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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

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

Defendants.

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

**PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
MOTION FOR LEAVE TO FILE
SUPPLEMENTAL DECLARATION
OF BERNARD B. SMYTH IN
SUPPORT OF OPPOSITION TO
INDIVIDUAL DEFENDANTS'
MOTION FOR PROTECTIVE
ORDER**

**EXPEDITED RELIEF REQUESTED
[BEFORE MAY 24, 2017 HEARING]**



CERTIFICATE OF COMPLIANCE WITH LR 7-1

In compliance with LR 7-1, counsel for Plaintiff United States Securities and Exchange Commission (“Commission” or “SEC”) certifies that it and counsel for Defendants Robert Jesenik, Brian Oliver, and N. Scott Gillis (collectively, “Defendants”) made a good faith effort to resolve this dispute but were unable to do so.

MOTION

In compliance with LR 26-3(c), the Commission seeks leave to file the Supplemental Declaration of Bernard B. Smyth in Support of Plaintiff Securities and Exchange Commission’s Opposition to Individual Defendants’ Motion for Protective Order, attached as Exhibit 1.

Defendants reply (Dkt. No. 452) provides an incomplete and inaccurate description of the representations made by the parties during the meet-and-confer process. In order to provide the Court with a more complete record, the Commission seeks leave to file the attached declaration and exhibit thereto.

Dated: May 23, 2017

Respectfully submitted,

/s/ Bernard B. Smyth
Sheila E. O’Callaghan
Wade M. Rhyne
Bernard B. Smyth
SECURITIES AND EXCHANGE COMMISSION
44 Montgomery Street, Suite 2800
San Francisco, CA 94104
(415) 705-2500

Exhibit 1
to
SEC Motion For Leave

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HOLDINGS, LLC; AEQUITAS COMMERCIAL
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MANAGEMENT, LLC; ROBERT J. JESENİK;
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Defendants.

**SUPPLEMENTAL DECLARATION
OF BERNARD B. SMYTH IN
SUPPORT OF PLAINTIFF
SECURITIES AND EXCHANGE
COMMISSION'S OPPOSITION TO
INDIVIDUAL DEFENDANTS'
MOTION FOR PROTECTIVE
ORDER**

DECLARATION OF BERNARD B. SMYTH

I, Bernard B. Smyth, declare:

1. I am an attorney duly admitted to practice in the State of California. I am Senior Counsel in the San Francisco Regional Office of the United States Securities and Exchange Commission (the “Commission”), the plaintiff in the above-captioned matter. I am one of the attorneys who has primary responsibility for investigating and litigating this matter. I have custody of the Commission’s file concerning this matter, including the documents described below. I have personal knowledge of the facts set forth herein, and if called as a witness, I could and would competently testify as follows:

2. I am submitting this supplemental declaration in light of the reply filed by the Individual Defendants in support of their request for a protective order (Dkt. No. 452). The Defendants’ reply, which purports to characterize communications during the meet-and-confer process, contains assertions that are incomplete and inaccurate regarding the discussions. Between May 12, 2017 and May 19, 2017, counsel for Mr. Jesenik and the Commission staff engaged in email communications regarding the Defendants’ characterization of the meet-and-confer process. Included in those communications is a detailed description of the Commission’s records of the representations made during the meet-and-confer process. Attached as Exhibit 1 is a true and correct copy of those email communications.

3. The Commission requested that Defendants include the attached email communications with their reply so that the Court would have a more complete record of the parties’ discussion on this topic. Defendants refused to do so.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was signed in San Francisco, California on May 23, 2017.

/s/ Bernard B. Smyth
BERNARD B. SMYTH

Exhibit 1
to
Supplemental Smyth
Declaration

Smyth, Bernard B. (Brent)

From: Robertson, Jeffrey <Jeffrey.Robertson@srz.com>
Sent: Friday, May 19, 2017 12:40 PM
To: Smyth, Bernard B. (Brent); Raissi, Jahan; Meisenheimer, Larisa A.; Sprague, Doug; 'Simonsen, Ashley M'; White, Pete
Cc: OCallaghan, Sheila E.; Rhyne, Wade M
Subject: RE: SEC v. Aequitas, et al.

