (9th Cir. Apr. 24, 2003) (the same conduct can satisfy the material misstatement or omission element of both Section 17(a) Securities Act claims and Section 10(b) Exchange Act claims as well as the fraudulent or deceitful course of action element of Section 206 Advisers Act claims). With certain exceptions inapplicable here, an "investment adviser" is defined for purposes of a Section 206 claim as:

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities

15 U.S.C. § 80b-2(11). No party disputes that ACM and AIM were investment advisers for purposes of the SEC's Section 206 claims.

In connection with such a primary violation of the securities laws, the question:

> Whether an omission is "material" . . . "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976); *accord United States v. Gaudin*, 132 L. Ed. 2d 444, 115 S. Ct. 2310, 2314 (1995) (materiality is an "application-of-legal-standard-to-fact sort of question . . . [that] has typically been resolved by juries"); *Kaplan v. Rose*, 49 F.3d 1363, 1375 (9th Cir. 1994) ("materiality" is a "fact-specific issue[] which should ordinarily be left to the trier of fact"), *cert. denied*, 116 S. Ct. 58 (1995). Similarly, whether a public statement is misleading, or whether adverse facts were adequately disclosed is a mixed question to be decided by the trier or fact. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1268 (9th Cir.) (*quoting TSC Indus.*, 426 U.S. at 450, and stating that "like materiality, adequacy of disclosure is normally a jury question"), *cert. denied*, 484 U.S. 944 (1987). **Therefore, only if the adequacy of the disclosure or the materiality of the statement is "so obvious that reasonable minds [could] not differ" are these issues "appropriately resolved as a matter of law."** *Durning*, 815 F.2d at 1268; *accord TSC Indus.*, 426 U.S. at 450.

Fecht v. Price Co., 70 F.3d 1078, 1080-1081 (9th Cir. 1995) (emphasis supplied; internal modifications original).

To state a claim for aiding and/or abetting a primary violation of a Section 17(a) Securities Act claim, a Section 10(b) Exchange Act claim, or a Section 206 Advisers Act claim, the SEC must allege that the defendant "knowingly provided substantial assistance to another person's violation of the securities laws." *SEC v. Rogers*, 790 F.2d 1450, 1460 (9th Cir. 1986), *citing Harmsen v. Smith*, 693 F.2d 932, 943 (9th Cir. 1982). The allegation that a defendant knowingly made false or misleading statements in periodic reports used in connection with marketing or selling securities is adequate to satisfy the knowing provision of substantial assistance element of an aiding and abetting claim, *see Mazilo*, 2009 U.S. Dist. LEXIS at *48, as is, *e.g.*, the allegation that a CPA included a misleading statement in a financial report, *see Ponce*

v. SEC, 345 F.3d 722, 737-738 (9th Cir. 2003), or the allegation that a Chief Financial Officer reviewed a misleading statement drafted by another person and did not correct it to make it non-misleading before permitting it to be included in a securities filing, *see SEC v. Daifotis*, C 11-137 WHA, 2011 U.S. Dist. LEXIS 60226, *22-23 (D. Cal. Jun. 6, 2011).

Gillis argues, first, that the entity defendants' alleged misstatements and omissions underlying the primary violations at issue in Claims 6, 8, 10, and 12 are inadequately pled, with the result that each derivative aiding and abetting claim against Gillis necessarily fails at the pleading stage. Gillis makes this argument separately in connection with the alleged misstatements and/or omissions contained in or arising in connection with (i) the ACF Private Note Program PPM, (ii) the Aequitas funds private placement memoranda, and (iii) the Aequitas quarterly financial updates.

In connection with the ACF PPM, Gillis argues that the statement that proceeds would be used to repay prior investors "from time to time" was not misleading when made, because at the time the PPM issued it was the Aequitas companies' subjective intent to use the proceeds for that purpose only on irregular and infrequent occasions. Gillis further argues that the statement was in any event never misleading, in that the phrase "from time to time" arguably does not absolutely exclude the possibility that proceeds would be used for that purpose frequently, routinely, and/or generally. Moreover, Gillis argues, in light of the PPM's cautionary language warning that "[a]ctual future conditions may require actions that differ from those contemplated" as of the date the PPM issued, that "all statements made [in the PPM] are made as of the date [it issued]," *id.*, and that "[ACF] does not undertake any obligation to update or revise the forward-looking statements contained [in the PPM] . . . to reflect circumstances occurring after the date

[the PPM issued] or to reflect the occurrence of unanticipated events," PPM at ii, iii, iv, neither Gillis nor any other defendant was at any time under any obligation to advise the public or any Aequitas investor that Private Note Program proceeds were being used primarily and systematically to pay off prior investors rather than for investment purposes, because in light of that cautionary language it would have been unreasonable for an investor to presume the accuracy of any statement regarding the uses to which Private Note Program investments would be put at any time after the PPM issued.

