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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;	No. 3:16-cv-00438-JR DECLARATION OF STANLEY H. SHURE IN SUPPORT OF RECEIVERSHIP ENTITY'S RESPONSE TO INTERESTED NON-PARTY INSURERS' MOTION TO INTERVENE FOR LIMITED PURPOSE AND FOR RELIEF FROM STAY

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AEQUITAS CAPITAL MANAGEMENT, INC.; AEQUITAS INVESTMENT MANAGEMENT, LLC; ROBERT J. JESENIK, BRIAN A. OLIVER; and N. SCOTT GILLIS,

Defendants.

I, Stanley H. Shure, declare as follows:

1. I am the principal and owner of the Law Offices of Stanley H. Shure ("LOSHS"), which is the duly appointed insurance coverage counsel for the Receivership Entity.[1] I have over thirty (30) years' experience as an insurance coverage attorney, and my legal practice for approximately the last twenty-five (25) years has almost exclusively been involved in representing policyholders in connection with insurance coverage disputes. I make this declaration in support of the Receivership Entity's Response to Interested Non-Party Insurers' Motion to Intervene for Limited Purpose and for Relief from Stay (Dkt. No. 685) (hereinafter "Motion"). I am over eighteen years of age and otherwise competent to testify. I make this declaration based upon personal knowledge.

2. During the course of LOSHS's representation of the Receivership Entity, I have been intimately involved with the insurance coverage matters concerning the Receivership Entity, including those involving the 2014/2015 policy-year and 2015/2016 policy-year Management Liability Policies and the insurers issuing these policies, which include Forge, Starr, and Underwriters. Based upon my involvement, I believe I have likely seen or been the author of all the written communications from the Receivership Entity to any of the 2014/2015 insurers (Catlin Specialty Insurance Company ("Catlin"), Forge, and Starr), and/or to any of the 2015/2016 insurers (Forge, Underwriters, and Starr). During the course of LOSHS's representation of the Receivership Entity, I have also spoken with on multiple occasions over the years the various legal

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

representatives for Forge, Underwriters, and Starr, which are all now represented by John Williams.

3. A true and correct copy of the Receivership Entity's proposed complaint for damages against Forge, Starr, and Underwriters, and other defendants, is attached hereto as Exhibit 1. For brevity, I have omitted the exhibits to the proposed complaint, with the two exceptions noted below at paragraphs 8 and 9 of this declaration.

4. In or around mid-April 2019, Movants' counsel, Mr. Williams, and I spoke telephonically. Mr. Williams indicated that his clients would like to file a declaratory relief action, and he asked me if the Receiver would have any objection to the lifting of the stay for this purpose. I informed him that I would respond to him after I had a chance to discuss the matter with the Receiver.

5. On April 24, 2019, I emailed Mr. Williams to set forth a number of legal issues that I had with his request in anticipation of having another telephone call with him. Notwithstanding these issues, I proposed that the parties 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 in the form of a counterclaim if they so choose. On April 25, 2019, Mr. Williams left me a voicemail message and followed up with an email outlining the reasons why Movants disagreed with the positions laid out in my April 24th email, and rejecting my proposed stipulation. A true and correct copy of the email string between Mr. Williams and me, containing both my April 24, 2019 email and Mr. Williams' April 25, 2019 response, is attached hereto as Exhibit 2.

6. Each of the moving insurers have disclaimed coverage on multiple occasions for claims that are at issue in both Movants' proposed complaint for declaratory relief and the Receivership Entity's complaint for damages (hereafter, the "Investors' Claims"). This includes (a) Forge for both its 2014/2015 policies; (b) Starr, for both of its 2014/2015 and 2015/2016 policies, which, pursuant to the Motion, was acting as the managing general agent for PartnerRe Ireland Insurance Limited DAC ("PartnerRe") in issuing the 2015 Forge Primary Policy on its

behalf (Dkt. No. 685 at p.2); (c) Starr, for both its 2014/2015 and 2015/2016 policies; and (d) Underwriters for its 2015/2016 policy.

7. The Insurers admit in their Motion that each of the 2015/2016 Insurers disclaimed coverage for the Investors' Claims. Specifically, they state "[f]urther, 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." (Dkt. No. 685 at p. 4).

8. With respect to Forge's 2014-2015 Policy, on August 16, 2018, Forge sent a letter denying coverage by refusing to pay its $5 million in limits of liability – or any part of them – toward a proposed $30 million settlement between the Receivership Entity and the investors, on account of the Investors' Claims. A true and correct copy of this denial letter is attached hereto as Exhibit 3.

9. Similarly, with respect to Starr's 2014-2015 Policy, on August 16, 2018, Starr sent its own letter denying coverage by refusing to pay any portion of its $5 million in limits of liability toward the same proposed $30 million settlement between the Receivership Entity and the investors. A true and correct copy of this denial letter is attached hereto as Exhibit 4.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed this 8th day of May, 2019, at Los Angeles, California.

/s/ Stanley H. Shure
Stanley H. Shure

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

RONALD F. GREENSPAN, in his capacity as COURT-APPOINTED RECEIVER for the RECEIVERSHIP ENTITY, Plaintiff, v. CATLIN SPECIALTY INSURANCE COMPANY; FORGE UNDERWRITING, LTD. (AS MANAGING GENERAL AGENT FOR PARTNERRE IRELAND INSURANCE LIMITED); STARR INDEMNITY AND LIABILITY COMPANY; and CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, IN PARTICULAR, LLOYD'S SYNDICATE 4711, LLOYD'S SYNDICATE 1274, LLOYD'S SYNDICATE 1861, AND LLOYD'S SYNDICATE 1980, Defendants.	No. _______________ RECEIVER'S COMPLAINT FOR BREACH OF CONTRACT, BREACH OF THE DUTY TO SETTLE, BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, BREACH OF CONTRACT, AND BREACH OF DUTY TO PRESERVE RECEIVERSHIP ESTATE ASSETS JURY TRIAL DEMANDED

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Plaintiff Ronald F. Greenspan, in his capacity as the Court-Appointed Receiver ("Greenspan") for the Receivership Entity, hereby files this Complaint against Defendants Catlin Specialty Insurance Company ("Catlin"), Forge Underwriting, Ltd. (as Managing General Agent for PartnerRe Ireland Insurance Limited) ("Forge"), Starr Indemnity & Liability Company ("Starr"), and Certain Underwriters at Lloyd's of London, in particular, Lloyd's Syndicate 4711, Lloyd's Syndicate 1274, Lloyd's Syndicate 1861, and Lloyd's Syndicate 1980 ("Underwriters") (collectively, "Insurer Defendants"), and alleges as follows:

A. THE PARTIES.

1. Plaintiff Ronald F. Greenspan ("Receiver") is a federally-appointed receiver acting pursuant to Federal Rule of Civil Procedure 66, the provisions of 28 U.S.C. §§ 754, 959, and 1692, as well as this Court's April 14, 2016 Order Appointing Receiver ("Receivership Order") in the United States District Court for the District of Oregon, Portland Division, Case No. 3:16-cv-00438-JR, captioned *Securities and Exchange Commission v. Aequitas Management, LLC, et al.* ("Enforcement Action"). A copy of the Receivership Order is in the Court record at Dkt. No. 156 and is incorporated herein by reference.

2. This Court appointed the Receiver to marshal and preserve all assets of the Receivership Defendants named in the Enforcement Action, as well as their subsidiaries and/or majority-owned affiliates (collectively the "Receivership Entity"). The Receiver is authorized and empowered to investigate claims and commence legal actions for the benefit and on behalf of the Receivership Entity as the Receiver deems necessary and appropriate. The Receiver brings this action for the benefit and on behalf of the Receivership Entity.

3. Plaintiff is informed and believes, and based thereon alleges, that Catlin is incorporated in the State of Delaware, with its principal place of business in Delaware.[1] Plaintiff is further informed and believes that Catlin is a non-admitted carrier in the State of Oregon.

[1] XL Group acquired the various Catlin Group of insurers in 2015.

4. Plaintiff is informed and believes, and based thereon alleges, that Forge is a London-based Managing General Agent with a principal place of business located in London, United Kingdom. Forge's security is PartnerRe Ireland. Plaintiff is further informed and believes that Forge is a non-admitted carrier in the State of Oregon.

5. Plaintiff is informed and believes, and based thereon alleges, that Starr is incorporated in the State of Texas, with its principal place of business in New York. Starr is an admitted carrier in the State of Oregon.

6. Plaintiff is informed and believes, and based thereon alleges, that Underwriters at Lloyd's of London consists of numerous syndicates trading at Lloyd's of London who severally subscribed to a first-level excess policy for the 2015/2016 Policy Year (Policy No. B0146ERUSA1500634) issued to Aequitas Holdings. The particular Lloyd's syndicates that subscribed to the first-level excess policy are as follows: Lloyd's Syndicate 4711, Lloyd's Syndicate 1274, Lloyd's Syndicate 1861, and Lloyd's Syndicate 1980. Plaintiff is further informed and believes, and based thereon alleges, that the Syndicates are unincorporated associations, domiciled, organized, and existing under the laws of the United Kingdom, with their principal place of business in London, England.

B. JURISDICTION AND VENUE.

7. This Court has subject matter jurisdiction to adjudicate the Receiver's claims against the Insurer Defendants pursuant to 28 U.S.C. § 1331. This Court also assumed exclusive jurisdiction to adjudicate claims regarding the assets that are the basis of this Complaint, defined as "Receivership Assets," in the Receivership Order as well as the October 10, 2017 Opinion and Order (Dkt. No. 551).

8. This Court has personal jurisdiction over the Insurer Defendants pursuant to 28 U.S.C. §§ 754 and 1692. This Court also has *in rem* jurisdiction over all property of the Receivership Entity pursuant to 28 U.S.C. § 754.

9. Venue in this District is proper under 28 U.S.C. §§ 1391 and 754 because this action is related to the Enforcement Action pending in this District and because the Receiver was appointed in this District.

C. NATURE OF THIS ACTION AND RELIEF SOUGHT.

10. This is an action by the Receiver on behalf of the Receivership Entity[2] to recover $30 million in bargained-for coverage under the Insurer Management Liability and Professional Liability Policies (the "Policies") sold to the Receivership Entity by the Insurer Defendants for the 2014/2015 and 2015/2016 Policy-Year periods, all of which provide coverage to Insured Organizations within the Receivership Entity. The primary purpose of the Policies was to provide protection for the Receivership Entity in the event that claims were made against it for its alleged wrongful acts. The coverage afforded by the Policies was understood and intended, among other benefits, to protect the Receivership Entity against claims for wrongful acts.

11. The eventuality that the Policies were sold to cover occurred. Among other things, a number of the Aequitas entities were named as defendants in the Enforcement Action that is deemed a claim first made during the 2014/2015 Policy Year. The Receiver also preserved coverage under the 2015/2016 Policies by providing timely notices to those insurers of wrongful conduct outside the purview of the Enforcement Action or other matters triggering coverage under the 2014/2015 Policies. The Receivership Entity subsequently received claims made by certain Aequitas investors (the "Investors' Claims") alleging that the Receivership Entity committed various wrongful acts that "relate back" to and therefore trigger coverage for the Investors' Claims under both the 2014/2015 Policies and the 2015/2016 Policies.

[2] Pursuant to the Order Appointing Receiver, the forty-eight Aequitas entities comprising the defined Receivership Entity are presently recognized as a consolidated enterprise. Each of the individual Aequitas entities that offered and sold the subject securities underlying the claims made by investors, giving rise to the insured Loss sustained by the Receivership Entity, are included within the Court's definition of Receivership Entity. Furthermore, all of the individual Aequitas entities that qualify as Insureds under the subject policies of insurance are included within the Court's definition of Receivership Entity. Accordingly, the Receiver simply refers to the Receivership Entity throughout this Complaint.

12. Because the Investors' Claims are the precise type of **Claims**[3] expressly covered by the Policies that the Insurer Defendants sold to the Receivership Entity, through the Receiver, the Receivership Entity timely notified the Insurer Defendants of the **Claims**, asking the Insurer Defendants to assume all of their respective duties under the Policies.

13. Instead of honoring their duties, however, the Insurer Defendants have sought to deprive the Receivership Entity of the protection that was the primary reason for the purchase of the Policies by initially denying coverage for a proposed $21 million settlement between the Receivership Entity, on the one hand, and investors, on the other hand, of the Investors' Claims, and then denying coverage for a proposed $30 million settlement between the Receivership Entity and the investors that the Receivership Entity and investors ultimately entered into. The Insurer Defendants' total abandonment of the Receivership Entity constitutes a material breach of the Policies' terms and the Insurer Defendants' good-faith obligations under their respective policies.

14. The Insurer Defendants' conduct is also contrary to the duty of good faith and fair dealing that they owe to the Receivership Entity and constitutes bad faith.

15. Specifically, breaches by the Insurer Defendants include, but are not limited to, the following:

(a) The 2015/2016 Insurer Defendants (Forge, Underwriters, and Starr) all denied coverage for the Investors' Claims based upon their assertions that, if the Investors' Claims in any way "involve" wrongful conduct at issue in an earlier **Claim** that previously triggered coverage under the 2014/2015 Policies, there is no coverage whatsoever available for the Investors' Claims under the 2015/2016 Policies. The 2015/2016 Insurer Defendants' denials, however, are erroneous because they are inconsistent with, and not supported by, the terms of the 2015/2016 Policies.

