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Counsel for Katherine Jesenik

IN THE UNITED STATES DISTRICT COURT  
FOR THE 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. JESENİK; BRIAN A. OLIVER; and  
SCOTT GILLIS,

Defendants.

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

MOTION TO INTERVENE OF  
KATHERINE JESENİK

ORAL ARGUMENT  
REQUESTED

EXPEDITED CONSIDERATION  
REQUESTED

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**MOTION**

Katherine Jesenik, spouse of defendant Robert J. Jesenik, hereby moves to intervene in this action as of right pursuant to Fed. R. Civ. P. 24(a)(2) and alternatively for permissive intervention under Fed. R. Civ. P. 24(b)(1)(B). Dissolution proceedings between Mr. & Mrs. Jesenik are pending in Clackamas County Circuit Court, Case No. 17-DR-14620. The dissolution action has a current trial date of November 29, 2018. A Limited Judgment regarding temporary spousal support has been entered in that action, but Mr. Jesenik has not yet complied with the terms of that order.

MOTION TO INTERVENE OF KATHERINE JESENİK

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Mrs. Jesenik seeks to intervene in this action for the purpose of obtaining disclosure of the details of any proposed settlement agreement between Mr. Jesenik and/or any entities under his control on the one hand and the Securities and Exchange Commission and/or any regulatory agency on the other. Mrs. Jesenik has requested this information from Mr. Jesenik as part of the dissolution action, but Mr. Jesenik has refused to provide such documents based on assertions that such documents are confidential. Based on this refusal, among other factors, Mrs. Jesenik is concerned that Mr. Jesenik may intend to utilize property and resources which include marital assets of which she claims ownership to fund a settlement of claims against him and/or fines imposed upon him.

Mrs. Jesenik seeks to intervene in order to object to any proposed settlement which improperly utilizes marital assets which would otherwise be awarded to her through the dissolution action. Mrs. Jesenik also seeks to intervene in order to obtain copies of any proposed settlement agreements and supporting documents, subject to any protective order or other protections on confidential information requested by the parties and ordered by the Court.<sup>1</sup>

Should review of proposed settlement documents confirm that no marital assets are intended to be used for settlement payments or payments of any fines or penalties assessed against Mr. Jesenik, Mrs. Jesenik will not object to the finalization of any settlement between the parties.

### **MEMORANDUM IN SUPPORT OF MOTION**

#### **1. Mrs. Jesenik is Entitled to Intervention as a Matter of Right**

Under Fed. R. Civ. P. 24(a)(2), “the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” The Ninth Circuit has adopted a four-part test to resolve applications for intervention of right, finding intervention

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<sup>1</sup> Contemporaneously with this filing, Mrs. Jesenik is submitting a Motion to Lift the Stay of Discovery entered in this action on June 1, 2018 for the limited purpose of obtaining these requested documents.

as a matter of right appropriate where “(1) the applicant's motion is timely; (2) the applicant has asserted an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that without intervention the disposition may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant’s interest is not adequately represented by the existing parties.” *U.S. ex rel. McGough v. Covington Technologies*, 967 F.2d 1391, 1394 (9<sup>th</sup> Cir 1992), *citing*, *County of Orange v. Air California*, 799 F.2d 535, 537 (9<sup>th</sup> Cir 1986), cert. denied, 480 U.S. 946 (1987). “Generally, Rule 24 (a)(2) is construed broadly in favor of proposed intervenors and ‘we are guided primarily by practical considerations.’” *Id.*, *quoting*, *United States v. Stringfellow*, 783 F.2d 821, 826 (9<sup>th</sup> Cir 1986) *vacated on other grounds* 480 U.S. 370 (1987).

Here, Mrs. Jesenik’s application to intervene satisfies all four elements for mandatory intervention. As to factor one, timeliness, “three factors are weighed: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.” *County of Orange*, 799 F.2d at 537. While this request for intervention is made after this matter has been pending for 28 months, it is brought in anticipation of a forthcoming proposed settlement agreement so that any potential improper utilization of property to which Mrs. Jesenik has ownership can be addressed prior to the presentation to the Court of a final settlement proposal. Resolution of this potential issue at this point is in the best interests of all parties to this action.