Brent:

While we appreciate your response, the Individuals' counsel recall participating in meet and confer discussions in which the SEC (i) indicated that Bob Holmen informed the SEC that he did not recall ever being a party to a joint defense agreement with the Individuals and (ii) refused to concede or acknowledge that a joint defense agreement existed between the individuals and Aequitas. So on those points, we respectfully disagree with the SEC. As for submitting this email chain to the Court along with our motion, we see no reason to burden the Court with correspondence involving lawyers squabbling over who said what, when. We will, of course, indicate that the SEC does not consent to our request to submit a reply, as the local rules require.

Jeff

Jeffrey F. Robertson
 202.729.7478 (o)
 202.841.7534 (c)
jeffrey.robertson@srz.com

Schulte Roth & Zabel LLP
 1152 Fifteenth Street NW, Suite 850
 Washington, D.C. 20005

From: Smyth, Bernard B. (Brent) [mailto:SmythB@sec.gov]
Sent: Wednesday, May 17, 2017 4:17 PM
To: Robertson, Jeffrey; Raissi, Jahan; Meisenheimer, Larisa A.; Sprague, Doug; 'Simonsen, Ashley M'; White, Pete
Cc: OCallaghan, Sheila E.; Rhyne, Wade M; Smyth, Bernard B. (Brent)
Subject: RE: SEC v. Aequitas, et al.

Dear Mr. Robertson:

We are confused by your claim that we are not interested in having an "honest" discussion regarding the meet-and-confer process. Our email to you on Monday sets forth in detail our records regarding our meet-and-confer discussions. We also expressly invited a telephone conversation to discuss the matter further. As we explained, we are not aware of any "prior inconsistent statements" by Mr. Holmen. Again, there are 44 documents over which you assert a joint defense privilege and to which Mr. Holmen was a party, where we do not challenge your assertion. That fact alone makes clear that we did not challenge your position that Mr. Holmen was a party to a joint defense arrangement.

The Local Rules do not provide for replies in connection with discovery disputes. See LR 26-3(c). Moreover, at the time you filed your motion, you were well aware that we would be submitting a declaration from Mr. Holmen and that we did not challenge the existence of a joint defense arrangement. We see no basis for a reply here. Therefore, we do not

consent to your filing of a reply. However, if you insist on submitting a reply, it should include this email and our email from Monday so that the Court would have a record of our discussions on this topic.

Brent Smyth
Senior Counsel, Office of Enforcement
Securities and Exchange Commission
Ph: (415) 705-1052 Fax: (415) 705-2501

From: Robertson, Jeffrey [<mailto:Jeffrey.Robertson@srz.com>]
Sent: Wednesday, May 17, 2017 11:49 AM
To: Smyth, Bernard B. (Brent); Raissi, Jahan; Meisenheimer, Larisa A.; Sprague, Doug; 'Simonsen, Ashley M'; White, Pete
Cc: OCallaghan, Sheila E.; Rhyne, Wade M
Subject: RE: SEC v. Aequitas, et al.

Brent:

Thanks for your response. Our request was quite simple—that the SEC provide evidence of the prior inconsistent statements of the witness whose declaration you filed with your opposition. Your rambling response repeatedly mischaracterizes what you told us Mr. Holmen had told you, incomprehensibly alleges our bad faith, but ultimately admits that your witness's recollection about the existence of a joint defense agreement has changed. This response is baffling, but given that you appear intransigent in refusing to provide the information we requested or having an honest discussion of what was actually conveyed during the meet and confer process, we see no reason to continue debating Mr. Holmen's prior inconsistent statements about the privilege claims at issue in our motion and will instead submit that issue to the Court. Accordingly, please advise whether the SEC will consent to our request to file a reply in further support of our Motion. In light of the upcoming hearing, if we don't hear back by the close of business today, we'll assume you don't consent.

Let us know if you'd like to discuss. Thanks.

