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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

No. 3:16-cv-00438-PK

RECEIVER'S MOTIONS FOR AN ORDER
(1) AUTHORIZING AEQUITAS ETC
FOUNDERS FUND TO CONSENT TO

Page 1 - RECEIVER'S MOTIONS FOR AN ORDER AUTHORIZING
AEQUITAS ETC FOUNDERS FUND TO CONSENT TO
LOAN TO ETC GLOBAL GROUP LLC, AND OTHER REI

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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.

LOAN TO ETC GLOBAL GROUP, (2)
 AUTHORIZING RECEIVERSHIP
 ENTITIES TO (A) SELL SPECIAL
 MEMBER INTERESTS IN AEQUITAS ETC
 FOUNDERS FUND, (B) RELEASE
 CLAIMS, (C) CONVERT AEQUITAS ETC
 FOUNDERS FUND'S EQUITY INTERESTS
 IN ETC GLOBAL GROUP, and (D)
 EXECUTE INSTRUMENTS TO
 EFFECTUATE LOAN TO ETC GLOBAL
 GROUP, (3) APPROVING COMPROMISE
 OF MANAGEMENT FEES OWED BY
 AEQUITAS ETC FOUNDERS FUND TO
 AEQUITAS INVESTMENT
 MANAGEMENT, and (4) GRANTING
 RELATED RELIEF

EXPEDITED HEARING REQUESTED

LR 7-1 CERTIFICATION

On July 17, 2017, the undersigned circulated to the approximately 72 counsel of record, via email, a version of this motion (and supporting declaration and proposed form of order) that is substantially the same as this filed version. The conferral requested that counsel respond by 12:00 noon (Pacific time) on July 24, 2017, as to whether their clients object or consent to the motion. As of the time of filing this motion the undersigned had received no consents and no objections.

MOTION

Ronald F. Greenspan, the duly appointed Receiver ("Receiver") for each of Aequitas Investment Management, LLC ("AIM"), Aequitas Commercial Finance, LLC ("ACF"), and Aequitas ETC Founders Fund, LLC ("AEFF") (and collectively the "Aequitas Entities"), hereby moves (the "Motion") this Court for the entry of an order (1) authorizing the Receiver, on behalf of each Aequitas Entity, to execute, deliver, and perform the ETC-AEFF Transaction (defined below), including execution and delivery of the ETC-AEFF Transaction Documents (defined

below) in substantially the form submitted herewith, (2) authorizing the Receiver to execute such other instruments and take such other actions as may reasonably be required to effectuate the ETC-AEFF Transaction, (3) authorizing the Receiver to sell AIM's Interest as the Special Member in AEFF to Aaron D. Maurer ("Maurer"), for \$1.00 and assumption of liabilities, (4) authorizing AEFF to convert its equity interests in ETC Global Group, LLC ("ETC"), (5) approving the compromise of AIM's claim for management fees owed by AEFF, (6) approving AEFF's release of claims in favor of ETC and certain affiliated parties, and (7) granting related relief.

For the reasons set forth below, the Receiver requests that authority to execute and perform the ETC-AEFF Transaction Documents, and related relief, be granted on an expedited basis.

This Motion is supported by the Declaration of Brad Foster ("Foster Decl.") submitted herewith, and the following memorandum.

I. Procedural and Fact Background.

A. Appointment of the Receiver.

1. On March 10, 2016, the Securities and Exchange Commission ("SEC") filed a complaint in this Court against the Receivership Defendants and three individuals, Robert J. Jesenik, Brian A. Oliver, and N. Scott Gillis.

2. On March 16, 2016, pursuant to the Stipulated Interim Order Appointing Receiver, Mr. Greenspan was appointed as Receiver for the Receivership Entity on an interim basis (the "Interim Receivership Order"). On April 14, 2016, pursuant to the Order Appointing Receiver, Mr. Greenspan was appointed as Receiver for the Receivership Entity on a final basis (the "Final Receivership Order") [Dkt. 156].¹ (Foster Decl., ¶ 2).

¹ Capitalized terms not otherwise defined in this Motion shall have the meanings ascribed to them in the Final Receivership Order.