(b) Starr's denial of coverage for the Investors' Claims under its 2014/2015 Policy pursuant to (i) its "Pending or Prior Litigation" Exclusion, which, as written by Starr, is unintelligible and not reasonably susceptible to the overly broad interpretation Starr has given to

[3] Words that are in bold are defined terms found in the various 2014/2015 and 2015/2016 policies, where they are also set in bold type.

its exclusion and; (ii) a "warranty" letter that, if enforceable and according to its terms, does not apply to, and bar coverage for, the Investors' Claims.

(c) Insurers in the State of Oregon may not deliver or issue liability insurance policies in Oregon that provide for reduction of their limits of liability by payment of defense costs unless the form used is filed with and approved by Oregon's Director of the Department of Consumer and Business Services ("Director"). The Director may not approve this form unless it contains a statement, which the Director must also approve, disclosing that the costs of defending a claim under the policy are included in the policy limits. *See* ORS 742.063 (formerly ORS 743.115). Neither 2014/2015 Insurer Catlin nor 2014/2015 Insurer Forge complied with ORS 742.063. Yet both Catlin and Forge, knowing that they failed to qualify as Oregon surplus lines insurers (and, therefore, that they were not excused from complying with ORS 742.063 and, as such, still have their full $5 million limits of liability available to settle the Investors' Claims), breached their policies by refusing to contribute their respective $5 million in limits towards the Receivership Entity's $30 million settlement with the investors.

16. By and through his undersigned counsel, the Receiver brings this Complaint seeking damages against the Insurer Defendants for breach of their respective insurance policies and breach of the implied covenant of good faith and fair dealing. The Receiver also seeks to recover any and all monies that the Insurer Defendants improperly paid to the Individual Defendants.

D. OVERVIEW OF THE RECEIVERSHIP ENTITY'S MANAGEMENT LIABILITY AND PROFESSIONAL LIABILITY COVERAGE.

17. The Aequitas Entities had a $15 million tower of Management Liability and Professional Liability coverage that was initially in effect for the **Policy Period** of July 1, 2014, to July 1, 2015. This period was subsequently extended for an additional four months to November 1, 2015 (the "2014/2015 Policies").

18. This $15 million figure is the combined sum of the limits of liability of the three separate $5 million 2014/2015 Policies: (1) a $5 million primary policy issued by Catlin; (2) a $5 million first-level excess policy issued by Forge; and (3) a $5 million second-level excess policy issued by Starr. True and correct copies of the 2014/2015 Catlin, Forge, and Starr policies are attached hereto as Exhs.1-3, respectively. Neither the Catlin policy nor the Forge policy contain any language indicating that they purport to be surplus lines insurance. The Catlin policy contains a statement with language asserting that the payment of **Loss**, in the form of **Defense Costs**, reduces its limits of liability. The Starr policy for this year also contains a statement with language to the same effect. The Forge policy does not contain any such statement.

19. The Forge and Starr excess policies generally "follow form" to the terms of the Catlin primary-level policy, though the Starr policy does add, by its endorsement number 6, an exclusion entitled "Pending Or Prior Litigation Exclusion" to its excess policy. The Starr policy, by its endorsement number 7, also expressly deletes from its policy the "Representations And Warranty" provisions of its policy and follows form to any applicable provisions of the Catlin primary-level policy.

20. Upon the expiration of the 2014/2015 Policies, the Receivership Entity purchased another $15 million tower of Management Liability and Professional Liability coverage in effect for the **Policy Period** of November 1, 2015, to November 1, 2016 (the "2015/2016 Policies").

21. The $15 million figure of combined limits of liability for the 2015/2016 Policies was again provided by three separate policies consisting of a $5 million primary policy issued by Forge, a $5 million first-level excess policy issued by Underwriters, and once again a $5 million second-level excess policy issued by Starr. The terms of the 2015/2016 Policies are the same as the 2014/2015 Policies they replaced. True and correct copies of the 2015/2016 Forge, Underwriters, and Starr policies are attached hereto as Exhs. 4-6, respectively.

E. RELEVANT FACTUAL BACKGROUND.

1. The Aequitas Consolidated Enterprise.

22. Aequitas Management, LLC ("AM") has an 84% ownership stake in Aequitas Holdings, LLC ("AH"), which is the sole owner and member of Aequitas Commercial Finance, LLC ("ACF") and also the sole shareholder of Aequitas Capital Management, Inc. ("ACM").[4] AH was formed in 2007. ACF was formed in 2003 and ACM was formed in 1993. ACF is the entity defendant that issued promissory notes to Aequitas investors in exchange for their investments. ACM is the manager of ACF and is also the sole owner and member of Aequitas Investment Management, LLC ("AIM"). AIM, which was formed in 2006, manages the various business ventures (the "Aequitas funds") in which the Aequitas investors were at material times told their assets would be invested.

23. One primary vehicle by and through which the Receivership Entity solicited and received investments was the issuance of promissory notes through what the Receivership Entity apparently referred to internally as the "Private Note Program."

24. The notes, which were issued specifically by ACF, typically had terms of 1-4 years and offered returns ranging from 5-15%, with a weighted average of approximately 10%. Interest was typically either paid monthly or quarterly, or otherwise automatically reinvested in an ACF note.

25. Over the course of years, different private placement memoranda ("PPM") and supplemental quarterly updates were issued in connection with the solicitation and receipt of investments in connection with the sale of private notes. The PPM applicable to notes sold in the Private Note Program during 2014 and 2015 had a date of 2013. Earlier dated PPM applied to notes sold by ACF prior to 2014.

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[4] The background facts contained in this section are partially incorporated from the facts set forth in Judge Papak's January 9, 2017 Findings and Recommendation in the Enforcement Action, denying Defendant Gillis's motion to dismiss the SEC's claims against him or, in the alternative, an order for a more definite statement (Dkt. No. 336). On April 20, 2017, Judge Marco A. Hernandez entered an Order adopting Judge Papak's Findings and Recommendation (Dkt. No. 417).

26. In addition to raising money through the Private Note Program administered by ACF, the Receivership Entity also raised money from investors by offering and selling notes issued by the Aequitas funds managed by AIM. PPM were also provided in connection with the solicitation and receipt of funds from investors who invested in Aequitas funds. These Aequitas funds include but are not limited to the Aequitas Income Protections Fund, LLC ("IPF"), Aequitas Income Opportunity Fund, LLC ("IOF"), Aequitas Income Opportunity Fund II, LLC ("IOF II"), Aequitas Opportunities Fund, LP ("ACOF"), Aequitas ETC Founders Fund, LLC ("AETC"), Aequitas Enhanced Income Fund, LLC ("AEIF"), and MotoLease Financial, LLC ("AMLF"). By the end of 2015, the largest such fund, whose sales started in November 2014, was IOF II. IOF II is also the only Aequitas Fund mentioned in the Enforcement Action.

27. It is alleged that, up through 2013, the Aequitas companies, the Private Note Program, and the Aequitas funds, at least facially, were profitable. By the end of 2013, ACF was heavily invested in receivables purchased by one of its subsidiaries from Corinthian College ("Corinthian"), a for-profit education company. Shortly thereafter, Corinthian became the target of numerous criminal and civil lawsuits and investigations by both federal and California authorities.

28. Corinthian began shutting down its schools in 2014 and ultimately closed all of its operations and filed for bankruptcy in 2015. In June 2014, Corinthian defaulted on its obligations to ACF.

29. Prior to Corinthian's default, ACF already relied heavily on raising investor funds to meet its weekly cash obligations. The loss of income from Corinthian's recourse payments and other fees worsened ACF's already dire financial condition, making it even more dependent upon investor funds to meet obligations, including redemptions and interest payments to prior investors.

30. Starting in 2014 and running through January 2016, the Receivership Entity concealed its deteriorating financial condition and insolvency from current and prospective investors, and continued soliciting investments through the Private Note Program.

31. By November 2015, the Receivership Entity could no longer maintain what the SEC has characterized as a Ponzi-like scheme and stopped paying out redemptions of the ACF notes. In February 2016, the Receivership Entity laid off two thirds of its employees and brought in Greenspan to assess the possibility of restructuring. Greenspan was then appointed Receiver after the Enforcement Action was filed.

2. Matters Triggering Coverage Under the 2014/2015 Policies—CFPB Investigation, SEC Investigation, and Enforcement Action.

a. The CFPB Investigation

32. On February 26, 2015, the Receivership Entity received a Civil Investigative Demand ("CID") from the Consumer Financial Protection Bureau ("CFPB") regarding loans made available to Corinthian students (hereinafter, the "CFPB Investigation").

33. On June 25, 2015, Colin Lindsey ("Lindsey"), a senior claim consultant for Woodruff-Sawyer & Co. ("Woodruff-Sawyer"), wrote the claims managers for the 2014/2015 Insurers on behalf of the Receivership Entity to provide them with notice of the CID.

34. In the notice, Lindsey explained that the purpose of the CFPB's Investigation was to determine whether lenders, debt collectors, or other unnamed persons engaged in unlawful practices relating to the issuance of private student loans in violation of various sections of the Consumer Financial Protection Act of 2010 and the Fair Debt Collections Practices Act. Lindsey further noted that the CFPB had requested documentation and information that may be relevant to its investigation.

b. The SEC Investigation

35. On October 8, 2014, the SEC authorized a non-public Order Directing Private Investigation and Designating Officers to Take Testimony ("Formal Order"). Aequitas was not aware of this Formal Order, however, until sometime after the SEC served it with a subpoena dated May 7, 2015.

36. On June 25, 2015, Lindsey wrote the claims managers for the 2014/2015 Insurers on behalf of the Receivership Entity to provide them with notice regarding the SEC's Investigation.

Lindsey referenced the receipt of the non-public Formal Order regarding possible violations of the federal securities law. He further relayed that, on or about May 7, 2015, the Receivership Entity was served with a subpoena from the SEC requesting the production of records and documents relating to the structure of the Receivership Entity, investors, their investments, as well as the business relationship with Corinthian.

37. The SEC's Investigation continued subsequent to the May 7, 2015 subpoena.

c. The Enforcement Action

38. On March 10, 2016, the SEC filed suit seeking injunctive and other relief against the Receivership Defendants and Individual Defendants.

39. Also, on March 10, 2016, the SEC and the Receivership Defendants filed a Proposed Stipulated Order Appointing Receiver.

40. On the same day the Enforcement Action was filed, notice was given to the insurance carriers.

41. In its complaint filed in the Enforcement Action, the SEC alleged that, under the control of the Individual Defendants, the Receivership Entity was utilized to defraud more than 1,500 individual investors of approximately $350 million in a "Ponzi-like" scheme. As further alleged, investors were led to believe that they were purchasing indirect interests in trade receivables while funds were used largely to pay operating expenses and repay earlier investors.

42. The focus of the Enforcement Action is wrongful conduct of the Receivership Entity occurring during the latter part of 2014, all of 2015, and the first few month of 2016. In the Enforcement Action, the SEC alleges the Receivership Entity committed five **Wrongful Acts** during this time frame by: (a) failing to disclose primary uses of new investments in private placement memoranda and quarterly updates; (b) hiding insolvency, commencing sometime during July 2014, by representing that AH could pay the "Holdings Note" when it could not; (c) misrepresenting the value of trade receivables for the purpose of showing the existence of sufficient collateral; (d) transferring new investor funds from IOF II to ACF in violation of its PPM, as well as issuing IOF II and ACF subsidiary notes without real backing; and (e) avoiding

ACF's obligation to register as an investment company by altering the values given for the "Holding Note."

3. Wrongful Conduct Preserving Coverage Under the 2015/2016 Policies—Receiver's Notice Pursuant to Section IX.B to the 2015/2016 Insurers.

43. On October 31, 2016, through coverage counsel, the Receiver timely submitted several Notice of Claims and Notices of Potential Claims to the claims managers for the 2015/2016 Insurer Defendants Forge, Underwriters, and Starr. These notices were sent pursuant to Section IX.A (for Notice of Claims) and Section IX.B (for Notice of Potential Claims) of the Forge Policy, and include but are not limited to those specifically referenced below.

44. In one of the notices, entitled "Notice of Potential Claims Re Allegations against Outside Professionals," the Receiver identified and provided pleadings filed in a number of lawsuits brought against third-party professionals initiated by investors after entry of the Court's April 14, 2016 Order Appointing Receiver. Among other things, the Receiver pointed out that the complaints filed by the investors contain numerous allegations of **Wrongful Acts** by the Receivership Entity, which were first articulated during the November 1, 2015 to November 1, 2016 **Policy Period** and which do not have a "common nexus" with the **Wrongful Acts** alleged in the Enforcement Action, as they involved different notes, funds, transactions and PPM. A true and correct copy of the "Notice of Potential Claims Re Allegations against Outside Professionals," but without the enclosures submitted therewith, is attached hereto as Exh. 7.

45. The Receiver stated that these "new allegations of **Wrongful Acts** involving these different notes, transactions and PPM than those put at issue in the SEC [Enforcement] Action contained in the attached lawsuits are likely to form, at least in part, the basis for future **Claims** made against the **Insured Organizations** and **Insured Persons** by Aequitas Investors, if and when the stay in bringing actions against the Receivership Entity and/or its former management is lifted. Accordingly, such future **Claims** will trigger coverage under both the 2015/2016 and 2014/2015 policy year policies."

