Troy D. Greenfield, OSB #892534
Email: tgreenfield@schwabe.com
Alex I. Poust, OSB #925155
Email: apoust@schwabe.com
Lawrence R. Ream (Admitted *Pro Hac Vice*)
Email: lream@schwabe.com
Schwabe, Williamson & Wyatt, P.C.
Pacwest Center
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Telephone: 503.222.9981
Facsimile: 503.796.2900

Stanley H. Shure (Admitted *Pro Hac Vice*)
Email: sshure@shurelaw.com
Law Offices of Stanley H. Shure
2355 Westwood Blvd. #374
Los Angeles, CA 90064
Telephone: 310.984.6945
Facsimile: 310.984.6945

Ivan B. Knauer (Admitted *Pro Hac Vice*)
Email: iknauer@swlaw.com
Snell & Wilmer LLP
1101 Pennsylvania Ave., N.W., Suite 300
Washington, DC 20004
Telephone: 202.802.9770
Facsimile: 202.688.2201

Attorneys for the Receiver for Defendants
AEQUITAS MANAGEMENT, LLC; AEQUITAS HOLDINGS, LLC; AEQUITAS COMMERCIAL FINANCE, LLC; AEQUITAS CAPITAL MANAGEMENT, INC.; AEQUITAS INVESTMENT MANAGEMENT, LLC

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. JESENIK, BRIAN A. OLIVER; and N. SCOTT GILLIS, Defendants.	No. 3:16-cv-00438-JR RECEIVERSHIP ENTITY'S RESPONSE TO INTERESTED NON-PARTY INSURERS' MOTION TO INTERVENE FOR LIMITED PURPOSE AND FOR RELIEF FROM STAY

The Receivership Entity,[1] by and through the Receiver, responds to the Motion to Intervene for Limited Purpose and for Relief from Stay (Dkt. No. 685) (the "Motion"), as set forth below. This response is supported by the accompanying Declaration Stanley H. Shure ("Shure Decl.").

I. THE MOVANTS' MOTION IS AN UNNECESSARY WASTE OF JUDICIAL RESOURCES; IT COULD HAVE BEEN AVOIDED IF MOVANTS HAD MEANINGFULLY COMPLIED IN GOOD FAITH WITH THE LETTER AND SPIRIT OF LOCAL RULE 7-1

It is unfortunate that the Interested Non-Party Insurers ("Movants") chose to file the Motion. As explained below, the Motion was completely avoidable. The Receiver's insurance coverage counsel advised Movants' counsel that the Receiver was not only prepared to litigate the parties' insurance coverage issues, but he would also circulate a stipulation lifting the stay so that: (a) the Receiver could file its complaint for damages, which was almost finalized,[2] (b) Movants

[1] Capitalized terms not otherwise defined have the meanings ascribed to them in the April 14, 2016, final Order Appointing Receiver ("Final Receivership Order") (Dkt. No., 156).

[2] Shure Decl., Exhibit 1.

could fully litigate their coverage positions and defenses, and (c) the Movants could file a counterclaim if they so choose. Rather than accept the Receiver's offer, however, Movants responded by mischaracterizing the nature of the proposed stipulation, abruptly ceasing (without notice) the parties' meet-and-confer discussions, and racing to the courthouse to file the Motion just a few days before the Receiver's complaint was finalized. The Movants also apparently failed to meet and confer with the Securities and Exchange Commission ("SEC") prior to filing their Motion.[3] The Movants' should not be rewarded for their failure to comply with Local Rule 7-1.

Local Rule 7-1(a)(1) requires that, prior to filing any motion in a civil case, counsel for the movant must confer with the parties who may be affected by the relief sought in the motion. Because the Rule serves the purpose of attempting to avoid unnecessary expenditure of judicial resources, this requirement is not merely aspirational or intended to be complied with *pro forma*. *See Warner v. Stryker Corp.*, 2009 U.S. Dist. LEXIS 52634, at *8-9 & n.1 (D. Or. June 19, 2009). To the contrary, the Rule requires that a party make a "good faith effort . . . to resolve the dispute" at issue in the motion. *See* L.R. 7-1(a)(1); *see also Kramer v. Ray Klein, Inc.*, 2018 U.S. Dist. LEXIS 220094, at *5-6 (D. Or. Nov. 15, 2018) (Local Rule 7-1 requires a meaningful attempt to resolve the dispute). Failure to comply with the letter and spirit of the Rule may be cause for the Court to deny the motion and impose on counsel an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorneys' fees and costs. *See Kramer, supra*, 2018 U.S. Dist. LEXIS 220094, at *8.

