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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

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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* ECF No. 449, 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.*, ECF No. 449, 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 the 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 22, 2017

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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
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