46. In another Notice of Potential Claim, entitled "List of Wrongful Acts/Notice of Potential Claims," the Receiver provided descriptions of the transactions, matters, and circumstances that could be alleged by third parties as **Wrongful Acts** by an **Insured Person(s)** and/or **Insured Organization(s)** and form the basis for future **Claims** being made against them. For example, the Receiver noted that "Aequitas held onto investments too long in numerous instances. In general, Aequitas continued to invest in these money losing investments because foreclosing on the investment and writing it down would make the loss real and thereby negatively impact financials. By making further investments and coming up with narratives for how the losing company was on the precipice of massive growth/profit, Aequitas could continue to keep the asset on its books at an inflated value." A true and correct copy of the "List of Wrongful Acts/Notice of Potential Claims" is attached hereto as Exh. 8.

47. The Receiver, in this notice, also referenced loans or indebtedness that seemed out of place. Among other things, the Receiver explained that "Aequitas made a number of loans to registered investment advisers, wealth managers and other entities with access to wealthy individuals. While not always explicitly stated, these loans appear to have been made in a *quid pro quo* manner, with Aequitas expecting that the borrowers would direct their clients or refer their contacts to invest in Aequitas products. Examples of these loans include loans to Fieldstone Financial Management, Circle Squared Alternative Investments, EURO Investment Partners and SCA Holdings. The loans ranged from a few hundred thousand dollars to over $1 million."

4. The Investors' Claims.

a. Allegations in the Investors' Claims

48. Given that the Investors were enjoined from filing suit against the Receivership Entity, class counsel and counsel for various groups of named Aequitas investors instead presented letters on behalf of their respective investor clients. These letters constitute written demands upon the Receivership Entity and thus qualify as **Claims** under the various policies (the "Investors' Claims").

49. The Investors' Claims include the following: (a) August 10, 2017 – Robert Banks of Samuels Yoelin Kantor ("SYK Claim"); (b) September 7, 2017 – Thomas C. Sand of Miller Nash Graham & Dunn ("Miller Nash Claim"); (c) September 11, 2017 – Timothy S. DeJong of Stoll Berne ("Stoll Claim"); and (d) September 12, 2017 – Christopher J. Kayser of Larkins Vacura Kayser ("LVK Claim"). True and correct copies of the Investors' Claims are attached hereto as Exhs. 9 through 12.

50. The Investors' Claims include allegations of wrongful conduct by the Receivership Entity. Some of the wrongful conduct alleged is at issue in the Enforcement Action. However, much of the wrongful conduct alleged in the Investors' Claims involves **Wrongful Acts** concerning matters that are not at issue in the Enforcement Action or any of the other 2014/2015 Claims, *i.e.,* the SEC Investigation or CFPB Investigation. The **Wrongful Acts** alleged in the Investors' Claims that are not addressed in the 2014/2015 **Claims** include, but are not limited to, the following:

(a) The performance, liquidity, character, or valuation of numerous individual entities included within the Receivership Entity and their assets not put at issue in the Enforcement Action;

(b) Misrepresentations, misstatements and omissions made as to how investor funds would be used in connection with, *inter alia*, ACF notes, notes and/or other investment interests involving other entities within the Receivership Entity, such as those involving the various Aequitas funds, occurring prior to 2014;

(c) Other misrepresentations, misstatements and omissions made in connection with the sale of notes and/or other investment interests by ACF and other entities within the Receivership Entity, involving the various Aequitas funds occurring prior to 2014;

(d) The failure to disclose and/or fully disclose the relationship between the Receivership Entity and/or entities within the Receivership Entity and registered investment advisers; and/or

(e) The suitability of investments for particular investors, such as the elderly.

b. The Receiver Provides Notice of the Investors' Claims to the Insurers.

51. In August and September 2017, the Receiver provided notice of the four Investors' Claims to Forge, Starr, and Underwriters. True and correct copies of the four Notices are attached hereto as Exhs. 13 through 16.

52. Among other things, the Receiver explained (a) the alleged wrongful conduct that the Receivership Entity was alleged to have committed in the four Investors' Claims; (b) the reasons why each of the four Investors' Claims qualifies as a "Claim," as that term is defined in the Forge and Starr 2014/2015 Policy-Year policies, as well as the Forge, Underwriters, and Starr 2015/2016 Policy-Year policies; (c) why Forge's position—that all of the claims first made against the Receivership Entity during the 2015/2016 Policy Year, of which the Receiver gave notice prior to the policy's expiration, only "relate back" to the 2014/2015 Policy Year—was erroneous; and (d) how Forge's reliance on *Alexander Manufacturing, Inc. v. Illinois Union Ins. Company*, 666 F. Supp. 2d 1185, 1203-04 (D. Or. 2009), was also misplaced.

c. The 2015/2016 Insurers Deny Coverage for the Investors' Claims.

53. On November 28, 2017, counsel for Forge, which issued the primary Private Equity Management Liability Insurance Policy (the "2015/2016 Primary Policy") wrote to respond to the Receiver's August 30, 2017 letter regarding the four Investors' Claims. True and correct copies of Forge's denial letters are attached hereto as Exhs. 17 through 20.

54. Forge disclaimed coverage for all four Investors' Claims. Among other things, Forge argued that all of the Investors' Claims are interrelated to the CFPB Investigation, the SEC Investigation, and the Enforcement Action (as well as other related actions and demands) and therefore are deemed first made during the 2014/2015 Policy Year because all of the wrongful conduct alleged in the Investors' Claims purportedly share a common nexus of facts, circumstances, situations, events, transactions, and causes, and/or a series of causally connected facts, circumstances, situations, events, transactions, and/or causes. Essentially, Forge's denial was based upon its assertion that each and every **Wrongful Act** asserted in the Investors' Claims

qualifies as **Interrelated Wrongful Acts** to the **Wrongful Acts** at issue in the 2014/2015 Claims. Forge also disclaimed coverage under the Prior Notice Exclusion A.1 of its policy and otherwise reserved its rights for other erroneous reasons.

55. On February 7, 2018, counsel for Starr wrote to disclaim coverage for all four Investors' Claims on essentially the same grounds as those asserted by Forge Underwriting. A true and correct copy of Starr's denial letter is attached hereto as Exh. 21.

56. In addition, Starr has also denied coverage based on two defenses not raised by the other Insurer Defendants: its Pending Or Prior Litigation Exclusion, found in both policies Starr issued to Aequitas, and the Warranty Letter Defense, even though it applies by its terms only to its 2014/2015 Policy. Both of these defenses focus upon events that occurred and/or knowledge of events that occurred prior to or in or around the inception of Starr's second-level excess 2014/2015 Policy. Neither of these "coverage" defenses applies to the Investors' Claims.

57. On or about May 4, 2018, counsel for Underwriters provided denials for the Investors' Claims on Underwriters' behalf, essentially on the same grounds as those asserted by Forge. True and correct copies of Underwriters' denial letters are attached hereto as Exhs. 22 through 25.

5. Forge and Starr, in Connection with Their 2014/2015 Policies, and Forge, Lloyd's, and Starr, in Connection with Their 2015/2016 Policies, Repeated Refusals to Settle the Investors' Claims.

58. After the Investors' Claims were made against the Receivership Entity in August and September 2017, they were tendered to the Receivership Entity's insurers for both the 2014/2015 Policy Year and the 2015/2016 Policy Year.

59. All of the 2015/2016 Insurers denied coverage, asserting that each of the Investors' Claims qualified as Interrelated Claims, which they contend all relate back to the 2014/2015 Policy-Year policies. However, Insurer Defendants Forge and Starr, in connection with their respective 2014/2015 Policies, asserted that they had unexhausted limits of liability and therefore acknowledged that their policies provided potential coverage for the Investors' Claims. At that

time, Forge had at least $2 million in limits remaining in its 2014/2015 Policy and Starr had its full $5 million in limits of liability remaining in its 2015/2016 Policy.

a. The Receiver Provided the Insurer Defendants' Counsel with Its Liability and Damage Evaluation of the Investors' Claims and Other Relevant Documentation

60. On October 27, 2017, counsel for the Receiver and Receivership Entity provided counsel for Forge and Starr with a detailed report analyzing the Investors' Claims and resulting significant exposure. At the time the report was provided to Forge's counsel (Eryk Gettell) for its 2014/2015 Policy, he was also counsel for Forge and Underwriters with respect to their respective 2015/2016 Policies. Similarly, at the time the report was provided to Starr's counsel for its 2014/2015 Policy, Starr's counsel also represented Starr with respect to its 2015/2016 Policy.

61. Forge and Starr, through their counsel, were further advised in the report that, based on the likelihood of a verdict well in excess of the combination of the Receivership Estate's non-insurance assets and the then-available liability insurance assets, "[t]he Receiver hopes to secure a comprehensive settlement of all Investors' Claims within the policy limits, and will seek your consent to any such settlement." In the report, counsel also advised that the Investors' Claims could result in damages in excess of $600 million.

62. After issuing the October 27, 2017 report, counsel for the Receiver and Receivership Entity took a number of steps to keep counsel for Forge and Starr informed about the Investors' Claims, including the existence of a settlement demand within policy limits. For example, they had a lengthy conference call on December 18, 2017, during which time the Receivership Entity's liability, the amount of damages the Investors could recover if their Claims were prosecuted, and the Receivership Entity's desire to settle were discussed. Shortly after the conference call, the Receiver, through counsel, provided Forge and Starr with further information that they had requested regarding liability issues.

b. The Investors' $21 Million Settlement Demand and the Insurer Defendants' Responses

63. On February 13, 2018, the Receivership Entity received a $21 million settlement demand made on behalf of the investors. On February 16, 2018, the investors' $21 million demand was forwarded to counsel for Forge, Underwriters, and Starr. The Receivership Entity noted that this demand fell within the Receivership Entity's combined policy limits, which included the then-remaining policy limits of Forge's 2014/2015 Excess Policy.

64. At the time the investors made their $21 million settlement demand, there was in excess of $6 million in unimpaired limits of liability remaining in the 2014/2015 coverage tower, consisting of somewhere between $1 million and $2 million in Forge's 2014/2015 first-level excess policy and $5 million in Starr's 2014/2015 second-level excess policy, and $15 million in limits of liability available in the 2015/2016 tower of coverage, consisting of Forge's $5 million primary-level policy, Underwriters' $5 million first-level excess policy, and Starr's $5 million second-level excess policy for that policy year.

65. Rather than promptly respond to the investor's $21 million settlement demand, Forge and Starr, which under their 2014/2015 Policies had acknowledged a potential for coverage, essentially sat on their hands for six weeks. During these six weeks, based upon Forge's position that its policy limits had depleted due to the amounts it paid out in **Defense Costs** for the Individual Defendants in the Enforcement Action, Forge's "limits" available for the proposed $21 million settlement with the investors continued to erode.

66. On March 30, 2018, counsel for the Receiver and Receivership Entity wrote another letter to counsel for Forge and Starr, noting, among other things: "Exclusive of interest, attorneys' fees, and exemplary damages, the investors claim damages of $605,793,896. We believe there is a high probability that jurors would sympathize with the investors and, as a result, return verdicts in their favor." Accordingly, counsel for the Receiver and Receivership Entity recommended that they accept the $21 million settlement demand.

67. Even then, Forge and Starr unreasonably withheld their consent to allow the Receiver to enter into the settlement. Additionally, Forge and Starr took the position that (1) because they were not technically defending the Investors' Claims, they owed no duty to settle under their 2014/2015 Policies under Oregon law, and (2) the Receivership Entity would not sustain **Loss** per the terms of their respective policies unless and until the Receiver obtained Court approval of any settlement the Receiver entered with the investors.

68. Subsequently, on May 3, 2018, coverage counsel for the Receivership Entity wrote counsel for Forge and Starr to explain the reasons why their positions were without merit. Counsel concluded the letter by stating that, if Forge and Starr immediately provided their consent, the Receiver would attempt to settle the Investors' Claims for $21 million. This assumed, of course, that the Investors were still willing to settle for $21 million.

69. On May 7, 2018, counsel for Forge, with respect to its 2014/2015 Policy, responded: "To avoid any confusion as to what Forge's position has been and continues to be regarding the Settlement Demand, please be advised that Forge agrees not to raise as a coverage defense lack of consent regarding the Receivership's acceptance of the Investors' Settlement Demand. In other words, the Receivership is free to accept and take whatever steps are necessary to finalize the Investors' Settlement Demand." The May 7, 2018 communication on behalf of Forge, however, did not assert that Forge would pay any **Loss** or even provide an estimated amount of **Loss** available to pay towards a $21 million settlement.

70. On the same day, counsel for Starr advised that Starr, under its 2014/2015 Policy, would not raise lack of consent as a coverage defense with respect to any settlement with the investors. Starr, however, did not agree to pay a single dollar toward the proposed $21 million settlement, let alone the $5 million limits of liability available at that time under its 2014/2015 second-level excess policy.

