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Eleanor Dolev, OSB# 153324
Email: edolev@mahlerlawgroup.com
Mahler Law Group PLLC
14029 NW Harbor Lane
Portland, OR 97229
Telephone: 971-373-0778

Peter H. White (admitted *pro hac vice*)
Email: peter.white@srz.com
Jeffrey F. Robertson *(*admitted *pro hac vice)*
Email: jeffrey.robertson@srz.com
Schulte Roth & Zabel LLP
1152 15th Street NW, Suite 850
Washington, DC 20005
Telephone: 202-729-7470

Attorneys for Defendant Robert J. Jesenik

[Additional Counsel of Record Listed on Following Page]

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

Defendants.

Case No. 3:16-cv-00438-PK

INDIVIDUAL DEFENDANTS' MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

EXPEDITED RELIEF REQUESTED [BEFORE MAY 24, 2017 HEARING]

1600438170522000000000001

ADDITIONAL COUNSEL FOR INDIVIDUAL DEFENDANTS

B. Scott Whipple (OSB # 983750)
Email: swhipple@whippleduyck.com
Whipple & Duyck, PC
1500 SW First Avenue, Suite 1170
Portland, OR 97201
Telephone: 503-222-6004

William Douglas Sprague (admitted *pro hac vice*)
Email: dsprague@cov.com
Ashley M. Simonsen (admitted *pro hac vice*)
Email: asimonsen@cov.com
Covington & Burling LLP
One Front Street
San Francisco, CA 94111-5356
Telephone: 415-591-6000

Attorneys for Defendant N. Scott Gillis

Michael B. Merchant (OSB # 882680)
Email: mbm@bhlaw.com
Black Helterline LLP
805 SW Broadway, Suite 1900
Portland, OR 97205
Telephone: 503-224-5560

Jahan P. Raissi (admitted *pro hac vice*)
Email: jraissi@sflaw.com
Larisa A. Meisenheimer (admitted *pro hac vice*)
Email: lmeisenheimer@sflaw.com
Shartsis Friese LLP
One Maritime Plaza, 18th Floor
San Francisco, CA 94111-3598
Telephone: 415-421-6500

Attorneys for Defendant Brian A. Oliver

CERTIFICATE OF COMPLIANCE WITH LR 7-1

In compliance with LR 7-1, counsel for individual Defendants Robert J. Jesenik, Brian A. Oliver, and N. Scott Gillis (the "Individuals") certify that they and the Securities and Exchange Commission ("SEC") made a good faith effort to resolve this dispute but were unable to do so.

MOTION

In compliance with LR 26-3(c), the Individuals seek leave to file their Reply in Support of Motion for Protective Order, attached as Exhibit 1, and the accompanying material, in response to the SEC's Opposition to Individual Defendants' Motion for Protective Order. ECF No. 440 (the "Opposition" or "Opp."). The SEC does not consent to the Individuals' request for leave to file their Reply in Support of Motion for Protective Order.

LEGAL MEMORANDUM

A short reply is necessary because the SEC's Opposition adopts positions inconsistent with representations the SEC made during the parties' meet-and-confer discussions regarding the privilege issue currently before the Court. The declaration of the SEC's key witness, Robert Holmen, the former General Counsel of Aequitas, contradicts his prior position—as communicated by the SEC during the meet-and-confer process—regarding the existence of a joint defense agreement between the Individuals and Aequitas. Furthermore, the SEC's Opposition mischaracterizes the law and relevant facts, which must be corrected to permit the Court to make a fully informed decision.

Multiple times during the meet-and-confer process—both orally and in writing—the SEC refused to acknowledge the existence of a joint defense arrangement. *See, e.g.*, Ex. 2 (March 8, 2017 letter from the SEC stating that "we do not believe that such a joint defense existed"). The SEC took that position even after the Individuals provided the SEC with Mr. Holmen's

contemporaneous communications confirming the existence of a joint defense arrangement, including multiple communications with Mr. Holmen that explicitly referenced the "joint defense privilege" governing the communications at issue. ECF No. 429, Declaration of Jeffrey F. Robertson in Support of Individual Defendants' Motion for Protective Order, Ex. F. After providing this and other evidence to the SEC, the Individuals' counsel inquired whether the SEC would concede that the parties had a joint defense agreement. The SEC refused. Furthermore, the SEC represented that Mr. Holmen "had no recollection of agreeing to be part of a joint defense arrangement" or that Mr. Holmen denied ever being part of such an arrangement. *See, e.g.*, Ex. 2. The SEC represented to the Individuals' counsel that a declaration from Mr. Holmen confirming that Mr. Holmen was never part of a joint defense arrangement would be forthcoming if the Individuals brought their privilege claims before this Court.