Gillis' arguments regarding the allegedly misleading statement contained in the ACF PPM that investment proceeds would be used to repay prior investors only "from time to time" do not provide grounds for dismissal of any of the claims against him, whether in whole or in part. As to his argument that the statement was not misleading when made in November 2013, and was therefore not actionable at any time thereafter, I note that while the PPM issued in November 2013, it was provided anew to investors in connection with new investments in the Private Note Program solicited and/or received in 2014 and 2015. Each time that ACF and/or the other defendants provided the PPM to investors in connection with new investments in the Private Note Program, the question whether it contained misleading statements necessarily arose anew, such that the bare fact, if established, that the Aequitas companies may have intended to use proceeds to repay prior investors only "from time to time" as of November 2013 cannot insulate the defendants from liability in connection with subsequent provision of the PPM to actual or potential investors in the event it is established that the defendants were aware of facts that rendered the statements in the PPM misleading at any time subsequent to November 2013 when defendants relied on the PPM to secure new investments. *See Matrixx Initiatives, Inc. v.*

Siracusano, 563 U.S. 27, 44 (2011) (well established that a duty to disclose new information arises "when necessary 'to make . . . statements made, in the light of the circumstances under which they were made, not misleading.'"), *quoting* 17 CFR § 240.10b-5(b). As to his arguments that the phrase "from time to time" does not preclude regular, routine, or generally repeated occurrence and that in light of the cautionary language of the PPM the statement cannot have been actionable at any time, I decline to find that the non-misleading character of the statement, even considered together with all applicable cautionary language, is so patent and manifest that no reasonable investor could have found it misleading. Under *Fecht*, *supra*, it follows that the question whether the statement was actionably misleading in context is for a finder of fact to determine, such that it would be inappropriate to grant Gillis' motion to dismiss on the ground that the statement was necessarily not misleading.

In connection with the Aequitas funds private placement memoranda, Gillis argues that the allegations of primary violation necessarily fail as to all such funds other than the IOF II, because the SEC alleges with particularity the allegedly misleading statement made by and through the IOF II Memorandum (namely, that proceeds from IOF II investments would be used to purchase receivables) but alleges only generally that substantially the same representation was made in connection with each of the other, smaller Aequitas funds. Gillis further argues, in specific connection with the IOF II, that in light of language contained within an appendix to the IOF II Memorandum indicating that ACF expected that some IOF II investment proceeds would be used to repay other IOF II investors and to defray certain organizational and operational expenses, the statement that such proceeds would be used to purchase receivables was necessarily not misleading. Gillis additionally argues that because the statement was made in

October 2014 together with cautionary language repudiating any undertaking to update forward-looking statements in the future, the statement cannot have been misleading in 2015.

As to Gillis' argument that the misleading representations contained in memoranda that issued in connection with Aequitas funds other than the IOF II have not been adequately alleged, I simply disagree. The SEC has alleged that the memoranda issued in connection with other such funds contained statements similar to the ones alleged with particularity to have been misleading in connection with the IOF II. At this stage of these proceedings, it is appropriate to assume the truth of the SEC's allegations, and if it is Gillis' position that that assumption is inaccurate, it is his responsibility either to come forward with the memoranda at issue on a theory that they may be construed as incorporated by reference into the SEC's complaint or to move for summary judgment on the basis of evidence that the memoranda do not contain substantially similar misleading statements. Gillis' particularity-of-pleading argument therefore provides no grounds for dismissing the SEC's claims against him to the extent premised on Aequitas funds other than the IOF II.

As to Gillis' remaining arguments regarding primary violations arising out of statements made in connection with the Aequitas funds, as with his arguments regarding the statements contained within the PPM, I cannot find that no reasonable investor would have been misled at any material time by the statement that proceeds would be used to purchase receivables, notwithstanding the cautionary language upon which Gillis relies. Again, under *Fecht*, *supra*, it follows that the question whether the statement was actionably misleading in context is for a finder of fact to determine, such that it would be inappropriate to grant Gillis' motion to dismiss on the ground that the statement was necessarily not misleading.