71. By the terms of the investors' correspondence dated May 4, 2018, which had been provided to Forge and Starr *before* their May 7, 2018 communications, the investors' offer to settle for a total of $21 million expired as of May 8, 2018.

c. *After Expiration of the $21 Million Settlement Demand, the Investors Made a $30 Million Settlement Demand Upon the Receivership Entity That Was Ultimately Accepted.*

72. On June 1, 2018, coverage counsel for the Receiver wrote to counsel for Catlin, Forge, and Starr to advise them that the investors' $21 million settlement demand expired as of May 8, 2018, and, as of May 9, 2018, the investors had increased their demand to $45 million. Coverage counsel further advised that, while the $45 million settlement figure was still reasonable under the circumstances, the Receiver would try to negotiate this figure down if at all possible.

73. Finally, on August 9-10, 2018, coverage counsel sent letters to counsel for Catlin, Forge, Underwriters, and Starr to inform them that the Receivership Entity had elicited a $30 million settlement demand from the investors as a result of its negotiations with investors' counsel. The insurers were advised: "[t]he Receivership [Entity], based upon the same reasoning set forth in Schwabe's March 30, 2018 correspondence recommending acceptance of the now-moot $21 million demand, believes that the $30 million settlement figure is a reasonable one taking into consideration the Receivership's clear liability and the more than $600 million in damages the Receivership [Entity] is facing." Accordingly, the Receivership Entity requested that Catlin, Forge, Starr, and Underwriters each consent to and agree to contribute their respective $5 million in limits of liability for the 2014/2015 and/or 2015/2016 Policy Years toward the $30 million settlement with the investors. The insurers were asked to indicate their respective positions no later than August 15, 2018.

74. On August 16, 2018, Starr advised that it was standing by its prior reservation of rights in connection with its 2014/2015 Policy and was making no promises whatsoever to make any payments towards the settlement of the Investors' Claims. Starr did not articulate in its August 16, 2018 communication (or any of its prior denials of coverage for the investors' settlement offers) the basis for it having previously acknowledged a potential for coverage and then, when faced with settlement demands, denying coverage.

75. On August 16, 2018, Forge, in connection with its 2014/2015 Policy, asserted that it was in compliance with Oregon's surplus lines laws, its policy was exhausted, and accordingly, it would not make any payments towards the settlement of the Investors' Claims.

76. On August 16, 2018, Forge disclaimed coverage for the Investors' $30 million settlement demand under its 2015/2016 primary-level policy.

77. On the same day, Underwriters disclaimed coverage for the Investors' $30 million settlement demand under its 2015/2016 first-level excess policy.

78. Also on August 16, 2018, Starr disclaimed coverage for the Investors' $30 million settlement demand under its 2015/2016 second-level excess policy.

79. On August 17, 2018, Catlin also asserted that it was in compliance with Oregon's surplus lines laws, its policy limits were exhausted, and therefore it would not make any payments toward the settlement of the Investors' Claims.

80. On or about February 8, 2019, the Receiver and counsel for the investors entered into a written agreement to settle the Investors' Claims in the amount of $30 million. The settlement between the investors and the Receiver requires the Receivership Entity to pay the investors a total of $30 million irrespective of the amount of any recovery the Receivership Entity may obtain from the Insurer Defendants.

F. THE POLICY PROCEEDS OF BOTH THE 2014/2015 AND 2015/2016 POLICIES ARE PROPERTY OF THE RECEIVERSHIP ESTATE, TO WHICH THE RECEIVERSHIP INSURED ENTITIES HAVE RIGHTS.

81. During the course of the Enforcement Action, the Individual Defendants sought relief from the Order Appointing Receiver on their own behalf, as well as on behalf of Catlin and then Forge, to obtain payment from those insurers of the **Defense Costs** they claimed to have incurred in defending the Enforcement Action.

82. The initial request by the Individual Defendants for relief from the Receivership Order involving Catlin was resolved after the Individual Defendants filed a motion. (Dkt. Nos. 176 and 185).

83. Disputes thereafter arose between the insured Receivership Entity and the Individual Defendants regarding, *inter alia*, (i) whether the amounts paid out under the policies for **Loss** (defined to mean both **Defense Costs** and amounts paid to settle Claims against Insureds) are property of the Receivership Estate; (ii) the rights of the Individual Defendants to obtain payment of **Defense Costs**, incurred from the policy proceeds, even if the proceeds are property of the Receivership Estate; (iii) how the Priority of Payments provision of the Policies works when the Individual Defendants and insured Receivership Entity both have **Loss**; and (iv) the obligation the Individual Defendants and the insurers have to the other Insured(s), in particular the Receivership Entity, in connection with seeking payment of attorneys' fees from the policy proceeds and in paying out policy proceeds if the proceeds were property of the Receivership Estate. (*See* Dkt. Nos. 496, 499, 527-34, 536, 539, and 542.)

84. These issues were litigated before the Court, with Judge Papak, in his Opinion and Order of October 23, 2017, making the following rulings:

(a) The policy proceeds of the 2014/2015 Policies were property of the Receivership Estate (Dkt. No. 551, at p. 8);

(b) The Priority-of-Payments provision in Catlin/XL's policy (and therefore also in the "follow form" Forge policy) was inapplicable because losses had not yet been incurred in excess of the applicable coverage limit. (*Id*. at 8-9.) The Court stated that, "[b]ecause by its terms that provision only dictates the order in which proceeds of the policy must be paid where *incurred* losses exceed the applicable coverage limit, the priority-of-payments provision is simply inapplicable to the issues raised by the individual defendants' motions." *Id*. (Italics in original.)

(c) Any entity included within the Receivership Entity that is obligated to pay in connection with the Investors' demands that were made (and were entered into evidence by the Receivership Entity) will be entitled to coverage. Specifically, Judge Papak stated:

> Written demands for payment of money in consequence of complained-of conduct of the defendants in that action have been made on the receivership entity, and the receivership entity will be entitled to coverage in connection with any amounts any entity within the receivership is obligated to pay in connection with those demands.

> Because the receivership entity has a beneficial interest (and also because the receivership entity has a direct or indirect right to control) in some portion of the proceeds of the Catlin and/or Forge policies, under the express terms of the receivership order, the proceeds of the policies are receivership assets.

(*See id*. at 8 (italics added).) Thus, Judge Papak found that the Investors' Claims are covered under the 2014/2015 Policy-Year policies once a legal obligation to pay exists. Put another way, as soon as the Receivership Entity's **Loss** ripens, it will be covered under the Insurers' 2014/2015 Policies. Since the second-level excess policy issued by Starr, like the Forge policy, "follows form" to the Catlin Specialty policy, Judge Papak's coverage ruling applies to Starr's 2014/2015 second-level excess policy as well.

(d) Notwithstanding these conclusions, Judge Papak agreed to lift the asset freeze associated with the Order Appointing Receiver and authorized Forge to pay the Individual Defendants' reasonably-incurred covered **Defense Costs** in the Enforcement Action. The Court found that "it is clear that coverage under the Forge policy is triggered, not when judicial scrutiny has determined that the coverage limit of the Catlin policy has been properly met, but rather when Catlin has actually paid out amounts equal to or exceeding the coverage limit, has been found liable in an amount equal to or exceeding the coverage limit, or has acknowledged its own liability under the policy in an amount equal to or exceeding the coverage limit." (*Id*. at 10.)

(e) Notably, however, in the October 23, 2017 Opinion and Order, Judge Papak made it clear that the Receivership Entity can bring suit against the Individual Defendants, Catlin, and/or Forge to recover improperly paid defense costs. Judge Papak stated: "… [T]o the extent that any individual defendant is receiving improper payments from any insurers to the detriment of the receivership entity, the receivership entity can make a claim against that defendant and/or his insurer seeking repayment of such payments (again, presumably but not necessarily through a separately filed action)." *See* Order at 11. Accordingly, the Receivership Entity has the right to recover uncovered **Loss** paid to the Individual Defendants either from the Individual Defendants or the insurer who made that payment if the Receivership Entity sustained detriment as a result.

85. Subsequently, after Forge had asserted that its 2014/2015 Policy was exhausted, the Individual Defendants sought payment of certain **Defense Costs** from Starr under its 2014/2015 Policy.

86. The Receivership Entity and the Individual Defendants entered into a Stipulation and [Proposed] Order allowing the Individual Defendants, under the express terms of those Orders, to seek payment from Starr for certain **Loss**, in the form of **Defense Costs**, to which they asserted they were entitled. The Court subsequently entered Orders on the Stipulations. (Dkt. Nos. 646 and 660.)

87. The Receiver is informed and believes that Starr has paid much, if not the great majority, of the **Defense Costs** sought by the Individual Defendants.

G. RELEVANT POLICY TERMS.

1. The Investors' Letters Constitute Claims for Wrongful Acts under the Policies.[5]

88. The Investors' Claims are letters that make demands for monetary relief and, thus, constitute **Claims** as defined in Section III.F of the Forge Policy.

89. The Investors' Claims qualify as **Securities Claims**, which is defined in the Policy's **SECURITIES CLAIMS ENDORSEMENT** as "any **Claim** that a security holder of the **Company** brings in his or her capacity as a security holder of the **Company**."

90. The Investors' Claims also involve **Wrongful Acts** under the relevant policies. As amended by the **SECURITIES CLAIMS ENDORSEMENT**, the term "**Wrongful Act**," as applied to Insured Entities, is defined as follows:

> 2. regarding an **Insured Organization**, any actual or alleged act, error, omission, statement, misstatement, misleading statement, neglect or breach of duty by an **Insured Organization**:
>
> a. in rendering, or failing to render, **Asset Management Services**;
> b. in its capacity as:

[5] For all relevant purposes, Catlin's 2014/2015 primary-level policy contains the same terms as Forge's 2015/2016 primary-level policy, albeit the two policies might be numbered differently. To avoid redundancy, the Receiver has included only the terms from the Forge policy.

(i) a **Controlling Person**;
(ii) a purchaser of, investor in, or lender to a **Portfolio Company** or potential **Portfolio Company**;
(iii) a selling shareholder of a **Portfolio Company**; or
(iv) a general partner, limited partner or member of any other **Insured Organization** that is a limited partnership or limited liability company.

c. constituting an **Employment Practices Wrongful Act**;
d. alleged in a **Securities Claim**.

91. The Investors' Claims have also resulted in **Loss**, which the Receivership Entity is legally obligated to pay. The term "**Loss**" is defined in Section III.DD of the Forge Policy as including, *inter alia*, "**Defense Costs**, compensatory and other damages, settlements, judgments, pre- and post-judgment interest, and legal fees and costs awarded pursuant to judgments and appeals."

2. The Policy's Deemed First Made Provisions Determine When a Subsequent Claim "Relates Back" to One or More Prior Policy Years.

a. A Claim Arising Out of a Wrongful Act Contained in a Prior Section IX.B Potential Claim Notice Is Deemed First Made When That Notice Was Given

92. Section IX of the Forge 2015/2016 Policy is entitled "CLAIM AND POTENTIAL CLAIM NOTICES." Section IX.B., in particular, provides as follows:

> B. If during the **Policy Period** or Extended Reporting Period, if applicable, the **Claim Manager** becomes aware of a **Wrongful Act** that may reasonably be expected to give rise to a **Claim** against an **Insured**, and if written notice of such **Wrongful Act** is given to the **Insurer** during the **Policy Period** or Extended Reporting Period, if applicable, specifying the (i) reasons for anticipating such a **Claim**, (ii) nature and date of such **Wrongful Act**, (iii) identity of the **Insureds** involved, (iv) injuries or damages sustained, (v) names of potential claimants, and (vi) manner in which the **Insureds** first became aware of the **Wrongful Act**, any **Claim** subsequently arising from such **Wrongful Act** shall be deemed a **Claim** first made during the **Policy Period**.

93. Accordingly, by its terms, a **Claim** subsequently arising from a **Wrongful Act** that was properly noticed under Section IX.B is deemed first made during the **Policy Period** in which the notice was given. Thus, under this provision, to the extent any portion of the Investors' Claim arises out of a **Wrongful Act** for which notice was given under this section in connection with the

Receiver's October 31, 2016 Notices of Potential Claims, it qualifies as a **Claim** first made during the 2015/2016 **Policy Period**.

b. A Claim Under Section X Is Deemed First Made When the Wrongful Act or Interrelated Wrongful Acts Being Analyzed Were First Asserted in Either a Prior Claim or Notice of Potential Claim

94. Section X of the Forge Policy, entitled "**Interrelated Claims**," also contains language that determines when a **Claim** "relates back," i.e., is deemed first made. It provides:

> **X. Interrelated Claims**
>
> All **Claims** arising from, based upon, or attributable to the same **Wrongful Act** or **Interrelated Wrongful Acts** shall be deemed to be a single **Claim** first made on the earliest date that:
>
> A. any such **Claim** was first made, even if such date is before the Policy Period;
> B. proper notice of such **Wrongful Act** or any **Interrelated Wrongful Act** was given to the **Insurer** pursuant to Section IX.B; or
> C. notice of such **Wrongful Act** or any **Interrelated Wrongful Act** was given under any prior directors and officers, management, or similar insurance liability policy.

95. Under the **Interrelated Claims** provision quoted above, **Interrelated Claims** exist if they arise out of, are based upon, or are attributable to the same **Wrongful Act** or **Interrelated Wrongful Acts**.