Counsel for the Individuals drafted their Motion for Protective Order ("Motion") based on the SEC's refusal to concede the existence of any joint defense arrangement. The SEC has abandoned that position, stating for the first time in its Opposition that it now "does not dispute the existence of a joint defense arrangement." *See* Opp. at 3. With its Opposition the SEC submitted a declaration from Mr. Holmen that acknowledges the existence of a joint defense arrangement—directly contradicting the SEC's prior representations about Mr. Holmen's position. *See* ECF No. 442, Declaration of Robert R. Holmen in Support of Plaintiff Securities and Exchange Commission's Opposition to Individual Defendants' Motion for Protective Order ¶¶ 11-12. This reversal is surprising, and the prejudice to the Individuals is exacerbated by the SEC's suggestion that the Individuals somehow obfuscated the existence of the joint defense arrangement by not providing supporting evidence before filing the Motion. *See* Opp. at 3

(claiming that "the evidence submitted with [the Individuals'] motion . . . was never provided to the Commission during the meet-and-confer process"). That suggestion is false.

Given the inconsistencies between the SEC's prior representations about Mr. Holmen's position and his recent declaration, counsel for the Individuals urge the Court to hear testimony from Mr. Holmen. Such a hearing, with the opportunity for the Individuals' counsel to question Mr. Holmen, is necessary to permit the Court to assess his credibility. That determination is critical because the SEC's Opposition rests entirely on Mr. Holmen's fluctuating position regarding the joint defense arrangement that governs the communications at issue, at least as reported by the SEC.

Finally, a reply is necessary to permit the Individuals to correct errors of law and fact. The SEC argues that the Individuals submitted no evidence in support of their position and suggests a witness affidavit is required to meet the Individuals' burden. As established in the Individuals' proposed reply brief, the SEC incorrectly states the Individuals' burden and ignores the Individuals' privilege logs that were submitted through an attorney declaration.

CONCLUSION

The Individuals respectfully request leave to file the Reply in Support of Motion for Protective Order and accompanying material attached hereto as Exhibit 1.

DATED: May 19, 2017

SCHULTE ROTH & ZABEL LLP

By: */s/ Peter H. White*
PETER H. WHITE (*Pro Hac Vice*)

Attorneys for Defendant Robert J. Jesenik

DATED: May 19, 2017

COVINGTON & BURLING LLP

By: */s/ W. Douglas Sprague*
W. DOUGLAS SPRAGUE (*Pro Hac Vice*)

Attorneys for Defendant N. Scott Gillis

DATED: May 19, 2017

SHARTSIS FRIESE LLP

By: */s/ Jahan P. Raissi*
JAHAN P. RAISSI (*Pro Hac Vice*)

Attorneys for Defendant Brian A. Oliver

LR 11-1(D)(2) CERTIFICATION

I hereby attest that all other signatories listed, on whose behalf this filing is submitted, concur in the filing's content and have authorized this filing.

/s/ Peter H. White
PETER H. WHITE (*Pro Hac Vice*)

Exhibit 1

Eleanor Dolev, OSB# 153324
Email: edolev@mahlerlawgroup.com
Mahler Law Group PLLC
14029 NW Harbor Lane
Portland, OR 97229
Telephone: 971-373-0778

Peter H. White (admitted *pro hac vice*)
Email: peter.white@srz.com
Jeffrey F. Robertson *(*admitted *pro hac vice)*
Email: jeffrey.robertson@srz.com
Schulte Roth & Zabel LLP
1152 15th Street NW, Suite 850
Washington, DC 20005
Telephone: 202-729-7470

Attorneys for Defendant Robert J. Jesenik

[Additional Counsel of Record Listed on Following Page]

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; AEQUITAS CAPITAL MANAGEMENT, INC.; AEQUITAS INVESTMENT MANAGEMENT, LLC; ROBERT J. JESENIK, BRIAN A. OLIVER; and N. SCOTT GILLIS, Defendants.	Case No. 3:16-cv-00438-PK **INDIVIDUAL DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER** **REQUEST FOR ORAL ARGUMENT**