B. The Receivership Entities, ETC, and the Proposed ETC-AEFF Transaction.

3. Pursuant to the Interim Receivership Order and the Final Receivership Order the Receiver has, among other things, undertaken to determine the nature, location and value of all Receivership Property. Receivership Property includes AEFF's ownership of all of the Series A Preferred Units (the "Preferred Units") of ETC Global Group LLC ("ETC"). The Preferred Units are the only material asset of AEFF. ETC is not a Receivership Entity. The Preferred Units include a liquidation preference of approximately \$11 million (plus 5.0% accruing premium) and the right to put all of the Preferred Units back to ETC at the liquidation preference amount. (Foster Decl., ¶ 3).

4. Pursuant to ETC's limited liability company agreement, ETC cannot take certain transactions without the approval of AEFF. (Foster Decl., ¶ 4).

5. AIM is the Manager, Investment Adviser and Special Member of AEFF. AIM is currently obligated to perform certain services on behalf of AEFF as its Manager and Investment Advisor. AIM is owed approximately \$1.2 million from AEFF in accrued and unpaid management fees (the "Management Fees"). AEFF has been unable to pay the Management Fees because its only asset is the Preferred Units and it has not received any distributions on the Preferred Units. AIM is also a regular member of AEFF, holding 0.01% of those interests. (*Id.*, ¶ 5).

6. ACF holds approximately 16% of the membership interests in AEFF. Under AEFF's current limited liability company agreement, any revenues generated by AEFF are first used to pay its expenses, including the Management Fees. After the payment of expenses, AEFF allocates 20% of its profits to AIM as the Special Member and the remaining 80% to the other members of AEFF, including ACF. ACF is entitled to receive 16% of that 80% profits share. AIM is entitled to receive approximately 0.01% of that 80% profit share. To date, AEFF has not generated sufficient profits to provide ACF or AIM with any return on its investment in AEFF.

Under the current business terms, AEFf would need to generate revenues sufficient to cover the Management Fee before it could provide ACF, AIM and the other members in AEFf with any return on their investment. (Foster Decl., ¶ 6).

7. The ETC-AEFf Transaction. ETC intends to borrow approximately \$71,000,000 from two lenders and, as part of that transaction, will initially issue those lenders warrants to acquire approximately 98% of the equity in ETC, subject to performance based clawbacks (the “ETC Loan Transaction”). Under ETC’s current limited liability company agreement, AEFf’s consent is required for the ETC Loan Transaction. As part of the ETC Loan Transaction, AEFf is required to convert the Preferred Units into Class A-2 Units of ETC (the “Class A-2 Units”) pursuant to a Consent and Instrument of Accession and enter into an Amended and Restated Limited Liability Company Agreement for ETC. As additional consideration for the conversion of its Preferred Units, ETC would issue AEFf a \$200,000 promissory note (“Promissory Note”), payable over 6 months. (*Id.*, ¶ 7).

8. By converting the Preferred Units to the Class A-2 Units, AEFf would retain its liquidation preference with respect to the other existing members of ETC. However, it would give up its rights to appoint a member to ETC’s board of managers and its right to approve certain significant transactions. (*Id.*, ¶ 8).

9. AEFf intends to assign the Promissory Note to AIM in full satisfaction of the Management Fees. In turn, AIM will resign as Manager, terminate its Investment Advisory Agreement with AEFf and sell its Special Member Interest in AIM to Aaron D. Maurer for \$1.00 pursuant to a Termination and Resignation Agreement. As part of the consideration for AIM’s agreement to compromise its Management Fees, AEFf will provide AIM with a release of claims. Further, AEFf and its members are agreeing to amend and restate AEFf’s limited liability company agreement to remove the 20% profit share currently payable to AEFf’s Special Member and the related management fee. Mr. Maurer would be appointed as the Manager and

would perform those duties without compensation. (Foster Decl., ¶ 9).

10. AEFF would receive an additional liquidation preference of approximately \$1.8 million over all of ETC's members, including its new members ("A-2 Priority Payment Preference"). If there is no liquidation event at ETC within 24 months following the close of the ETC Loan Transaction, then AEFF may require ETC to pay the unpaid portion of the A-2 Priority Payment Preference at a 50% discount, subject to the restrictions on distributions set forth in the Delaware Limited Liability Company Act (the "Put Right"). AEFF may only exercise the Put Right at the request of ACF. If ACF directs AEFF to exercise the Put Right, the proceeds received by AEFF from the Put Right will be used to redeem ACF's entire interest in AEFF, and ACF would cease to be a member of AEFF. (*Id.*, ¶ 10).