(a) The focus for purposes of determining when such an Interrelated Claim is deemed first made therefore is looking to and analyzing whether the prior **Wrongful Act(s)** is contained in a **Claim** (Paragraph A), in a proper notice of **Wrongful Act(s)** pursuant to Section IX.B. of the subject policy(ies) (Paragraph B), or in a notice of **Wrongful Act(s)** given under any prior directors and officers or management liability policy (Paragraph C).

(b) In particular, if the comparison is between a **Wrongful Act(s)** contained in a current **Claim**, on the one hand, and a **Wrongful Act(s)** or **Interrelated Wrongful Act(s)** that, per Paragraph B, was contained in a prior proper notice given under the subject policy pursuant to Section IX.B, on the other hand, then the single **Claim** that exists is deemed first made at the time the Section IX.B notice was first given.

(c) Here, the Investors' Claims qualify as a single **Claim** first made during the 2015/2016 **Policy Period** under the Interrelated Claims provision of the Forge 2015/2016 Policy, quoted above. Specifically, to the extent the Investors' Claims arise out of, are based on, or are attributable to at least in part one or more **Wrongful Acts** and/or **Wrongful Acts** that qualify as **Interrelated Wrongful Acts** contained in one or more of the October 31, 2016 Notices of Potential Claims sent pursuant to Section IX.B, they qualify as a single **Claim** deemed first made during the 2015/2016 **Policy Period**.

96. Since **Interrelated Claims** can exist for both **Wrongful Acts** and **Interrelated Wrongful Acts**, understanding the meaning of **Interrelated Wrongful Acts** is required. Here, the Forge 2015/2016 primary-level policy defines "**Interrelated Wrongful Acts**" as follows:

> AA. "**Interrelated Wrongful Acts**" mean **Wrongful Acts** that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of causally connected facts, circumstances, situations, events, transactions or causes.

97. The term "**Interrelated Wrongful Acts**" is narrowly drafted. **Interrelated Wrongful Acts** are defined to exist only when there is a common nexus, i.e., a closely shared connection, between a fact, circumstance, situation, event, transaction, or cause, or a common nexus between a series of casually connected facts, circumstances, etc. Accordingly, as defined, the identity of the parties, the legal theories asserted, and the "wrongful conduct" asserted are all irrelevant for purposes of determining whether **Interrelated Wrongful Acts** exist.

98. Further, by its terms, the **Interrelated Claims** provision applies only if the same **Wrongful Act** or same **Interrelated Wrongful Acts** are present in both matters being compared/analyzed. Accordingly, to the extent a new **Claim** contains a **Wrongful Act** or **Interrelated Wrongful Act** that is not contained in the prior Claim or Notice of Potential Claim, it does not "relate back," i.e., it is not deemed first made during the year of the prior **Claim** or Notice of Potential Claim.

99. Finally, Section X, **Interrelated Claims**, does not contain any language that prohibits a new **Claim(s)** from "relating back" to more than a single prior policy year if the relevant

new **Claim(s)** factually arises from, is based upon, or is attributable to different **Wrongful Acts** or **Interrelated Wrongful Acts**, some of which were first asserted during one policy year, with others first being asserted during a different policy year.

3. The 2015/2016 Insurers' Reliance Upon Exclusion A.1.

100. The 2015/2016 Insurers have also asserted that the so-called "Prior Notice" Exclusion, Exclusion A.1, applied to the Investors' Claims and barred coverage. Like their position on the **Interrelated Claims** provision, the 2015/2016 Insurers' position on this issue is sorely misplaced.

101. The "Prior Notice" Exclusion (found in the Forge 2015/2016 Primary Policy at IV.A.1) provides:

> The Insurer shall not pay **Loss:**
>
> 1. in connection with any **Claim** *arising from, based upon or attributable to* any fact, circumstance or situation that, before the inception date of this Policy, was *the subject* of any notice given under any other liability policy. (Bold in original. Italics added.)

102. By its terms, Exclusion A.1 does not apply to **Wrongful Acts**. Rather, the exclusion is limited by its terms to the facts, circumstances, or situations that were the subject of a prior notice made under a liability policy before the inception date of the policy. The exclusion is further limited in that it applies only to the payment of **Loss** in connection with a **Claim** to the extent it arises from, is based upon or is attributable to the same fact(s), circumstance(s), or situation(s) for which notice was previously given. The "fact, circumstance, or situation" language tracks, or is extremely similar to, the "notice of circumstances" provisions found in many types of claims policies.

4. Policy Terms Unique to Starr.

103. As noted above, in addition to denying coverage for the Investors' Claims on the same grounds asserted by Forge and Underwriters, Starr has also denied coverage based on two

defenses not raised by the other Insurer Defendants: its Pending Or Prior Litigation Exclusion and its Warranty Letter Defense.

104. Starr asserts that the "**PENDING OR PRIOR LITIGATION EXCLUSION**" found in Endorsement No. 6 of its 2014/2015 (and 2015/2016) second-level excess policies applies to and precludes coverage in connection with the Investors' Claims. The exclusion, which is set forth in Endorsement No. 6 of the Starr second-level excess policy, provides:

PENDING OR PRIOR LITIGATION EXCLUSION

> It is understood and agreed that this Policy shall not cover any *loss* in connection with any Claim alleging, arising out of, based upon or attributable to, as of ***the*** July 2, 2014 any pending or prior: (1) litigation; (2) administrative or regulatory proceeding or investigation of which an Insured had notice, including any Claim or loss alleging or derived from the same or related act(s), error(s) or omission(s) or Wrongful Act(s), ***as alleged in*** such pending or prior litigation or administrative or regulatory proceeding or ***investigation***. (Emphasis added.)

105. By its terms, this "Pending Or Prior Litigation" Exclusion is rendered unintelligible and ambiguous by its reference to the "as of ***the*** July 2, 2014" language. Starr apparently, but ultimately unsuccessfully, attempted here to exclude coverage for **Loss** in connection with a **Claim** that in some way involved July 2, 2014.

106. Starr's second defense involves a so-called "warranty" letter dated as of July 2, 2014. A true and correct copy of the "warranty" letter is attached hereto as <u>Exh. 26</u>. It provides, in pertinent part, as follows:

> (b) No person or entity proposed for insurance under the policy referenced above has knowledge or information of any ***act, error or omission*** which might give rise to a claim(s), suit(s), or action(s) under such proposed policy, except as follows: (Attach complete details. If no such claim, check here "none": <u>none</u>.)
>
> > It is further understood and agreed that if such claim(s), suit(s) or action(s), knowledge or information exists, then such claim(s), suit(s), or action(s) and any claim(s), suit(s), or action(s) arising from or related to such knowledge or information is excluded from coverage under the [Excess Policy].
> >
> > Notwithstanding the above, it is agreed that this letter does not affect coverage otherwise available under the insurance pursuant to the

> severability of the application provisions in the [Catlin] Policy. (Bold added.)

107. This "warranty" letter was never made a part of the Starr Policy and applies only to an act, error or omission known prior to July 2, 2014, by a person or entity that might, *inter alia*, result in a claim, action or suit being brought seeking coverage under the proposed policy. By its express terms, the Warranty Letter is very narrowly drafted, as it is limited to knowledge or information of an act, error or omission that the relevant person or entity understands could give rise to a suit, etc. that would involve Starr's 2014/2015 second-level excess policy.

5. The Allocation Provision.

108. Finally, each of the Policies contain or incorporate an Allocation provision. These Allocation provisions are found in the primary-level policies issued by Catlin for the 2014/2015 Policies and Forge for the 2015/2016 Policies and provide:

> A. *If the **Insureds** incur **Loss** that is only partially covered by this Policy because a **Claim** includes both covered and uncovered matters or is made against both covered and uncovered parties, then the **Insurer** and the **Insureds** shall use their best efforts to allocate such **Loss** based upon*: (i) the relative legal and financial exposures of any covered and uncovered parties or covered and uncovered matters; and (ii) if a settlement occurs, the relative benefit of the parties from settlement of such covered and uncovered portions of such **Claim**. (Bold in original; italics added.)

109. As set forth above, the Allocation provision recognizes that a single **Claim** can contain both covered and uncovered matter, and the parties, in such a situation, would use their best efforts to allocate payment of **Loss** between what is and is not covered. This language reflects the contracting parties' intent to provide coverage, i.e., the Insurer is required to pay **Loss**, to the extent a **Claim** is partially covered, even if other portions of the **Claim** are not covered. Further, the Allocation provision reflects the parties' intent, namely that when a **Claim** contains some non-covered matter it does not bar coverage for the entirety of the **Claim**.

H. THE INSURER DEFENDANTS' BASES FOR DENYING COVERAGE FOR THE INVESTORS' CLAIMS ARE INCORRECT.

1. The Investors' Claims Are Deemed First Made Under Both the 2014/2015 and 2015/2016 Policy Years, with Loss Allocated Between

Covered and Uncovered Matter.

110. The policies making up the 2014/2015 and 2015/2016 Management Liability/D&O coverage towers are all triggered as to the Receivership Entity by a "**Claim** … *first* made" during their respective **Policy Periods** against an **Insured Organization** for a **Wrongful Act**.

111. These policies are also triggered if the insurers receive notice of a **Wrongful Act** during the **Policy Period** as part of a Section IX.B Notice of Potential Claim, where a **Claim** is subsequently made arising out of that/those **Wrongful Act(s).** A subsequent **Claim** can also "relate back" and be deemed first made during one of more preceding years under Section X if it arises from, is based upon, or is attributable to a **Wrongful Act** contained in a Section IX.B Notice of Potential Claims. In either or both these circumstances, a subsequent **Claim** arising from the **Wrongful Act(s)** is ***deemed first made*** during the **Policy Period** when such notice was given.

112. Here, the Investors' Claims—which were first made during the summer and fall of 2017—contain scores of different **Wrongful Acts** involving one or more of the entities included within the Receivership Entity, and many different transactions. Some of the **Wrongful Acts** asserted in the Investors' Claims are the same as those **Wrongful Acts** contained in **Claims** that were *first* made or were deemed first made while the 2014/2015 Policies were in effect. Crucially, many other **Wrongful Acts** contained in the Investors' Claims were first asserted in **Claims** that were *first* made against the Receivership Entity while the 2015/2016 Policies were in effect or were identified in a Notice of Potential Claim pursuant to Section IX.B sent to the 2015/2016 Insurers prior to the expiration of their policies on November 1, 2016, and therefore, at least partially qualify as **Claims** *deemed first made* while the 2015/2016 Policies were in effect.

113. The Investors' Claims—per the grants of coverage provided by the policies making up the 2014/2015 tower of coverage and the policies making up the 2015/2016 tower of coverage—therefore qualify as **Claims** ***first made*** during ***both*** the 2014/2015 and 2015/2016 Policy Years. That some of the **Wrongful Acts** asserted in the Investors' Claims trigger coverage under the 2014/2015 Policies and other **Wrongful Acts** trigger coverage under the 2015/2016

Policies is of no moment. Indeed, each set of policies contemplate such situations (e.g., in their Allocation provisions) where a **Claim** contains both covered and uncovered matter.

114. The 2015/2016 Insurers breached their obligations to the Receivership Entity by denying coverage for the Investors' Claims in their entirety by asserting they are deemed first made only during the 2014/2015 Policy Year and therefore do not trigger coverage under any of their 2015/2016 Policies. The 2015/2016 Insurers' no-coverage position is predicated upon a ***very*** strained interpretation of their policies, including the Interrelated Claims provision that applies to the 2015/2016 Policies, one that is inconsistent with Oregon's rule of policy/contract interpretation. The 2015/2016 Insurers also ignore the impact of the Allocation provision in their policies.

115. Forge's 2015/2016 primary policy, like Catlin's 2014/2015 primary policy, contains the following Interrelated Claims provision found in Section X of the Forge Policy:

> All **Claims** *arising from, based upon, or attributable to the same* **Wrongful Act** or **Interrelated Wrongful Acts** shall be deemed to be a single **Claim** first made on the earliest date that:
>
> A. any such **Claim** was first made, even if such date is before the **Policy Period**;
>
> B. proper notice of any such **Wrongful Act** or any **Interrelated Wrongful Act** was given to the **Insurer** pursuant to Section IX.B; or
>
> C. notice of such **Wrongful Act** or any **Interrelated Wrongful Act** was given under any prior directors and officers, management, or similar insurance liability policy. (Italics added; bold in original.)

116. Applying Oregon's rules of contract interpretation to the Interrelated Claims provisions of the 2015/2016 Policies shows that it is narrowly drafted. The Receivership Entity's Notices of Potential Claims of October 31, 2016 qualify as notices sent during the 2015/2016 **Policy Period** pursuant to Section IX.B of the 2015/2016 Policies. Accordingly, under Paragraph B of the Interrelated Claims provision, the Investors' Claims are deemed claims first made during

the 2015/2016 Policy to the extent they arise out of, are based upon, or are attributable to one or more **Wrongful Acts** set forth in the Receivership Entity's October 31, 2016 Notices. The same holds true when comparing the **Wrongful Acts** in the Investors' Claims to see if they qualify as **Interrelated Wrongful Acts** with the **Wrongful Acts** asserted in the Receivership Entity's Section IX.B notices. Accordingly, under the Interrelated Claims provision in Section X.B, the Investors' Claims are deemed first made during the 2015/2016 Policy Years.

117. The Investors' Claims are also deemed first made during the 2015/2016 Policy Year to the extent they arise out of one or more **Wrongful Act(s)** asserted in the Receivership Entity's Section IX.B Notices of October 31, 2016.