ADDITIONAL COUNSEL FOR INDIVIDUAL DEFENDANTS

B. Scott Whipple (OSB # 983750)
Email: swhipple@whippleduyck.com
Whipple & Duyck, PC
1500 SW First Avenue, Suite 1170
Portland, OR 97201
Telephone: 503-222-6004

William Douglas Sprague (admitted *pro hac vice*)
Email: dsprague@cov.com
Ashley M. Simonsen (admitted *pro hac vice*)
Email: asimonsen@cov.com
Covington & Burling LLP
One Front Street
San Francisco, CA 94111-5356
Telephone: 415-591-6000

Attorneys for Defendant N. Scott Gillis

Michael B. Merchant (OSB # 882680)
Email: mbm@bhlaw.com
Black Helterline LLP
805 SW Broadway, Suite 1900
Portland, OR 97205
Telephone: 503-224-5560

Jahan P. Raissi (admitted *pro hac vice*)
Email: jraissi@sflaw.com
Larisa A. Meisenheimer (admitted *pro hac vice*)
Email: lmeisenheimer@sflaw.com
Shartsis Friese LLP
One Maritime Plaza, 18th Floor
San Francisco, CA 94111-3598
Telephone: 415-421-6500

Attorneys for Defendant Brian A. Oliver

Defendants Robert J. Jesenik, Brian A. Oliver, and N. Scott Gillis (the "Individuals") submit this reply in support of the Individual Defendants' Motion for Protective Order ("Motion") and in response to the SEC's opposition brief (the "Opposition" or "Opp.").

The SEC's Portrayal of the Meet-and-Confer Process Is Inaccurate

Much of the SEC's Opposition attempts to justify the change in its position on the existence of the Joint Defense Agreement. Contrary to the SEC's repeated claims (Opp. at 1, 3, 5), until it filed its Opposition, the SEC never conceded the existence of the Joint Defense Agreement between the Individuals and Aequitas. Indeed, as recently as the final meet-and-confer discussion, the SEC refused to concede the existence of a joint defense arrangement. This occurred after the Individuals' counsel had provided the SEC with contemporaneous communications involving Robert Holmen, the former Aequitas General Counsel, indicating they were "subject to joint defense privilege" and noting "[w]e have a joint defense privilege." *Compare* ECF No. 429, Declaration of Jeffrey F. Robertson in Support of Individual Defendants' Motion for Protective Order ("Robertson Decl."), Ex. F (February 21, 2017 email from Mr. Robertson attaching multiple documents showing the existence of the Joint Defense Agreement) *with* Mot. for Leave to File Reply ISO Mot. for Protective Order ("Mot. for Leave") Ex. 2 (SEC's March 8, 2017 letter stating that "we do not believe that such a joint defense existed").

To excuse its prior refusal to recognize the Joint Defense Agreement, the SEC's Opposition suggests that the Individuals' counsel never provided it with evidence of the Agreement. Opp. at 3 (claiming that "the evidence submitted with [the Individuals'] motion . . . was never provided to the Commission during the meet-and-confer process" (citing ECF No. 443, Declaration of Bernard B. Smyth ("Smyth Decl."), ¶ 7)). This suggestion is false. The

Individuals' counsel furnished the SEC with evidence of the parties' Agreement, including the documents noted above, which conclusively establish the Joint Defense Agreement. *See* Robertson Decl. Exs. H & I (documents the SEC does not dispute receiving).[1] Nonetheless, in apparent reliance on prior statements from Mr. Holmen that he never entered into a joint defense arrangement with any of the Individuals, the SEC refused to concede that any such agreement existed. The SEC and—according to the SEC—its witness have now changed their position about the existence of the Joint Defense Agreement.

Reversals in the SEC's Statements About Mr. Holmen's Position Regarding the Joint Defense Agreement Require the Court to Assess His Credibility

The SEC's reversal was seemingly dictated by a change in the recollection of Mr. Holmen. *See* ECF No. 442, Declaration of Robert R. Holmen in Support of Plaintiff Securities and Exchange Commission's Opposition to Individual Defendants' Motion for Protective Order ("Holmen Decl.") ¶¶ 11-12. During the meet-and-confer process, the SEC represented to the Individuals' counsel, both orally and in writing, that Mr. Holmen did not believe that any joint defense arrangement ever existed to which he was a party. *See, e.g.*, Mot. for Leave Ex. 2 (SEC letter stating that Mr. Holmen "had no recollection of agreeing to be part of a joint defense arrangement"). Now, Mr. Holmen acknowledges there was a Joint Defense Agreement, but asserts that the only communications in furtherance of it were those on which the Individuals' personal counsel were copied. Holmen Decl. ¶ 12.