Regarding factor two, an interest in the property or transaction, this “is a practical, threshold inquiry.” *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9<sup>th</sup> Cir 2001). “No specific legal or equitable interest need be established. It is generally enough that the interest asserted is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue.” *Id.* (alteration, quotation, and citations omitted). The interest claimed by Mrs. Jesenik in the marital assets which may be implicated is clear.

On the third factor, impairment of interest, “if an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be

entitled to intervene.” *Id.* at 822 (alteration omitted) (quoting Fed. R. Civ. P. 24 Advisory Comm. Notes). Again, the rights of Mrs. Jesenik to the marital assets would be substantially affected if improperly used by her husband to satisfy claims against him in this action. Any procedure to attempt to “claw back” such assets, if available, would likely be inadequate to protect Mrs. Jesenik’s rights. A post-settlement attempt to account for these assets would also be prejudicial to all other parties to this action.

Regarding factor four, no adequate representation of interest, the “applicant-intervenor’s burden . . . is minimal: it is sufficient to show that representation may be inadequate.” *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9<sup>th</sup> Cir 1995) (emphasis in original), abrogated on other grounds by *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9<sup>th</sup> Cir 2011). A non-party is adequately represented by existing parties if: (1) the interests of the existing parties are such that they would undoubtedly make all of the non-party’s arguments; (2) the existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect. *Sw. Ctr. for Biological Diversity*, 150 F.3d at 1153-54. Here, the arguments and rights asserted by Mrs. Jesenik are uniquely her own - no existing party has the incentive or ability to represent her interests in this matter.

Mrs. Jesenik should be granted leave to intervene in this action for the limited purposes described above as a matter of right. Without the ability to obtain documents related to any proposed settlement agreements, she will be unable to determine whether there is a need to object to the proposed settlement on the basis that marital assets to which she claims ownership are improperly utilized to fund a settlement by Mr. Jesenik.

## **2. In the Alternative, Mrs. Jesenik Should be Granted Permissive Intervention**

Should the Court find that Mrs. Jesenik is not permitted to intervene as of right, she should be allowed to permissively intervene. Under Fed. R. Civ. P. 24(b)(1)(B), “the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.” The district court has broad discretion to allow permissive

intervention where three threshold requirements are met: (1) a common question of law or fact with the main action; (2) a timely motion; and (3) an independent basis for jurisdiction over the applicant's claims. *Donnelly v. Glickman*, 159 F.3d 405, 412 (9<sup>th</sup> Cir 1998).

Here, Mrs. Jesenik has a good faith belief that the assets that may be used to fund a settlement agreement may include marital assets to which she claims ownership. The division of those assets is the subject of the pending dissolution action in Clackamas County Circuit Court, and if those same assets are included in any settlement proposal, the property is within the jurisdiction of this court by virtue of its oversight of any proposed settlement. Resolution of the legitimate concerns of Mrs. Jesenik is in the best interest of all parties, and her intervention in this matter represents an efficient procedure for resolution.

### CONCLUSION

For the reasons outlined above, Mrs. Jesenik respectfully request the Court enter an order permitting her to intervene for purposes of obtaining copies of any proposed settlement agreements and supporting documents in order to determine whether or not objection to the proposed settlement is appropriate based on the improper utilization of marital assets to which she claims ownership.

Dated this 16<sup>th</sup> day of July, 2018.

s/ Robert J. McGaughey

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Robert J. McGaughey, OSB #800787  
 Kevin P. Kress, OSB #146003  
 Attorneys for Katherine Jesenik

### CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2018, I served a true and correct copy of the foregoing Motion to Intervene upon all counsel of record in the above-captioned case via the Court's CM/ECF system.

s/ Robert J. McGaughey

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Robert J. McGaughey, OSB #800787

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KATHERINE JESENİK,

Intervenor.

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

[PROPOSED] ORDER  
GRANTING MOTION TO  
INTERVENE OF KATHERINE  
JESENİK

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[PROPOSED] ORDER GRANTING MOTION TO INTERVENE  
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The Court, having reviewed the Motion to Intervene filed by Katherine Jesenik, hereby orders as follows:

IT IS ORDERED that the Motion to Intervene of Katherine Jesenik is GRANTED.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

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United States Magistrate Judge Paul Papak