118. Thus, under both Section X.B and Section IX.B, the Investors' Claims are deemed first made during the 2015/2016 **Policy Period**.

119. The same Investors' Claims, which are deemed first made during the 2015/2016 **Policy Period**, also qualify as **Interrelated Claims** with respect to 2014/2015 **Claims** (e.g., the CFPB Investigation, the SEC Investigation and the Enforcement Action). The Investors' Claims, to the extent they are first made during the 2014/2015 **Policy Period**, would preclude coverage for **Loss** involving those portions of the Investors' Claims that are deemed first made during the 2015/2016 **Policy Period**.

120. This result—the same **Claims** being deemed first made during two different policy years—is perfectly appropriate and is contemplated by the policies' Allocation clauses, providing coverage for **Claims** containing both covered and non-covered matter. Consequently, for the Investors' Claims, each policy year applies only to the **Loss** the Insureds are legally obligated to pay to the extent the **Claim** is deemed to be first made during that year.

2. The Insurers Misconstrue the Relevant Policy Language and Ignore That the Investors' Claims Are Also Deemed Made During the 2015/2016 Policy Year.

121. Each of the 2015/2016 Insurer Defendants—Forge, Underwriters, and Starr—base their denials, in material part, upon the assertion that the Investors' Claims, in their entirety, qualify

as a single **Claim** under the Interrelated Claims provision of their respective policies that is deemed first made during the 2014/2015 Policy Year. To reach this conclusion, the 2015/2016 Insurer Defendants must necessarily assert that either: (1) the Investors' Claims consist entirely of the same **Wrongful Acts** asserted in the 2014/2015 Claims, such as the Enforcement Action and **Wrongful Acts** that qualify as **Interrelated Wrongful Acts** when compared to the Wrongful Acts contained in the 2014/2015 Claims or (2) if the Investors' Claims contain any **Wrongful Act** or **Interrelated Wrongful Act** attributable to one of the 2014/2015 Claims, the entirety of the Investors' Claims are deemed first made during the 2014/2015 Policy Year. Neither of the 2015/2016 Insurer Defendants' positions are valid.

(a) The Investors' Claims assert many **Wrongful Acts** that do not qualify as **Interrelated Wrongful Acts**, as they involve facts, circumstances, transactions, and causes that are distinct from those Wrongful Acts asserted, for example, in the 2014/2015 Claims, such as the Enforcement Action. For example, that facts, circumstances or transactions involved in different **Wrongful Acts** are similar does not turn them into **Interrelated Wrongful Acts**, which was not defined in the 2015/2016 Policies to include similar facts, circumstances, transactions, etc.

(b) Further, any assertion by the 2015/2016 Insurer Defendants that the Investors' Claims are not covered at all under the 2015/2016 Policies if they "*involve*" a single **Wrongful Act** or **Interrelated Wrongful Act** is not supported by any of the relevant terms of the 2015/2016 Policies. The term "involve" means "to have within or as part of itself" or "to include," *see, e.g.*, *U.S. v. Awan*, 607 F.3d 306, 315 (2d Cir. 2010) (citation omitted), and would require only a minimal overlap between **Wrongful Acts** or **Interrelated Wrongful Acts** for multiple **Claims** to qualify as **Interrelated Claims**. Yet neither Forge, Underwriters, nor Starr have pointed to any of the language contained in the Interrelated Claims—to wit: "arising from, based upon, or attributable to"—or any other policy provision that is reasonably susceptible to the meaning of the term "involve." This is not surprising, as there is none.

122. In addition to misinterpreting the relevant language of the Interrelated Claims provisions, the 2015/2016 Insurers also conveniently ignore that: (1) under their own

interpretations of the Interrelated Claims provision, the Investors' Claims are also deemed first made during the 2015/2016 Policy Year; (2) the Investors' Claims are also deemed first made under Section IX.B to the extent they arise from **Wrongful Acts** asserted in the Receivership Entity's October 31, 2016 Notices; and (3) the Policies, both for the 2014/2015 and 2015/2016 Policy Years, contemplate under their Allocation provisions coverage for **Claims** that are only partially covered by the Policies.

3. The 2015/2016 Insurers' Reliance on the "Prior Notice" Exclusion Is Misplaced.

123. The 2015/2016 Insurers have also asserted that the so-called "Prior Notice" Exclusion applies to the Investors' Claims and bars coverage. Like their position on the Interrelated Claims provision, the 2015/2016 Insurers' position on this issue is meritless.

124. The "Prior Notice" Exclusion (found in the Forge 2015/2016 Primary Policy at IV.A.1) provides:

> The Insurer shall not pay **Loss:**
>
> 1. in connection with any **Claim** *arising from, based upon or attributable to* any fact, circumstance or situation that, before the inception date of this Policy, was *the subject* of any notice given under any other liability policy. (Bold in original. Italics added.)

125. Forge and the other 2015/2016 Insurers assert that the Prior Notice Exclusion applies to and bars coverage for the Investors' Claims because the Receivership Entity gave notice of certain claims prior to the November 1, 2015 inception of the 2015/2016 Policies.

126. The 2015/2016 Insurers' no-coverage position as to the Prior Notice Exclusion suffers from a variety of fatal problems.

(a) First, the only notices sent to liability insurers that occurred before the 2015/2016 Policies' November 1, 2015 inception date were those sent by the Receivership Entity to the 2014/2015 Insurers in connection with the CFPB and SEC Investigations. Notice of the Enforcement Action did not occur, however, until mid-to-late March 2016, many months *after*

November 1, 2015, when the SEC filed its complaint. Accordingly, any fact, circumstance, or situation asserted in the Enforcement Action is irrelevant for purposes of the exclusion's application.

(b) Second, by its terms, the Prior Notice Exclusion applies only if a **Claim** arising from, based upon, or attributable to any fact, circumstance, or situation that, before the November 1, 2015 inception date, "was *the subject* of the notice." The word *"the"* refers to something in the singular. By its terms, this means that the **Claim** the insurers are seeking to exclude must arise from, be based upon, or be attributable to a particular subject for which notice was previously provided (here, the CFPB Investigation and the SEC Investigation). The subject of the CFPB Investigation was the Receivership Entity's relationship with Corinthian. Simply reviewing the Investors' Claim(s) shows that that **Claim** is not based on, arising from, or attributable to the CFPB Investigation and, at best, from the insurers' perspective has a very tangential and remote connection with that investigation. Similarly, the subject of the SEC Investigation is set forth in the SEC subpoena and Formal Order referenced above. Again, it is readily apparent that the Investors' Claims are based upon, arise out of, or are attributable to many different things and are only remotely connected in any way to that investigation. Thus, the Prior Notice Exclusion does not apply to the Investors' Claims.

(c) Finally, even if the Exclusion were found to apply, its scope is limited to the particular subject of the prior notice and under the 2015/2016 Policies' Allocation provisions would not bar coverage for those aspects of the Investors' Claims that are outside of the exclusion's purview.

4. Starr's Reliance on the "Pending Or Prior Litigation Exclusion" and the 2014 Warranty Letter Is Meritless.

127. Starr has also denied coverage based upon the "Pending Or Prior Litigation Exclusion" in its Policy. Starr's position is erroneous for several reasons, including, but not limited to, the following:

(a) The Pending Or Prior Litigation Exclusion is incomprehensible as written and, thus, it is not enforceable.

(i) Starr's inclusion of the term "the" in the phrase "as of **the** July 1, 2014 any pending or prior …" renders the Pending Or Prior Litigation Exclusion incomprehensible on its face. Indeed, counsel for Starr implicitly acknowledged this problem when he attempted in his July 11, 2016 letter to "clean up" Starr's confusing drafting by omitting the word "the" when he purportedly "quoted" the exclusion.

(ii) A court may not permit the party who drafted an incomprehensible term or phrase to benefit from the ambiguity. Nor does a court have the right or power to alter or amend contractual terms.

(iii) Accordingly, the Pending Or Prior Litigation Exclusion is not enforceable.

(b) The Pending Or Prior Litigation Exclusion is also not susceptible to an interpretation that it includes an "informal" investigation.

(i) Starr's July 11, 2016 letter, which was purportedly incorporated into its February 7, 2018 letter (without any policy interpretation or analysis), simply assumes that the reference to the term "investigation" in the Pending Or Prior Litigation Exclusion in Endorsement No. 6 includes both informal and formal investigations. Starr's unsupported assumption is not well taken.

(ii) The caption of the exclusion itself is titled "Pending Or Prior *Litigation* Exclusion" (emphasis added).

(iii) Starr also expressly states in the body of the exclusion that it applies to "(1) litigation." Starr does not define the term "litigation."

(iv) Where a policy does not define a particular term, the Court must presume that the words have their plain, ordinary meanings. The plain, ordinary meaning of an undefined term may be ascertained by referring to a dictionary.

(v) The term "litigation" means "the action or process of carrying on a suit in law or equity; legal proceedings; … in process of investigation before a court of law." It is also interpreted as "1. The process of carrying on a lawsuit; 2. A lawsuit itself." By contrast, arbitration does not fit within the plain, ordinary meaning of the term "litigation."

(vi) The inclusion in both the caption and the body of the exclusion of the undefined term "litigation" connotes that the exclusion applies to formal lawsuits. This meaning is wholly consistent with the plain, ordinary meaning of the other terms used within the exclusion itself.

(vii) The exclusion states, in pertinent part, that it applies to "(1) litigation; (2) administrative or regulatory *proceeding* or investigation of which an Insured had notice, …" (Emphasis added.) The common dictionary definition of a "proceeding" is a "legal action." Thus, the term "proceeding" as used in the Pending Or Prior Litigation Exclusion refers to a formal legal action of some kind, albeit one that does not qualify as a lawsuit, brought in a court or other official tribunal.

(viii) Thus, the words "administrative or regulatory proceeding" must therefore refer to a "formal" process brought by a regulatory agency, such as the SEC. Accordingly, one can reasonably infer from the use of the term "investigation" immediately following the terms "administrative or regulatory proceeding" that it also refers to a formal and structured investigation brought by a regulatory agency, such as the SEC, and not informal requests for information or documents. Further, the dictionary definition of the word "investigation" itself makes clear it involves a formal proceeding of some kind.

(ix) In summary, (i) the exclusion's use of the term "litigation" in its title; (ii) the exclusion's use of the term "litigation" in its body; (iii) the exclusion's use of the term "proceeding" in its body; and (iv) the dictionary definition of "investigation" all point to the conclusion that the term "investigation" as used in the Pending Or Prior Litigation Exclusion refers to a formal investigation. Conversely, there is nothing within the terms of the Pending Or Prior

Litigation Exclusion that points to "informal investigations" (as Starr has described them) as being within the contemplation of the parties.

(x) Even if the term "investigation" were ambiguous regarding whether it applies to an informal investigation, it would be construed against the drafter (i.e., Starr).

(xi) If Starr had meant the Pending Or Prior Litigation Exclusion to include both formal and informal investigations, it could have easily written the exclusion to provide: "… administrative or regulatory proceeding or investigation, *whether formal or informal*, of which an Insured had notice, …" (Emphasized words added.)

(xii) Starr, in asserting that the Pending Or Prior Litigation Exclusion applies to informal investigations, is effectively trying to rewrite its exclusion, something it cannot do under Oregon law.

(c) Starr's description of an "informal" investigation also goes far beyond what the Catlin Policy described as an informal investigation.

(i) The Receivership Entity's interpretation that the Pending Or Prior Litigation Exclusion does not apply to informal investigations is further reinforced by looking at the terms of the primary policy used by Catlin.

(ii) Catlin, in using the term "investigation," felt it necessary to distinguish between types of investigations, i.e., a "formal" investigation and an informal investigation. Specifically, Catlin distinguishes in its policy form between a formal investigation (one that falls within that policy's definition of "Claim" and is commenced by an Insured's receipt of, *inter alia,* a Wells Notice, a formal subpoena, or a formal order of investigation) and an "informal investigation" (which is one of the supplementary coverages set forth in the policy form used by Catlin). There would have been no need to distinguish between an investigation and an informal investigation if the word "investigation" in and of itself encompassed both formal and informal investigations.

(iii) Moreover, the "informal investigation" coverage described in the Catlin policy is very limited in scope and applies *only* to pre-Claim expenses of an Insured Person who receives a subpoena from an investigatory authority asking him or her to appear or produce documents in connection with the Insured Organization and the Asset Management services that such Insured Person provides for the organization. This "informal investigation" Supplemental Coverage discussed in the Catlin policy is a much narrower and much more formal process than what Starr's counsel described in his July 11, 2016 correspondence.

(iv) Starr's description of an "informal investigation" is so broad that it would effectively include any requests for information or documentation made in connection with the periodic compliance examinations of Aequitas Investment Management ("AIM") conducted by the SEC's Office of Compliance Inspections and Examinations ("OCIE"). Such a result is, however, far beyond what one normally would consider to be an investigation.

128. Another ground upon which Starr has denied coverage—the 2014 "warranty" letter—is equally meritless.

(a) To support Starr's coverage position, in his July 11, 2016 correspondence, Starr's counsel references allegations in the Enforcement Action Complaint that supposedly indicate that Oliver and Jesenik knew, as of July 2014, of acts, errors, or omissions that might give rise to a claim, suit, or action.