[1] Despite the SEC's contrary claim (Smyth Decl. ¶ 7), the Individuals' counsel did provide the SEC with the December 12, 2015 email constituting Ex. E, with redactions since the privilege of that document was still at issue when it was transmitted. *See* Robertson Decl. Ex. F (attaching LD00234724, the December 12, 2015 email the SEC claims never to have received).

Mr. Holmen's credibility is critical to resolution of the issue before this Court. The SEC's assertion that Mr. Holmen has been "clear" and "unequivocal," (Opp. at 6, 7), is belied by his statements to the SEC—as represented to the Individuals' counsel during the meet-and-confer discussions—that he was *not* a party to a joint defense agreement with the Individuals. The Individuals asked the SEC to produce Mr. Holmen's prior (inconsistent) statements, but the SEC refused to do so. As a result, the Individuals submit that, while the Court may grant the Individuals' Motion without convening a hearing, denying the Individuals' Motion without a hearing during which the Individuals' counsel may question Mr. Holmen about the Joint Defense Agreement would force the Court to make a credibility determination while lacking necessary information. Given his inconsistent recollections, at least as reported by the SEC, such a hearing is necessary to permit the Court to assess Mr. Holmen's credibility regarding the scope and content of the Joint Defense Agreement.

The Individuals Have Demonstrated That the Communications At Issue Are Pursuant to the Joint Defense Agreement

Contrary to the SEC's suggestion (Opp. at 6), a privilege log with descriptions of the subject of the communications' content is sufficient on its own to assert attorney-client privilege for those communications, without accompanying affidavits. *See Burlington Northern & Santa Fe Ry. v. United States Dist. Court*, 408 F.3d 1142, 1148 (9th Cir. 2005) ("This circuit has held that a privilege log is *sufficient* to properly assert the privilege . . . . ") (emphasis in original) (citation omitted); *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir.1992) ("We have previously recognized a number of means of sufficiently establishing the privilege, one of which is the privilege log approach."); Fed. R. Civ. P. 26(b)(5).

The Individuals' privilege logs substantiate their privilege assertions, and are sufficient to demonstrate that the communications described therein are in furtherance of the joint defense.

Every document the Individuals claim privilege over concerns either legal advice related to how to minimize exposure on issues central to the SEC investigation, or how to respond to the SEC lawsuit. For example, in some communications, Mr. Holmen responds to the Individuals' requests for advice with specific recommendations for how to minimize the Individuals' liability in the SEC action. Other communications concern legal advice sought by the Individuals about how to disclose the insolvency of Aequitas' key funds. *See, e.g.*, Robertson Decl. Ex. A at 4 (entry for LD00612618 with a description reading "[E]mail chain providing legal advice regarding investor disclosures . . . . "). When the Individuals sought this advice, it was clear the SEC was investigating whether the Individuals were properly disclosing Aequitas' financial condition. Indeed, this was a key allegation in the SEC's Complaint. *See, e.g.*, SEC Complaint, ¶ 46 (alleging Individuals failed to disclose Aequitas' insolvency to investors). All of the communications on the Individuals' privilege logs are similarly in furtherance of the Joint Defense Agreement.

It is necessarily difficult to discuss with any more particularity the reasons that the communications at issue are privileged, as too detailed a discussion in a public filing may risk waiver and could undermine the very goal of the instant Motion. The Individuals are therefore willing to offer the communications for *in camera* review by the Court so that it may make a fully informed determination. The Individuals make this offer despite the fact that the burden of showing a basis for *in camera* review rests with the SEC—a burden the SEC has not carried. *See Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 353 (9th Cir. 2014) (citing *In re Grand Jury Investigation*, 974 F.2d 1068 (9th Cir. 1992)).