11. Section 13.2 of the Amended and Restated Limited Liability Company Agreement of ETC includes a release of claims by the existing members of ETC, including AEFF (the "Release"). The Release would apply to any claims, known or unknown, that AEFF may have against ETC, Quantlab Investments, LLC, AVG Holdings LLC, and Southport Investments, LLC, arising from its equity investment in ETC. (*Id.*, ¶ 11).

12. The above-described agreements and transactions shall be documented by, among other instruments, the following (collectively, the "ETC-AEFF Transaction Documents"): (i) Amended and Restated Limited Liability Company Operating Agreement of ETC Global Group LLC; (ii) Consent and Instrument of Accession (including the Promissory Note); (iii) First Amended and Restated Limited Liability Company Agreement of Aequis ETC Founders Fund, LLC; and (iv) Termination and Resignation Agreement. (Foster Decl., ¶ 12, and Exhibits 1-4). The agreements and transactions memorialized by the ETC-AEFF Transaction Documents are referred to collectively as the "ETC-AEFF Transaction."

C. Business Justification for the ETC-AEFF Transaction.

13. There is substantial business justification for compromising the Management Fees and entering into the ETC-AEFF Transaction. First, ETC appears to be insolvent and continues to incur significant operating losses each month. ETC needs the ETC Loan Transaction to close promptly in order to continue as an ongoing concern. Absent AEFF's consent to the ETC Loan Transaction, ETC is likely to cease operating, which would result in a complete loss of AEFF's investment in ETC and the forfeiture of the Management Fees. AEFF could attempt to exercise its put right. However, ETC lacks the funds to make payment. (Foster Decl., 13). Further, the Delaware Limited Liability Company Act prohibits ETC making any distributions to its members if immediately following such distributions its liabilities would exceed its assets.

14. Second, the investment and execution risks of the ETC Loan Transaction are high. ETC has been generating significant operating losses. Its liabilities currently exceed its assets. It will be highly leveraged following the ETC Loan Transaction. AEFF will only receive a return on its investment in ETC if ETC can meet the payment obligations on its loans and other expenses. The Receiver feels there is a significant risk that ETC will be unable to meet the payment obligations owed to its new lenders. If that occurs, those lenders could foreclose which would probably result in a complete loss in AEFF's investment in ETC. (*Id.*, ¶ 14).

15. Third, the investment timeline for ETC is not aligned with the Receiver's objectives. Even if ETC is successful following the ETC Loan Transaction, a liquidation event sufficient to return capital to AEFF could be many years away and long after the Receiver expects to conclude the receivership case. (Foster Decl., ¶ 15).

16. Fourth, the Receiver does not believe there is a meaningful market for the equity in AEFF or management rights to justify a sale of equity or its position. (*Id.*, ¶ 16).

17. Fifth, the initial proposal by ETC was for the Receiver to consent to the ETC Loan Transaction in exchange for conversion to common stock and loss of the liquidation

preference. The Receiver has negotiated the terms of the ETC-AEFF Transaction taking into consideration the Aequitas investors, the interests of non-AIM/ACF investors, the investment and execution risks, and the investment timeline. The Receiver has, in the exercise of his business judgment, concluded that compromise of the Management Fees, obtaining the Put Right at 24 months, the sale of the Special Member Interest in AEF, the conversion of the Preferred Units, the Release, and the other transactions set forth in and contemplated by the ETC-AEFF Transaction represent fair value for, and are in the best interests of, the Aequitas Entities, their creditors and the Aequitas investors. Also, since the non-AIM/ACF investors must consent to the ETC-AEFF Transaction, the Receiver believes that their interests will necessarily be taken into consideration. (*Id.*, ¶ 17).

18. Finally, in light of the above, as well as the cost, risk and uncertainty of litigation, the Receiver believes in the exercise of his business judgment and discretion that it is in the best interests of AEF to grant the Release. (*Id.*, ¶ 18).