(b) A significant problem with Starr's "warranty letter" defense is that the language it uses is divorced from the language of the Catlin primary policy, which the Starr policy incorporates by reference. For example, the warranty letter by its express terms is limited to "*acts, errors or omissions*," which are a subset of the kind of wrongful conduct that are the subject of these policies. Rather, the full panoply of wrongful conduct these policies cover can be determined by looking to the Policies' definition of "**Wrongful Acts**". "**Wrongful Act**" is defined to mean, in pertinent part, any actual or alleged "*act, error, omission, statement, misstatement, misleading statement, neglect or breach of duty.*" (Italics added.)

(c) Thus, by its express terms, the language of the warranty letter applies only to knowledge or information of acts, errors, or omissions and does *not* apply to wrongful conduct that qualifies as a statement, misstatement, misleading statement, neglect or breach of duty.

(d) The phrase "act, error or omission" or "negligent act, error or omission" is commonly used in professional liability policies to describe the nature of the conduct those policies cover. Additionally, the meaning of the words "error" and "omission" connote some form of wrongful conduct and, when used with the term "act" in the phrase "act, error or omission," infer some form of wrongful conduct.

(e) Accordingly, when Starr's "warranty letter" refers to "knowledge or information" of any "act, error or omission," it is referring to knowledge or information about specific forms of wrongful conduct in the form of "acts, errors or omissions" (which itself involves a subjective determination) and *not* knowledge or information about the circumstances or situations that form the underlying factual basis upon which someone could conclude that an "act, error or omission" had taken place.

(f) Starr's assertion that the complaint in the Enforcement Action shows knowledge or information about acts, errors, or omissions as of July 2, 2014, is not supported.

(i) A review of the Enforcement Action Complaint reflects that it refers generally to knowledge or information about the underlying factual circumstances, i.e., that the Receivership Entity was insolvent, and it *does not refer* to knowledge or information about any act, error or omission occurring as of or prior to July 2, 2014.

(ii) Moreover, any wrongful conduct based upon knowledge or information regarding the insolvency of the Receivership Entity would have been in the form of a misstatement or misleading statement occurring sometime after July 1, 2014 (or July 2, 2014), that did not accurately describe the financial condition of the Receivership Entity as of the end of the second quarter 2014.

(g) Because there are misstatements or misleading statements occurring after July 2, 2014, the warranty letter does not apply for at least two different reasons.

(i) First, since the wrongful conduct at issue is in the form of a misstatement or misleading statement, it is outside the scope of the warranty letter's focus upon an act, error, or omission.

(ii) Second, even if one conflated "omission" as being included within the concept of a misstatement or misleading statement, any such misstatements or misleading statements about the Receivership Entity's solvency or insolvency would have occurred sometime later in 2014, *after* July 2, 2014, describing the Receivership Entity's financial condition as of the end of the second quarter 2014. Because the "omission" occurred after July 2, 2014, it is once again outside the purview of the "warranty letter."

(iii) Therefore, Starr's "warranty letter" coverage defense does not apply to the Enforcement Action, and it does not form a legitimate basis for Starr denying coverage for its 2014/2015 second-level excess policy.

(h) Finally, Starr's "warranty" letter coverage defense also fails because the "warranty" letter, which became part of the application on which Starr purportedly relied when issuing its policy to Aequitas Holdings, was not physically attached to the Starr 2014/2015 Policy. As such, it is not enforceable under Oregon law. ORS 742.013 ("Misrepresentations, omissions, concealments of facts and incorrect statements shall not prevent a recovery under the policy unless the misrepresentations, omissions, concealments of fact and incorrect statements: (a) Are contained in a written application for the insurance policy, and a copy of the application is indorsed upon or attached to the insurance policy when issued …").

I. THE RECEIVER'S INQUIRIES INTO WHETHER CATLIN AND FORGE COMPLIED WITH OREGON'S SURPLUS LINES LAWS REVEALED THEY DID NOT DO SO.

129. Both Catlin and Forge assert that the limits of liability of each of their respective policies are reduced by their payment of **Defense Costs**—which are commonly referred to as "burning limits" policies—and that they have each "exhausted" their respective $5,000,000 in limits of liability, for a combined total of $10,000,000, through their payment of the **Defense Costs** incurred by the Individual Defendants (Jesenik, Oliver, and Gillis) in connection with their defense of the Enforcement Action.[6]

[6] The subject policies contain or incorporate by reference a Regulatory Exclusion that bars coverage for "Claims" brought against Insureds by regulatory agencies, such as the SEC. However, the Regulatory

130. The Receiver, by contrast, does not believe that either Catlin or Forge (under its 2014/2015 Policy) are entitled under Oregon law to reduce (and ultimately exhaust) their respective limits of liability by payment of **Defense Costs** because of their failure to comply with ORS § 742.063, which prohibits insurers in Oregon from issuing a "burning limits" policy until the policy form has been approved by Oregon's Director of the Department of Consumer and Business Services.

131. Insurance carriers that want to conduct business in the State of Oregon as admitted Oregon insurers must meet certain financial conditions and comply with each requirement of ORS 742.001, *et seq*. In the event an admitted insurer becomes insolvent, its insureds are then protected by the Oregon Insurance Guaranty Association, which, subject to ORS 734.510-734-710, steps into the insolvent insurer's shoes.

132. If a non-admitted insurer wants to conduct business in Oregon, it can do so only as a surplus lines insurer. Moreover, to obtain the benefit of issuing policies to Oregon Insureds as a non-admitted surplus lines insurer, it must fulfill certain statutory requirements. Only a licensed surplus lines producer (broker) holding a current Oregon license is authorized to place surplus lines insurance in Oregon. *See* ORS 735.450.

133. To qualify as a surplus lines insurer, the non-admitted insurer must, through the licensed surplus lines producer, satisfy, *inter alia*, the following conditions:

(i) Notify the insured that an admitted insurer is not available to the insured to cover the risk(s) being insured. ORS 735.425.

(ii) The surplus lines insurer must meet certain financial requirements as set forth in ORS 735.415.

(iii) The policy issued must comply with ORS 742.435(6), which provides as follows:

Exclusion contains an exception for Insured Persons, such as Jesenik, Oliver, and Gillis, which means that the 2014/2015 Policies are triggered for each of them, at least for purposes of paying their **Defense Costs** in that action.

> Each insurance policy or certificate of insurance negotiated, placed or procured under the provisions of ORS 735.400 to 735.495 by the surplus lines licensee *shall* bear the name of the licensee and the following legend in bold type: This insurance was procured and developed under the Oregon surplus lines laws. It is NOT covered by the provisions of ORS 734.510 to 734.710 relating to the Oregon Insurance Guaranty Association. If the insurer issuing this insurance becomes insolvent, the Oregon Insurance Guaranty Association has no obligation to pay claims under this insurance. (Italics added).

(iv) As reflected by the term "shall," compliance with ORS 735.435(6) is mandatory for every surplus lines policy issued to an Oregon insured. Neither the Catlin nor the Forge policies contain this required legend. Thus, the policies fail to comply with an essential provision of Oregon's surplus lines laws.

134 Neither Catlin nor Forge meet the requirements needed to satisfy the Oregon surplus lines laws. No letter was sent to the Receivership Entity stating that admitted insurers were not available to cover the risks being insured by these policies. Further, the required notices in the policies informing the insured(s) that coverage was being placed with a non-admitted surplus lines carrier were not contained in the policies issued. Finally, a licensed Oregon surplus lines producer was not used to place the surplus lines insurance. On these bases alone, neither Catlin nor Forge qualify as an Oregon surplus lines insurer for purposes of the 2014/2015 Policies they issued to the Receivership Entity.

135. Accordingly, since neither Catlin nor Forge is a surplus lines insurer, the requirements of ORS 742.063 are not excused and their policies under Oregon law do not reduce limits of liability by payment of **Defense Costs**.

136. Further, the Forge policy also does not contain any express term that would even arguably comply with ORS 742.063.

137. Finally, when confronted with their failure to comply with Oregon surplus lines requirements, Catlin and Forge suddenly provided documents that purported to contain the notices under ORS 735.435(6), neither of which was previously provided to the Receivership Entity. Moreover, the document produced by Catlin was determined to have been recently altered, by

adding the ORS 735.435(6) notice, under circumstances that are highly suspect. Significant doubts also exist about the authenticity of the document produced by Forge.

J. THE RECEIVER MAY BRING CLAIMS AGAINST CATLIN/XL AND FORGE TO CLAW BACK IMPROPERLY REIMBURSED DEFENSE COSTS.

138. As noted above, in his October 23, 2017 Opinion and Order, Judge Papak made clear that the Receiver may bring claims against Catlin and Forge to claw back defense costs that they had improperly paid. (*See* Dkt. No. 551 at p. 11 ("[A]s already discussed, while it is possible that it may ultimately be determined (presumably, in connection with some judicial proceeding other than this one, unless new claims or cross-claims are filed by the receiver in this action) that some of the amounts already tendered by Catlin were improperly disbursed under the terms of its policy, and possible that counsel for one or more of the individual defendants may in the future successfully attempt to receive reimbursement from Forge for unreasonably incurred attorney fees or for attorney fees incurred in connection with matters outside the scope of policy coverage …")).

139. The Receiver has in fact called into question substantial amounts of defense costs that have been reimbursed.

140. In the Declaration of James P. Schratz, for example, which was filed in support of the Receivership Entity's Opposition to the Motions of the Individual Defendants for Relief from Stay [Dkt. No. 530], Mr. Schratz declared that "[b]ased on [his] experience as an attorney, insurance executive and expert witness and consultant it is [his] opinion that there is no indication the primary carrier here, Catlin, spent the time to analyze the bills [submitted by counsel for the Individual Defendants] looking for such potential red flags [such as vague entries, excessive minimum billing increments, excessive intra firm conferencing, excessive hourly rates, multiple attendance at hearings or depositions, billing for clerical work, multiple attorneys reviewing the same document, and billing for work not covered by the insurance policy]."

141. The Receivership Entity has also pointed out, for example, that (1) legal services have been performed on Jesenik's behalf by Gibson Dunn & Crutcher ("Gibson") (primarily) that

did not involve defending Jesenik in the Enforcement Action; (2) the Rose Law Firm ("Rose") (local counsel for Jesenik) has incurred **Defense Costs** totaling $207,600 for a five month period; and (3) between March and July 2017, the combined payments made by Catlin to Jesenik's counsel dwarfed payments made to counsel for Gillis and Oliver.

142. In addition to expressing concerns about the amounts that Catlin and Forge have paid to Jesenik's counsel, the Receivership Entity has also expressed alarm about the number of firms (local and national) that Jesenik has used. As of August 3, 2017, Jesenik replaced Gibson and the local counsel he was using (Stoel Rives) with Schulte Roth & Zabel and new local counsel (Rose). Jesenik then replaced Rose with the Mahler Law Group, and also retained the Jonak Law Group, P.C. as co-counsel.

FIRST CAUSE OF ACTION – BREACH OF CONTRACT

(Against 2015/2016 Insurer Defendants Forge and Underwriters)
(Interrelated Claims and Prior Notice Exclusion)

143. The Receiver hereby realleges and incorporates by reference each of the allegations made herein at paragraphs 1 through 142, inclusive.

144. Forge's and Underwriters' 2015/2016 Policies promise to provide coverage for **Loss**, which an **Insured Organization** becomes legally obligated to pay resulting from a **Claim** first made against the **Insured Organization** during the **Policy Period** for a **Wrongful Act**.

145. The Investors' Claims against the Receivership Entity sought total potential damages from the Receivership Entity in excess of $600 million, with the Receivership Entity's liability almost certainly to be established if the Investors' Claims were litigated and a judgment was ultimately entered. Further, the Receivership Entity's potential liability for damages for those portions of the Investors' Claims that qualify as a **Claim** deemed first made during the 2015/2016 **Policy Period**, which triggers coverage for **Loss** under the 2015/2016 Policies, is far in excess of the combined $10 million in limits of liability available under Forge's and Underwriters' policies.

146. Nevertheless, at all material times, Forge and Underwriters have materially breached their respective 2015/2016 Policies of insurance, attached hereto as Exhibits 4 to 6, by failing and refusing pay their respective $5 million limits of liability coverage based upon their respective erroneous reliance on the Interrelated Claims provision and the Prior Notice Exclusion found or incorporated by reference in their respective policies.

147. Forge and Underwriters, in connection with their respective 2015/2016 Policies, have respectively breached their duty to pay **Loss** on behalf of the Receivership Entity, as the representative of the **Insured Organizations**, here in the form of a settlement on multiple occasions: (i) by denying coverage for the Investors' Claims, after they received notice of the Investors' Claims, prior to any settlement discussions between the Receivership Entity and the investors; (ii) after they knew the investors were willing to settle the Investors' Claims for a total of $21 million; and, after the $21 million proposed settlement fell through; (iii) when each 2015/2016 Insurer was specifically asked to contribute their respective $5 million limits of liability toward a proposed settlement between the investors and the Receivership Entity to settle the Investors' Claims for $30 million.

148. The Receivership Entity and the investors, following Forge's and Underwriters' repeated denials of coverage with respect to their 2015/2016 Policies, ultimately entered into a settlement whereby the Receivership Entity has agreed to pay the investors a total of $30 million in full and complete settlement of the Investors' Claims.