Jeff

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Schulte Roth & Zabel LLP
1152 Fifteenth Street NW, Suite 850
Washington, D.C. 20005

From: Smyth, Bernard B. (Brent) [<mailto:SmythB@sec.gov>]
Sent: Monday, May 15, 2017 2:52 PM
To: Robertson, Jeffrey; Raissi, Jahan; Meisenheimer, Larisa A.; Sprague, Doug; 'Simonsen, Ashley M'; White, Pete
Cc: OCallaghan, Sheila E.; Rhyne, Wade M; Smyth, Bernard B. (Brent)
Subject: RE: SEC v. Aequitas, et al.

Mr. Robertson,

We were disappointed to receive your email on Friday as it misstates the representations made by the Commission staff during our meet-and-confer discussions. It also leads us to question whether the meet-and-confer process was conducted in good faith.

Because your email makes serious, but false, assertions, we offer a fairly lengthy timeline of the actual circumstances:

As you know, the individual defendants first provided privilege logs that identified documents over which a privilege was asserted on March 15, 2017. Prior to that time, while we engaged in meet-and-confer discussions, those discussions were necessarily limited to general categories of the individual defendants' privilege claims rather than any specific documents over which privilege was asserted. At that time, the primary focus of our meet-and-confer discussion was the individual defendants' claim of an individual attorney-client relationship with Robert Holmen. Ultimately of course, the individual defendants changed their position on whether they had an individual attorney-client relationship with Mr. Holmen.

While the individual defendants also claimed that a joint defense privilege existed, the individual defendants had not provided basic information as to the claimed joint defenses, such as "1) the date the joint defense arrangement was entered into; 2) the parties to the joint defense arrangement; 3) the common interest pursuant to which the parties entered into the joint defense arrangement; 4) the duration of the joint defense arrangement; and 5) if those agreements are in writing." (See my March 22, 2017 email requesting such information).

It was in that context that we had initial discussions with Mr. Holmen. As we informed you on our March 7, 2017 meet-and-confer call and by letter the next day, Mr. Holmen "made clear that he never agreed to represent any of the individuals in their personal capacity." We informed you that he was prepared to sign a declaration to that effect. We also informed you that "[b]ased on our initial discussions with Mr. Holmen" we were not persuaded that a joint defense arrangement existed. We noted simply that "Mr. Holmen informed us that he had no recollection of agreeing to be part of a joint defense arrangement." Again, we made very clear that this was based on "initial discussions."

On March 15, 2017, the individual defendants provided their initial privilege logs and we learned for the first time the particular documents over which a privilege assertion was made. Among the documents over which privilege was asserted were numerous documents withheld on the basis of a joint defense privilege assertion. The individual defendants had still failed to provide us the basic information necessary to support the joint privilege assertion. We requested that information on our meet-and-confer call of March 17, 2017. We reiterated that request in writing via a March 22, 2017 email. Your email of March 23, 2017 outlined in detail for the first time the individual defendants' basis for their joint defense privilege assertions. And as your motion reflects, the joint defense arrangement was based on the "parties' conduct" (Motion pp. 6-7) rather than any formal agreement to which Mr. Holmen would have been privy.

On March 24, 2017, we had another meet-and-confer discussion. During that call, we informed you that the Commission would not challenge the joint defense privilege over communications that included outside counsel for the individual defendants, **including those communications to which Mr. Holmen was a party**. Thus, it was clear at that point that **the existence of** a joint defense privilege was no longer in dispute. We had no reason to, nor did we, ask Mr. Holmen to review specific documents regarding the existence of a joint defense arrangement.

On March 29, 2017 the individual defendants submitted revised privilege logs. On March 31, 2017, we provided a list of those documents on the revised logs for which we intended to challenge the individual defendants' privilege assertions. Notably, we did not challenge your assertion of a joint defense privilege as to many communications to which Mr. Holmen was a party. Clearly, we did not take the position that Mr. Holmen claimed that he never participated in a joint defense arrangement. Indeed, Robert Jesenik's revised privilege log, dated April 14, 2017, identifies 44 documents in which Bob Holmen was a party to the communication and for which the Commission does not challenge your client's joint defense privilege assertion.