In connection with the quarterly updates, Gillis argues that the SEC has failed to allege any misleading statement contained in any such update. However, as noted above, the SEC expressly alleges that the "ACF quarterly [financial] updates for the first and second quarters of 2015 listed ACF's trade receivable assets with a book value in excess of $200 million, without disclosing that only a fraction of that value was supported by actual receivables as collateral." *Id.*, ¶ 60. At the time Gillis approved the ACF quarterly updates for the first and second quarters of 2015 to be provided to investors and potential investors in the Aequitas funds, the SEC alleges, Gillis knew that "the vast majority of those trade receivable assets were already pledged as security for lines of credit with financial institutions or other senior debt issued by various Aequitas entities." *Id.* Moreover, rather than use Aequitas fund proceeds for the direct or indirect purchase of trade receivables, the SEC alleges that Gillis transferred such proceeds "directly to ACF and then used the money either to pay redemptions and interest to prior investors or to continue paying the operating expenses of the entire [Aequitas] enterprise with no documented note or loan agreement between ACF and IOF II." *Id.*, ¶ 63. At the end of each month during this period, the SEC alleges, Gillis met with other Aequitas executives, including Jesenik and Oliver, to conceal this practice through the issuance of notes from ACF subsidiaries to IOF II, such notes to be collateralized by unpledged trade receivables owned by such subsidiaries. *See id.*, ¶¶ 63-65. The SEC further alleges that, at that time, Gillis had actual knowledge that the subsidiaries lacked sufficient unpledged receivables to collateralize the notes. *See id.*, ¶ 63. It is for a finder of fact to determine whether the quarterly updates were actionably misleading. *See Fecht*, 70 F.3d at 1080-1081. In consequence, Gillis' motion to dismiss should be denied to the extent premised on the theory that the SEC has failed to allege that the quarterly

updates contained any actionably misleading statement potentially giving rise to a primary violation of the securities laws.

Second, Gillis argues, in the alternative, that he is not adequately alleged to have knowingly provided substantial assistance in connection with any other defendant's primary violation of any of the securities laws. However, as discussed above, the SEC affirmatively alleges that Gillis knew the truth at all material times about the Aequitas companies' growing insolvency and about the uses to which proceeds from the Aequitas companies' investors' investments were being put, through presiding over and/or participating in Asset-Liability meetings on a regular basis, *see* Complaint, ¶ 52, monthly meetings with other executives to determine what trade receivables were available as collateral in connection with the Private Note Program and the Aequitas funds, *see id.*, ¶¶ 64-65, daily receipt of internal cash models and projections, *see id.*, ¶ 38, regular receipt of collateral analyses, *see id.*, ¶¶ 49-50, and regular receipt of Aequitas' "Product Menu," which indicated the value of ACF's subsidiaries' receivables and what proportion thereof had been pledged as collateral, *see id.*, ¶¶ 25, 65. The SEC further alleges that Gillis approved the financial information contained within quarterly updates provided to the investors in the ACF funds and the audited and unaudited financial statements, including those issuing in connection with the first two quarters of 2015, notwithstanding his knowledge that those updates were misleading. *See id.*, ¶¶ 5, 28, 33. Moreover, the SEC alleges that Gillis provided substantial assistance to other named defendants in connection with their alleged primary violations of the securities laws by "acting to conceal the insolvency of the [Aequitas] companies through . . . the [] Holdings Note[]" with knowledge that the Holdings Note's "collectability was essential for the solvency of ACF and the entire Aequitas enterprise." *Id.*, ¶

46. The SEC alleges that Gillis was responsible for preparing and/or approving ACF's accounting records in which the Holdings Note was listed as an asset despite the fact that it was owed to ACF by its corporate parent, AH, which at all material times lacked sufficient assets to repay it. *See id.*, ¶¶ 46-52. The SEC affirmatively alleges Gillis' knowledge that the Holdings Note could not in fact be repaid, and nevertheless allowed the Aequitas companies to raise money from investors on the basis of financial statements suggesting that the Holdings Note was a valuable asset, without disclosing AH's inability to repay the note and without disclosing that the proceeds from such investors' investments would be used either to repay prior investors or to fund the Aequitas companies' operating losses rather than be invested in the Private Note Program or the Aequitas funds as stated in the applicable Aequitas private placement memoranda. *See id.*, ¶¶ 44, 46, 52, 53, 56, 58. Moreover, the SEC alleges that Gillis further concealed the insolvency of the Aequitas companies when he instructed an ACF accountant to prepare an internal report that valued the Holdings Note at its "fair value" – the value of AH's assets that were potentially available to repay the note ($65 million) – rather than at the value recorded for the note on ACF's own books ($147 million, or $82 million more than was in fact available to repay it) in order to obtain a legal opinion that ACF was not an investment company, *see id.*, ¶¶ 69-74, and when he signed a certification on that basis stating that at least 55% of ACF"s assets were "qualifying" despite his knowledge that the value used for purposes of the certification established the Aequitas companies' insolvency and without disclosing the discrepancy to Aequitas investors, *see id.*, ¶¶ 75-76. A finder of fact could reasonably conclude that such conduct constituted provision of substantial assistance to the complained-of primary violations of the securities laws, both *qua* active concealment and/or affirmative

misrepresentation and *qua* failure to disclose information necessary to render prior statements non-misleading. Gillis' motion should therefore be denied to the extent premised on the theory that the SEC failed adequately to allege that Gillis provided knowing substantial assistance to the alleged primary violations.