The SEC's Opposition Mischaracterizes Applicable Law Regarding Waiver in the Joint Defense Context

The SEC's argument that the Receiver's waiver of Aequitas' *corporate* attorney-client privilege also waived the Individuals' *personal* privilege over the disputed documents is incorrect, as it is based on a faulty assumption. The SEC posits a scenario in which a corporation has solicited and received corporate legal advice that it later shared with parties to a joint defense agreement. The SEC argues that, in such an instance, the corporation alone retains the ability to waive privilege, without the need for consent from the other joint defense members. *See* Opp. at 9.

That scenario is irrelevant here, because the subset of disputed communications by Aequitas contain legal advice that reveals, either "directly or indirectly," the Individuals' own privileged communications, and the Individuals have not waived privilege. *See United States v. Balsiger*, 2011 WL 10879630, at *9 (E.D. Wis. May 11, 2011) ("any non-waiving member of the joint defense may still assert the common interest privilege over not only his own communications, but also those communications by other members that reveal his own otherwise-privileged communications"). This subset of disputed communications by Aequitas was not subject to a pre-existing claim of corporate privilege by Aequitas before they were shared with the Individuals as part of a joint defense effort. Rather, they arose in the context of a joint defense effort in which the Individuals solicited and received legal advice to assist in their joint defense of the SEC investigation or to reduce or eliminate their individual exposure to liability.

For example, an email sent by Mr. Holmen to Messrs. Jesenik, Oliver, and another Aequitas executive conveys legal advice about fundraising that is directed to multiple parties to the Joint Defense Agreement. *See, e.g.*, Robertson Decl. Ex. A at 4 (entry for LD00612618).

Aequitas cannot unilaterally waive the joint defense privilege over this communication, because the legal advice directly or indirectly reveals one of the Individuals' (Mr. Oliver's) own communications soliciting legal advice. Waiver could occur only by consent of all parties to the Joint Defense Agreement to whom the advice applied, and the Individuals have not so consented. *See Lord Abbett Mun. Income Fund, Inc. v. Asami*, 2013 WL 5609333, at *5 (N.D. Cal. Oct. 11, 2013) ("As [the non-waiving members of the joint defense] did not consent to [the waiving member's] disclosures, the privilege continues to extend to them," and therefore "[the waiving member] may not be questioned as to the statements made by [the non-waiving members] who participated in the communication.").

The SEC's selective quoting from the Restatement (Opp. at 8) ignores the Restatement's recognition that a member of the joint defense agreement "is not authorized to waive the privilege for another member's communication. If a document or other recording embodies communications from two or more members, a waiver is effective only if concurred in by all members whose communications are involved. . . ." Restatement (Third) of the Law Governing Lawyers § 76 cmt. g (2000) ("Restatement"); *see also United States v. Gonzalez*, 669 F.3d 974, 982 (9th Cir. 2012) ("[T]he case law is clear that one party to a JDA cannot unilaterally waive the privilege for other holders."); *DC Comics v. Pac. Pictures Corp.*, 2012 WL 12878651, at *1 (C.D. Cal. Feb. 15, 2012) (finding that advice given to one party to a common interest agreement, which was then shared with another party to that common interest agreement, meant that both parties to the agreement "became holders of the privilege, and neither unilaterally could waive the privilege").

CONCLUSION

Based on their showing of good cause, the Individuals respectfully request that this Court enter the Proposed Protective Order (Motion, Ex. 1).

DATED: May 19, 2017

SCHULTE ROTH & ZABEL LLP

By: */s/ Peter H. White*
PETER H. WHITE (*Pro Hac Vice*)

Attorneys for Defendant Robert J. Jesenik

DATED: May 19, 2017

COVINGTON & BURLING LLP

By: */s/ W. Douglas Sprague*
W. DOUGLAS SPRAGUE (*Pro Hac Vice*)

Attorneys for Defendant N. Scott Gillis

DATED: May 19, 2017

SHARTSIS FRIESE LLP

By: */s/ Jahan P. Raissi*
JAHAN P. RAISSI (*Pro Hac Vice*)

Attorneys for Defendant Brian A. Oliver

LR 11-1(D)(2) CERTIFICATION

I hereby attest that all other signatories listed, on whose behalf this filing is submitted, concur in the filing's content and have authorized this filing.