The first paragraph of the Motion states that "the parties have met and conferred in a [sic] good faith through telephone conferences in an effort to resolve the subject matter of this motion."[4] The email communications between counsel for Movants and the Receiver, however, make clear

[3] The Movants did confer with SEC counsel on May 1, a few days *after* filing the Motion. (Dkt. 690). The Receiver is unaware of any efforts by Movants to meet and confer with the other parties in the SEC's Enforcement Action, Case No. 3:16-cv-00438-JR, such as Robert J. Jesenik, Brian A. Oliver, or N. Scott Gillis.

[4] Again, it appears that Movants failed to meet and confer with the other parties in the SEC's Enforcement Action, including the SEC and the individual defendants, prior to filing the Motion.

that the Motion was unnecessary. Specifically, the emails show that the Receiver was willing to enter into a stipulation that would allow not only for the Receiver to file a complaint regarding the parties' insurance coverage dispute, but also for the Movants to fully litigate their coverage positions and defenses, including asserting a counterclaim if they so choose:

> Notwithstanding the foregoing, we understand your clients' legitimate desire to have their day in court sooner rather than later. The Receiver is also of the same mind and, in fact, has for some time now been preparing a complaint asserting, *inter alia,* that your clients, along with Catlin Specialty, breached their respective coverage obligations to its insureds. Since your clients and the Receivership Entity both desire to have the questions involving whether breaches have occurred adjudicated in the near term, we would like to make the following proposal.
>
> Specifically, since the Receiver's complaint is going to be finalized in the near term***, we propose preparing a stipulation allowing for the partial lifting of the stay to allow for the filing of his complaint, and we will promptly send it to you for your review. Once the complaint is filed, your clients will be able to defend the action, which will undoubtedly include the coverage defenses they are contemplating raising in a declaratory relief complaint, and file a counterclaim if they so choose***. Of course, if the counterclaim is one for declaratory relief, there is a very good chance the Receiver move to dismiss and/or strike that pleading.
>
> We believe that this proposed solution addresses the issues we talked about last week, [and] strikes an appropriate balance between the Receiver's powers in this action and your clients' desire to have the Court adjudicate your clients' rights under the various policies.
>
> I look forward to speaking with you about this proposal in the near term. If you need some time to discuss this with your clients let me know.

(Shure Decl., ¶ 5 and Exhibit 2) (emphasis added.)

Yet nowhere in the Motion, nor in the Declarations of John L. Williams in support of the Motion (Dkt. Nos. 686 and 690), do Movants acknowledge that the Receiver's coverage counsel's proposed stipulation included the very relief that Movants now seek from this Court, *i.e.*, that they be permitted to fully litigate their coverage defenses, including the filing a counterclaim. Instead, Movants' counsel has represented to this Court that the Receiver's proposal was "that the stay be

lifted to allow ***only*** the Receiver to sue" the Insurers for breach of contract, "which the Insurers could thereafter defend." *See* Williams Decl. ¶ 3 (emphasis added).[5]

Movants' failure to disclose the full scope of the Receiver's proposed stipulation is not their only critical omission. A review of the Insurers' proposed complaint for declaratory relief reveals that Movants have also omitted any reference to the fact that the Insurers have actually denied coverage for the Investors' Claims.[6] This omission is surprising given that in their Motion the Movants admit that "the Insurers each declined coverage under their 2015-2016 Policies for the . . . 'Claims' against Aequitas, its related entities, and the Insured Persons; principally on the grounds that they arise from the same 'Wrongful Act' or 'Interrelated Wrongful Acts' as defined by the Policies." (Motion, at p. 4).[7] The Receiver's coverage counsel explained to Movants' counsel, as part of the meet and confer process, that declaratory relief is not available once an insurer has already made a coverage decision. (*See* Shure Decl., Ex. 2 (noting that declaratory relief, by its nature, operates prospectively and is not appropriate where a claim has already accrued because an insurer has denied owing any coverage obligations to its insureds) (citing *Fleshman v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist. LEXIS 95900 (D. Or. July 23, 2015))).[8] This

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[5] Dkt. 686. There are other defects in Movants' proposed pleading. For example, Movants have failed to name the Receivership Entity, which is the real party in interest, as a defendant. While such defects are grounds upon which this Court may deny Movants' Motion, *see Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 819-20 (9th Cir. 2001) (intervention inquiry similar to that for a motion to dismiss; intervenor must assert a valid substantive claim for relief), the Receivership Entity is not advancing these arguments in response to the Motion because it essentially agrees that limited relief is appropriate so that the parties can litigate their coverage disputes, and the defects in Movants' proposed pleading can be addressed in a subsequent motion.

[6] Dkt. 686, Exhibit A.