For the foregoing reasons, Gillis' motion to dismiss should be denied to the extent it addresses the SEC's claims against him premised on aiding and abetting other defendants' violations of the securities laws premised on misstatements or omissions.

III. The Adequacy of the SEC's Pleading to State Claims against Gillis Premised on Either Direct Participation in or Aiding and Abetting a Scheme to Defraud

Claims 1 and 3 are premised on Gillis' direct participation in the Aequitas companies' scheme to defraud, while claims 2, 4, 10, and 12 are premised in whole or in part on Gillis' conduct in aiding or abetting that scheme. Gillis argues that the SEC has failed adequately to allege the existence of any such scheme, and that even if it has done so, it has failed to allege Gillis' involvement therein with adequate particularity.

To state a claim for primary scheme liability, the SEC must allege that a defendant substantially participated in, or was intricately involved in, furthering a scheme to defraud in connection with the sale of securities, with the intention to create a false appearance of fact, and moreover that the defendant's own conduct contributing to the transaction or overall scheme must have had a deceptive purpose and effect. *See Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040, 1047-1048 (9th Cir. 2006).

"Courts have generally held that "[a scheme liability] claim cannot be premised on the alleged misrepresentations or omissions that form the basis of a [misstatement or omission

violation] claim." *WPP Lux. Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011) (citations omitted). In the Ninth Circuit, "[a] defendant may only be liable as part of a fraudulent scheme based upon misrepresentations and omissions [actionable as a misstatement or omission violation] when the scheme also encompasses conduct beyond those misrepresentations or omissions." *Id.*

As in connection with claims for aiding and abetting primary violations of the securities laws premised on misstatements or omissions, to state a claim for aiding and abetting in a scheme to defraud, the SEC must allege that the defendant "knowingly provided substantial assistance to another person's violation of the securities laws." *Rogers*, 790 F.2d at 1460, *citing Harmsen*, 693 F.2d at 943.

Gillis argues, first, that the SEC has failed to allege any defendant's primary liability in connection with any scheme to defraud, in that the SEC has failed to allege any scheme beyond the misstatements and omissions alleged as the basis for the SEC's Section 17(a) Securities Act claims, Section 10(b) Exchange Act claims and Section 206 Advisers Act claims. I disagree. The SEC expressly alleges that Oliver and Jesenik affirmatively decided to embark on what amounts to a Ponzi scheme in order to conceal and cover the cash shortfall caused by the collapse of Corinthian Colleges. *See* Complaint, ¶¶ 4, 44. Thus, all of the SEC's allegations that the Aequitas entities continued to seek new investments to cover operations costs and to repay investors constitute allegations of a scheme that go beyond the allegations of misrepresentations and omissions in furtherance of that scheme. These allegations are sufficient to state a claim for scheme liability. *See WPP Lux.*, 655 F.3d at 1057.

Gillis argues, second, that even if the SEC has adequately alleged the existence of a

scheme to defraud, it has not alleged either Gillis' direct participation in or substantial assistance in furthering that scheme. Again, I disagree. For the same reasons and on the same basis discussed above in connection with the SEC's allegations of Gillis' liability for aiding and abetting in other defendants' violations of the securities laws premised on misstatements or omissions, I find that the SEC has adequately alleged Gillis' direct participation in the scheme – chiefly, Gillis' alleged conduct in affirmatively concealing the insolvency of the Aequitas companies – and substantial assistance in furthering the scheme – chiefly, Gillis' alleged conduct in preparing and/or approving financial statements intended to be used to solicit further investments.

For the foregoing reasons, Gillis' motion to dismiss should be denied to the extent it addresses the SEC's direct and indirect scheme liability claims against him.

CONCLUSION

For the reasons set forth above, Gillis' motion (#172) to dismiss the SEC's claims against him or, in the alternative, for a more definite statement of those claims, should be denied.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due fourteen (14) days from service of the Findings and Recommendation. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due fourteen (14) days after being served with a

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copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

Dated this 9th day of January, 2017.

Honorable Paul Papak
United States Magistrate Judge