19. Closing the ETC-AEFF Transaction is conditioned on, without limitation, (a) this Court's authorizing the Aequitas Entities to execute and perform the ETC-AEFF Transaction Documents, (b) the Securities and Exchange Commission's consent to remove AEF from the Receivership Entity,² and (c) consent of disinterested, non-receivership members who have contributed not less than 51% of the capital of AEF. (*Id.*, ¶ 19).

D. Exigent Circumstances Necessitate Approval on an Expedited Basis.

20. Because of cash flow issues and regulatory requirements for ETC, exigent circumstances warrant approving the ETC-AEFF Transaction, and the Aequitas Entities' execution, delivery and performance of the ETC-AEFF Transaction Documents, on an expedited basis. (Foster Decl., ¶ 20).

² The Receiver reserves the right to apply to this Court for removal of AEF as a Receivership Entity after the close of the ETC-AEFF Transaction.

II. Points and Authorities.

21. Pursuant to the Final Receivership Order, the Receiver may “without further Order of this Court, transfer, compromise, abandon or otherwise dispose of any Receivership Property...in the ordinary course of business, on terms and in the manner the Receiver deems most beneficial to the Receivership Entity and with due regard to the realization of the true and proper value of such Receivership Property.” (Final Receivership Order, ¶ 26). The Receiver may also sell assets outside of the ordinary course of business “only with Court approval after reasonable notice under the circumstances and an opportunity for interested parties to be heard.” (*Id.*). Here, the proposed ETC-AEFF Transaction concerning ETC, including but not limited to (a) the compromise of the Management Fees to be paid to AIM, (b) AEFF’s consent to the ETC Loan Transaction, (c) AIM’s sale of its Special Member interest in AEFF to Maurer, (d) AEFF’s relinquishment of any board seats or observer rights in ETC, (e) AEFF’s Release in favor of ETC and other parties, and (f) the conversion of AEFF’s Preferred Units to Class A-2 Units in ETC, comprise sales, compromises, and other dispositions of Receivership Property that is outside the ordinary course of business. Consequently, this Court’s approval of the Receivership Entity’s entering and performing the ETC-AEFF Transaction is required.

22. Here, for the reasons set forth in section 1.C above, there is substantial business justification for the ETC-AEFF Transaction. The Receiver believes, in the exercise of his reasonable business judgment, that the ETC-AEFF Transaction is in the best interests of the Receivership Entity, its creditors, and the Aequitas investors.

23. Although the Management Fees represent a claim between Receivership Entities, the Receiver’s compromise of the amount of the Management Fees is comparable to a bankruptcy trustee’s compromise of claims in a bankruptcy proceeding under Federal Rule of Bankruptcy Procedure 9019. That rule authorizes a bankruptcy trustee to seek court approval of a settlement, after notice and a hearing. FRBP 9019(a). A trustee is entrusted to “proceed in

settling [an estate's] accounts on whatever grounds he, in his informed discretion, believes will net the maximum return for the creditors.” *In re Mailman Steam Carpet Cleaning Corp.*, 212 F3d 632, 635 (1st Cir.), *cert. denied*, 531 US 960, 120 SCt 2661 (2000). Where pursuing a claim involves protracted or “potentially costly litigation, with no guarantee as to the outcome, the trustee must tread cautiously – and an inquiring court must accord him wide latitude should he conclude” that pursuing litigation is not worth the cost. *Id.* (citation omitted). Here, for the reasons set forth above, the Receiver believes, in the exercise of his discretion, that receiving ETC's agreement to pay \$200,000 represents a fair compromise that is in the best interests of the Receivership Entity and its creditors.

III. Conclusion.

For the foregoing reasons, the court should enter an order (1) authorizing the Receiver, on behalf of the Aequitas Entities, to execute, deliver, and perform the ETC-AEFF Transaction, including execution and delivery of the ETC-AEFF Transaction Documents in substantially the form submitted herewith, (2) authorizing the Receiver to execute such other instruments and take such other actions as may reasonably be required to effectuate the ETC-AEFF Transaction, (3) authorizing the sale of AIM's Special Member interests in AEFF to Maurer, (4) authorizing AEFF to convert its equity interests in ETC, (5) approving the compromise of AIM's claim for the Management Fees, and (6) approving the Release, and granting related relief.

A proposed form of order is submitted herewith.

Dated this 24th day of July, 2017.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

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