[7] In addition, both Forge and Starr have, with respect to their 2014/2015 policies, denied coverage by refusing to pay their respective $5 million in limits of liability. (*See* Shure Decl., Exhibits 3 and 4).

[8] On April 25, 2019, Movants' counsel responded to the Receiver's coverage counsel's April 24th email. (*See* Shure Decl., Exhibit 2.) Among other things, Movants' counsel mischaracterized the proposed stipulation as allowing "only the Receiver to sue [his] clients." Movants' counsel also cited case law that purportedly supports Movants' declaratory relief action. Yet this case law actually undermines their position. *See, e.g., State Farm Fire & Cas. Co. v. Reuter*, 294 Or. 446, 450-51 (1983) ("We agree with the Tenth Circuit's decision . . . [T]he purpose of the declaratory judgment action is to settle actual controversies before they have ripened into violations of law or legal duty or breach of contractual obligations." (Citation

may explain why Movants' proposed complaint does not include the same admission. Yet this omission will not save Movants' claims from dismissal.

In any event, Movants should not be rewarded for their violation of Rule 7-1. While it is within the Court's discretion to deny Movants' Motion and issue sanctions due to Movants' conduct, the Receiver believes that such a result would, as a practical matter, waste even more judicial resources because the Receiver essentially agrees with Movants that the stay should be partially lifted at this time to allow the parties to litigate their coverage issues. If the Court agrees to do so, however, the Receiver respectfully requests that relief be granted according to the terms the Receiver had initially proposed – *i.e.*, the Receiver will be permitted to file its complaint and the Insurers will be permitted to defend and file a counterclaim. Such a result is warranted not only because of Movants' improper behavior, but also because of the Receiver's power and control over the Receivership Estate and its assets. (*See* Order Appointing Receiver, Dkt. No. 156).

II. CONCLUSION

For the foregoing reasons, the Receivership Entity respectfully submits that, if this Court is inclined to grant Movant's Motion, then it should do so in a manner that does not reward Movant's for their failure to meaningfully comply with Local Rule 7-1. The Receivership Entity believes an Order that includes the following relief would achieve these goals:

1. The stay should be lifted to the extent necessary to allow the Receivership Entity and Movants to litigate their insurance coverage disputes;

2. The Receivership Entity should be permitted to file its complaint for damages and other relief against Movants in the United States District Court for the District of Oregon and, in

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omitted)). In addition, Movants' counsel claimed that declaratory relief is appropriate because his clients have not breached or repudiated any obligations owed to their insureds. The issue from a declaratory relief standpoint, however, is whether the Movants have made a coverage decision, not whether that determination amounts to a breach. The Movants, as admitted in the Motion, have unquestionably done so. Thus, the parties' dispute has ripened into a cause of action for damages. The Movants should have sought declaratory relief before making their coverage determinations, especially since the policies' assets are assets of the Receivership Estate and there is an injunction prohibiting anyone from taking any steps adverse to such assets. (Final Receivership Order, ¶ 17).

the interest of judicial economy, the Receiver respectfully requests that it be assigned to the Honorable Jolie A. Russo, who presides over this receivership case; and

3. The Movants should be permitted to answer or otherwise respond to the Receivership Entity's complaint and, if they so choose, file a counterclaim against the Receivership Entity, to which the Receivership Entity will be allowed to answer or otherwise respond.

Dated this 8th day of May, 2019.

Respectfully submitted,

LAW OFFICES OF STANLEY H. SHURE

By: */s/ Stanley H. Shure*
Stanley H. Shure (Admitted *Pro Hac Vice*)
sshure@shurelaw.com
2355 Westwood Blvd. #374
Los Angeles, CA 90064
Telephone: 310.984.6945
Facsimile: 310.984.6945

SCHWABE, WILLIAMSON & WYATT, P.C.
Troy D. Greenfield, OSB #892534
tgreenfield@schwabe.com
Alex I. Poust, OSB #925155
apoust@schwabe.com
Lawrence R. Ream (Admitted *Pro Hac Vice*)
lream@schwabe.com
Telephone: 503.222.9981
Facsimile: 503.796.2900

SNELL & WILMER LLP
Ivan B. Knauer (Admitted *Pro Hac Vice*)
iknauer@swlaw.com
1101 Pennsylvania Avenue, N.W., Suite 300
Washington, D.C. 20004
Telephone: 202.802.9770
Facsimile: 202.688.2201

Attorneys for the Receiver for Defendants Aequitas Management, LLC, Aequitas

Holdings, LLC, Aequitas Commercial Finance, LLC, Aequitas Capital Management, Inc., and Aequitas Investment Management, LLC