To suggest now that we represented that Mr. Holmen's position was that he was never part of a joint defense arrangement is plainly false. To the extent you asked us what Mr. Holmen's position was as to his participation in a joint defense our response was limited to our initial discussions with him which took place before the individual defendants had even identified any documents over which they asserted privilege. Accordingly, there are no "prior inconsistent statements" made by Mr. Holmen of which we are aware.

We are concerned that you did not approach the meet-and-confer process in good faith. Attached to the declaration you submitted in support of the individual defendants' motion were at least six emails regarding a joint defense arrangement that were never provided to the Commission. (See Exhibits D, E, G, J, K and L to your declaration in support of the motion for protective order). None of those emails were provided to the Commission in response to the requests for production served on the individual defendants on January 31, 2017 even though the requests specifically called for all documents concerning any joint defense arrangement between the individual defendants and Aequitas. Those emails were also withheld from the Commission during the meet-and-confer process despite the Commission repeated requests for any facts and/or documentation to establish not only the existence of a joint defense arrangement, but that Mr. Holmen acknowledged participation in such an arrangement. The individual defendants were clearly in possession of such documents but opted to withhold them contrary to their discovery obligations.

As you are aware, any notes that we may have regarding our discussions with Mr. Holmen are protected attorney work product. *Hickman v. Taylor*, 329 U.S. 495, 513 (1947) (testimony or notes of attorney as to witness remarks "could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer."); *SEC v. Sentinel Management Group, Inc.*, 2010 WL 4977220, at *7 (N.D. Ill. 2010) ("[m]aterials prepared by SEC attorneys in anticipation of litigation that disclose what they learned during witness interviews undoubtedly constitute attorney work product."). You have not made any request that would overcome this privilege.

Please let us know if you would like to set up a telephone conversation to discuss this matter further.

Thank you,

Brent Smyth
Senior Counsel, Office of Enforcement
Securities and Exchange Commission
Ph: (415) 705-1052 Fax: (415) 705-2501

From: Robertson, Jeffrey [<mailto:Jeffrey.Robertson@srz.com>]

Sent: Friday, May 12, 2017 8:38 AM

To: OCallaghan, Sheila E.; Rhyne, Wade M; Smyth, Bernard B. (Brent); Raissi, Jahan; Meisenheimer, Larisa A.; Sprague, Doug; 'Simonsen, Ashley M'

Cc: White, Pete

Subject: SEC v. Aequitas, et al.

Counsel:

According to the declaration of former Aequitas General Counsel Robert Holmen filed in support of your opposition to our motion for protective order, Mr. Holmen now admits that communications he had regarding the SEC investigation with counsel for the individual defendants were in furtherance of a joint defense effort between Aequitas and the individuals. As you know, this is inconsistent with your representations to us during the meet and confer process, when you advised us on multiple occasions that Mr. Holmen stated to you that he was not part of any joint defense effort with the individual defendants. This denial of any joint defense agreement by Mr. Holmen, according to the representations that you made to us during the meet and confer process,

was reiterated by Mr. Holmen even after he had reviewed the specific communications that we claimed to be covered by privilege.

The SEC's opposition asserts that the "only evidence before the Court" whether the communications at issue are subject to the individuals' joint defense privilege claims is Mr. Holmen's declaration. Given that Mr. Holmen's prior statements to you denying his participation in any joint defense effort are inconsistent with his recently-filed declaration, we believe it is critical that the Court be supplied with information regarding his prior inconsistent statements, which are relevant to Mr. Holmen's credibility and the accuracy of his recall surrounding the joint defense arrangement. As such, we request that you provide us as soon as possible with copies of any notes or other summaries of all discussions or communications the SEC has had with Mr. Holmen or his counsel regarding privilege and the joint defense arrangement since this action was commenced. Not only will these materials confirm that Mr. Holmen's position has changed and how, they are also necessary to determine whether Mr. Holmen disclosed privileged communications without the individuals' authorization or consent.

Please advise when we can expect to receive these materials. We are happy to get on a call to discuss this if you need further information to understand our request.

Jeff

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