/s/ Peter H. White
PETER H. WHITE (*Pro Hac Vice*)

Exhibit 2

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
San Francisco Regional Office
44 Montgomery Street, Suite 2800
San Francisco, CA 94104-4802

DIVISION OF ENFORCEMENT

Brent Smyth
Senior Counsel
(415) 705-1052
smythb@sec.gov

March 8, 2017

Via Email

Jeffrey Robertson, Esq. (jeffrey.robertson@srz.com)
Pete White, Esq. (pete.white@srz.com)
Jahan Raissi, Esq. (jraissi@sflaw.com)
Larisa Meisenheimer, Esq. (lmeisenheimer@sflaw.com)
Doug Sprague, Esq. (dsprague@cov.com)
Ashley Simonsen, Esq. (asimonsen@cov.com)

Re: SEC v. Aequitas Management, LLC, et al.

Dear Counsel:

We write to follow up on our March 7, 2017 telephone conversation regarding privilege assertions made by the individual defendants in the above captioned case both in connection with documents to be produced by the Receiver as well as documents to be produced by Sidley & Austin LLP and Tonkon Torp LLP in response to subpoenas.

With respect to documents to be produced by the Receiver, we agreed that the individual defendants will provide a privilege log detailing any privilege assertions by March 15, 2017. On March 17, 2017 the parties will participate in a further meet-and-confer regarding the assertions contained on any privilege logs provided. To the extent the parties are unable to reach agreement with respect to any assertions of privilege, the individual defendants will have until March 29, 2017 to file a motion for protective order to prevent production of such documents. The individual defendants have agreed to work with the Commission on a mutually agreeable briefing schedule with respect to any motions for protective order. We will provide a proposed briefing schedule shortly.

With respect to documents to be produced by Sidley & Austin and Tonkon Torp, we have agreed that the individual defendants should have the opportunity to review any communications in which they or their outside counsel were a party prior to their production by counsel for Sidley & Austin or Tonkon Torp. After that review, the individual defendants will identify any documents over which they assert a privilege in a privilege log. As of now, the date for Sidley & Austin and Tonkon Torp to respond to the Commission's subpoena is March 17, 2017. Therefore, we believe that any privilege log should be provided by that date. We understand, however, that the

individual defendants have not yet received documents from Sidley Austin and Tonkon Torp in which they or their outside counsel were a party. We will reach out to Sidley Austin and Tonkon Torp and ask that they provide the individual defendants such documents as soon as possible. We are happy to discuss the timing of any review if there is a delay in the provision of the documents by Sidley Austin and Tonkon Torp to the individual defendants. As we discussed yesterday, the Commission does not believe it is appropriate for the individual defendants to review communications in which neither they nor their outside counsel were a party prior to the production of such documents by Sidley Austin or Tonkon Torp. If you have any legal authority supporting such a process, please provide it to us as soon as possible so that we may consider it.

During our call yesterday, the Commission staff reiterated its position that the individual defendants have no cognizable privilege claim as to the documents at issue for at least four independent reasons.

First, no attorney-client privilege exists because Messrs. Jesenik, Oliver and Gillis did not have a reasonable expectation of privacy over communications conducted on Aequitas' email system. Aequitas maintained a clear policy that emails sent and received through company email accounts were not private, were subject to monitoring, and were records of the company, not the employee. Indeed, both the 2014 and 2015 Employee Policy and Procedures Handbook ("Employee Handbook") which are enclosed state:

- "All email messages are company records and the contents of the emails may be disclosed within the company without an employee's permission." (p. 38 of 2014 Employee Handbook; *See also*, p. 41 of 2015 Employee Handbook).

- "Employees should know that **messages are not private;** the Systems Administrator has access to all email messages and may monitor them to ensure compliance with Aequitas policy." (p. 38 of 2014 Employee Handbook (emphasis in original); *See also*, p. 41 of 2015 Employee Handbook).

Internal company records show that Messrs. Jesenik and Oliver acknowledged review and receipt of the 2014 and 2015 Employee Handbooks, and the Mr. Gillis acknowledged review and receipt of the 2015 Employee Handbook. Moreover, our understanding is that Mr. Jesenik approved these policies. The law is clear that under such circumstances, company employees have no reasonable expectation of privacy such that a valid attorney-client privilege could exist over communications made using the company's email system. *See In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005); *Thygeson v. U.S. Bancorp.*, 2004 WL 2066746, at *20 (D. Or. 2004).

We have also confirmed that the executive assistants for Messrs. Jesenik, Oliver and Gillis each had access to the email box of the executive for whom they worked. For that reason as well, the individual defendants had no reasonable expectation of privacy over communications on the Aequitas email system. There is therefore no cognizable privilege over any emails using the Aequitas email system.

Second, we understand that the individual defendants intend to assert privilege over communications with Aequitas' General Counsel, Bob Holmen. As we have previously explained and as we reiterated yesterday, there can be no legitimate privilege assertion over such

communications. In order to establish an individual attorney-client relationship with company counsel, the Ninth Circuit requires that the individual asserting such a relationship establish that (1) the individual approached the attorney for the purpose of seeking legal advice; (2) when he did so, he made it clear to the attorney that he was seeking legal advice in his personal capacity rather than as a representative of the company; (3) the attorney saw fit to represent him personally, knowing that a conflict could arise; (4) the communications with the attorney were in confidence; and (5) the substance of the conversations did not concern matters within the company or the general affairs of the company. *United States v. Graf*, 610 F.3d 1148, 1161 (9th Cir. 2010). We have had preliminary conversations with Mr. Holmen and he has made clear that he never agreed to represent any of the individual defendants in their personal capacity. Mr. Holmen informed us that he is prepared to sign a declaration to that effect. That fact alone is enough to defeat any assertion of privilege made by the individual defendants over communications with Mr. Holmen. Moreover, it seems highly likely that any such communications involved matters within Aequitas rather than unrelated personal matters. Thus, there appears to be no way that the individual defendants could meet the *Graf* test.

Given the facts here, and the Ninth Circuit's clear standard, there appears to be no good faith basis upon which the individual defendants could assert an individual privilege over communications with Mr. Holmen. That is so regardless of what Messrs. Jesenik, Oliver and Gillis may have believed about the nature of communications they had with Mr. Holmen. We hope that upon review of the relevant facts and law you will reconsider making such privilege assertions.

Third, we understand that the individual defendants intend to assert privilege over certain communications on the basis of a joint defense arrangement. The burden to establish a joint defense arrangement is on the party asserting the privilege. *United States v. Gonzalez*, 669 F.3d 974, 979 (9th Cir. 2012). The individual defendants have not met that burden. None of the defendants have provided a written joint defense agreement. Instead it appears that the individual defendants are asserting that there was either an implied or oral agreement among the parties to enter into a joint defense arrangement. Based on our initial discussion with Mr. Holmen, however, we do not believe that such a joint defense existed. Indeed, Mr. Holmen informed us that he had no recollection of agreeing to be part of a joint defense arrangement. A joint defense arrangement cannot exist where a purported party to the joint defense did not agree to enter into a joint defense arrangement. *See, e.g., Avocent Redmond Corp. v. Rose Electronics, Inc.*, 516 F. Supp. 2d 1199, 1203 (W.D. Wash. 2007).

Fourth, at a minimum, Mr. Oliver has raised advice of counsel as an affirmative defense in his answer. Mr. Jesenik similarly relies upon "advice of independent professionals" as an affirmative defense. Courts in the Ninth Circuit have recognized that "[f]undamental fairness compels the conclusion that a litigant may not use reliance on advice of counsel to support a claim or defense as a sword in litigation, and also deprive the opposing party the opportunity to test the legitimacy of that claim by asserting the attorney-client privilege or work product doctrine as a shield." *See, e.g., Aspex Eyewear, Inc. v. E'Lite Optik, Inc.*, 276 F. Supp. 2d 1084, 1092 (D. Nev. 2003). Here, reliance on advice of counsel acts to waive the attorney-client privilege as to communications and documents related to the advice. *Handgards, Inc. v. Johnson & Johnson*, 414 F. Supp. 926, 929 (N.D. Cal. 1976).

Finally, at the February 27, 2017 hearing in the related private litigation, Judge Acosta stated that the privilege position of the individual defendants in this matter could best be described as: "we

would like to go through the documents to see if there is anything in there we do not like." Given the record here and the lack of evidence to support a legitimate assertion of the attorney-client privilege, the Commission staff agrees with Judge Acosta. We hope the individual defendants will reconsider their privilege assertions.

If you have any questions regarding the above, please do not hesitate to contact me at (415) 705-1052.

Sincerely,

/s/ Brent Smyth

Brent Smyth
Senior Counsel
Division of Enforcement