149. The Receivership Entity has fully satisfied all terms and conditions under the 2015/2016 Forge and Underwriters (and/or those terms and conditions have been waived and/or excused), including but not limited to the payment of premiums, the submission of timely written notice of the Investors' Claims, the demand for coverage under the policies and the insurers' consent to settle.

150. As a proximate cause of the breaches of each of the 2015/2016 Insurers, Defendants Forge and Underwriters are each obligated to pay $5 million in connection with their 2015/2016

Policies towards satisfaction of the $30 million in **Loss** the Receivership Entity is legally obligated to pay because of its settlement of the Investors' Claims.

SECOND CAUSE OF ACTION – BREACH OF CONTRACT

(Against Defendant Starr Under Both Its 2014/2015 and 2015/2016 Policies – Pending Or Prior Litigation Exclusion, 2014 Warranty Letter & "No Loss" Position, and Under Its 2015/2016 Policy – Interrelated Claims and Prior Notice Exclusion)

151. The Receiver hereby realleges and incorporates by reference each of the allegations made herein at paragraphs 1 through 150, inclusive.

152. On behalf of the insured Receivership Entity, the Receiver tendered the Investors' Claims to Starr.

153. The Receivership Entity has fully satisfied all terms and conditions under Starr's 2014/2015 second-level excess policy, attached hereto as Exh. 3, and under Starr's 2015/2016 second-level excess policy, attached hereto as Exh. 6 (and/or those terms and conditions have been waived and/or excused), including but not limited to the payment of premiums, the submission to Starr of timely written notice of the Investors' Claims, the demand for coverage under the policies, and obtaining Starr's consent to settle.

154. The Investors' Claims are covered **Claims** that seek covered **Loss** against the Receivership Entity under both Starr's 2014/2015 second-level excess policy and its 2015/2016 second-level excess policy.

155. For the reasons set forth above, including but not limited to Paragraph 146 of the First Cause of Action, which are incorporated herein by this reference, Starr, like Forge and Underwriters, has materially breached its 2015/2016 Policy of insurance, attached hereto as Exh. 6, by failing and refusing to pay its $5 million limits of liability coverage based upon its erroneous reliance on the Interrelated Claims provision and the Prior Notice Exclusion found or incorporated by reference in its 2015/2016 Policy.

156. In addition, Starr has materially breached its insurance contract with the Receivership Entity by, among other things, asserting: (i) in connection with its 2014/2015 Policy and the investors' $21 million settlement demand that it would not recognize the existence of **Loss** unless and until the Receivership Entity received court approval of any settlement it entered with the investors; (ii) in connection with its 2014/2015 Policy and the investors' $21 million settlement demand, that it had no obligation to provide the Receivership Entity with its coverage position(s) unless and until Forge exhausted the limits of its policy by either agreeing to pay the remaining limits or actually paying out its remaining limits; (iii) no coverage for any **Loss** in connection with the Investors' Claims under its 2014/2015 Policy, and presumably its 2015/2016 Policies, based upon the Pending Or Prior Litigation Exclusion found in its policies and application of the 2014 Warranty Letter.

157. Starr's reliance on its "no **Loss**" position unless and until the Receivership Entity obtains court approval of a settlement constitutes a breach of contract for a variety of reasons, including but not limited to the fact that it violates the "Bankruptcy" clause of underlying primary policies, which is found in Section XIII.D of Catlin's 2014/2015 Policy and Section XIII.D of Forge's 2015/2016 Policy, which is incorporated into Starr's second-level excess policies.

158. Starr's refusal to fully and completely articulate its coverage positions under its 2014/2015 Policy constitutes a breach of contract, as it had agreed that a potential for coverage existed under this policy, and its refusal to provide its positions was in violation of its policies' implied duty of good faith and fair dealing.

159. Starr's reliance on the Pending Or Prior Litigation Exclusion to deny coverage under its 2014/2015 and 2015/2016 Policies constitutes a breach of contract for the reasons set forth in Paragraph 127(a) through (c) above.

160. Starr's reliance on the 2014 "warranty" letter to deny coverage under its 2014/2015 and 2015/2016 Policies also constitutes a breach for the reasons set forth Paragraph 128(a) through (h) above.

161. As a proximate cause of Starr's breaches of contract as set forth herein, it is obligated to pay $5 million under its 2014/2015 Policy and a separate $5 million under its 2015/2016 Policy.

THIRD CAUSE OF ACTION – BREACH OF CONTRACT

(Against 2014/2015 Defendants Catlin and Forge – Failure to Comply With ORS 742.063 and Do Not Qualify as Surplus Lines Insurers)

162. The Receiver hereby realleges and incorporates by reference each of the allegations made herein at paragraphs 1 through 161, inclusive.

163. Defendants Catlin and Forge both assert that the limits of liability of their respective policies are reduced by their payment of **Defense Costs** (which are commonly referred to as "burning limits" policies) and that they have each "exhausted" their respective $5 million in limits of liability for the 2014/2015 Policy Year, for a combined total of $10 million, through their payment of **Defense Costs** incurred by the Individual Defendants in the Enforcement Action.

164. The Receiver, by contrast, has established that neither Catlin nor Forge is entitled under Oregon law to reduce (and ultimately exhaust) its respective limit of liability by payment of **Defense Costs** because of their failure to comply with ORS 742.063, which prohibits insurers in Oregon from issuing a "burning limits" policy until the policy form has been approved by Oregon's Director of the Department of Consumer and Business Services and, as a result, any monies paid by Defendants Forge and Starr to reimburse the Individual Defendants' **Defense Costs** in the Enforcement Action did not reduce their respective limits of liability. Consequently, the full $5 million in limits under each policy is available for payment of **Loss**, other than **Defense Costs**.

165. The Investors' Claims that qualify as claims deemed first made during the 2014/2015 **Policy Period**, which trigger coverage for **Loss** under the 2014/2015 Policies, are far in excess of the available, combined Catlin and Forge $10 million in limits of liability.

166. Both Defendants Catlin and Forge have breached their 2014/2015 Policies by failing and refusing to pay their respective $5 million limits of liability coverage when they were

presented with the proposed $30 million settlement between the Receivership Entity and the investors, based upon their respective erroneous assertions that their policies were exhausted.

167. The Receivership Entity and the investors ultimately entered into a settlement whereby the Receivership Entity agreed to pay the investors $30 million in full and complete settlement of the Investors' Claims.

168. The Receivership Entity has fully satisfied all terms and conditions under the 2014/2014 Catlin and Forge policies and/or those terms and conditions have been waived and/or excused, including but not limited to the payment of premiums, the submission of timely written notice of the Investors' Claims, the demand for coverage under the policies and the insurer's consent to settle.

169. As a proximate cause of the breaches of Defendants Catlin and Forge under their respective 2014/2015 Policies, each is obligated to pay $5 million towards satisfaction of the $30 million in **Loss** the Receivership Entity is legally obligated to pay because of its settlement of the Investors' Claims.

FOURTH CAUSE OF ACTION – BREACH OF DUTY TO PRESERVE ASSETS OF THE RECEIVERSHIP ESTATE

(Against Defendants Catlin and Forge – 2014/2015 Policy)

170. The Receiver hereby realleges and incorporates by reference each of the allegations made herein at paragraphs 1 through 169, inclusive.

171. The Receivership Entity has an ownership interest in the proceeds from the Receivership Entity's subject insurance policies. In Judge Papak's October 10, 2017 Opinion and Order in the Enforcement Action (Dkt. No. 551 at p. 8), for example, the Court concluded that: "the receivership entity has an ownership interest in proceeds from the Forge policy, with the result that the proceeds of that policy constitute receivership assets under the receivership order subject to the asset freeze …. Because the receivership entity has a beneficial interest (and also because the receivership entity has a direct or indirect right to control) in some portion of the proceeds of the Catlin and/or Forge policies, under the express terms of the receivership order, the proceeds of

the policies are receivership assets." Thus, the proceeds of all the policies are property of the Receivership Estate.

172 In the same Opinion and Order, on page 11, Judge Papak determined that "to the extent that any individual defendant is receiving improper payments from any insurer to the detriment of the receivership entity, the receivership entity can make a claim against that defendant and/or his insurer seeking repayment of such payments (again, presumably, but not necessarily through a separately filed action)."

173. The Receiver may avoid transfers by Defendants Catlin and Forge in the form of reimbursement of the Individual Defendants' **Defense Costs** in the Enforcement Action to the extent those reimbursements were improper and/or unreasonable.

174. The burden is on Defendants Catlin and Forge to establish as an affirmative defense, if any, that all of their reimbursements of the Individual Defendants' **Defense Costs** in the Enforcement Action were proper and reasonable.

175. Therefore, to the extent that their policies' limits of liability are reduced by payment of **Defense Costs**, the Receiver seeks to recover reimbursement payments made by Defendants Catlin and Forge to the Individual Defendants' counsel for **Defense Costs** in the Enforcement Action that are (a) inconsistent in any way with the billing guidelines generally relied upon by Defendants Catlin and/or Forge, (b) inconsistent with the interim or permanent Orders Appointing Receiver (Dkt. Nos. 30 and 156), (c) inconsistent with the terms of the policies issued by Defendants Catlin and/or Forge, and/or (d) inconsistent with Oregon law and/or public policy, because they are property of the Receivership Estate to be held pursuant to a constructive trust for the benefit of the Receivership Estate, for an amount equaling the amount of said improperly reimbursed monies. The Receiver further seeks an award of reasonable attorneys' fees, costs, and interest, in connection with efforts to recover such improperly reimbursed monies.

FIFTH CAUSE OF ACTION – BREACH OF THE DUTY TO SETTLE

(Against 2014/2015 Defendants Forge and Starr)

176. The Receiver hereby realleges and incorporates by reference each of the allegations made herein at paragraphs 1 through 175, inclusive.

177. On behalf of the Receivership Entity, the Receiver timely tendered the Investors' Claims to both Defendants Forge and Starr under their respective 2014/2015 Policies.

178. The Receivership Entity has fully satisfied all terms and conditions under the 2014/2015 Policies issued by Defendants Forge and Starr, and/or those terms and conditions have been waived and/or excused.

179. Both Defendants Forge and Starr, under their respective first-level and second-level 2014/2015 Policies, acknowledged that the Investors' Claims sought recovery of **Loss** from the Receivership Entity that triggered, or at least potentially triggered, coverage under their policies. As a consequence, Defendants Forge and Starr were entitled, under the terms of their policies (such as the cooperation clause and the need to obtain the insurers' consent before incurring any **Loss** (which includes a settlement)) to receive (and they did receive) both written and oral evaluations of the Investors' Claims. These evaluations were provided by defense counsel the Receiver appointed to handle the Investors' Claims, and they contained analysis of the Receivership Entity's potential liability and the likely amount of damages the investors would ultimately receive if their claims were tried, as well as relevant documentation regarding the evaluations

180. Under Oregon law in such circumstances, Defendants Forge and Starr had an affirmative duty to contribute their policy limits to assist their insured(s) in obtaining as favorable a settlement with claimants as could be obtained. Additionally, both Defendants Forge and Starr understood at the time and took the position that the **Loss**, in the form of **Defense Costs** paid to the Individual Defendants in connection with their defense of the Enforcement Action, would reduce their limits of liability. Under these circumstances, Forge (for its 2014/2015 first-level excess policy) and Starr (for its 2014/2015 second-level excess policy) had affirmative obligations to contribute what they believed to be, at the time, their respective available limits of liability on behalf of the Receivership Entity toward satisfying the $21 million settlement demand made by the investors.

181. Oregon law imposes a heightened duty on a liability insurer to expeditiously effectuate a settlement on behalf of its insured(s) where it has received a settlement demand within policy limits. This heightened duty applies to both Forge and Starr. Additionally, Forge's and Starr's duty was further heightened due to their understanding upon their receipt of the within-limits settlement demand that their limits of liability to respond to the settlement demand were being reduced (or, as the case may be, impaired) by the **Defense Costs** being incurred by other insured(s) (here, the Individual Defendants in the Enforcement Action), causing the available limits to be reduced and therefore insufficient to meet the within-policy-limits demand.

182. Defendants Forge and Starr are also subject to a duty of care to settle the Investors' Claims by virtue of the special relationship between the insurers and insureds.

183. Rather than promptly respond to the Investor's $21 million settlement demand, however, Defendants Forge and Starr essentially sat on their hands for six weeks.

184. Defendants Forge and Starr also unreasonably withheld their consent to allow the Receiver to enter into the settlement. Specifically, Defendants Forge and Starr took the position that (1) an insurer owes no duty to settle under Oregon law absent a duty to defend, and (2) the Receivership Entity will not sustain **Loss** per the terms of their respective policies until the Receiver obtains Court approval of any settlement the Receiver enters with the investors.

185. Defendants Forge and Starr materially breached their duties to settle the Investors' Claims by failing and refusing to assist their Insured(s) in connection with the investors' $21 million settlement demand within policy limits.

186. In addition, implied in the Forge and Starr policies is a covenant that Defendants Forge and Starr would act in good faith and deal fairly with their Insured, the Receivership Entity, and that Defendants Forge and Starr would do nothing to interfere with the rights of their Insured to receive the benefits of their policies, which includes, *inter alia*, the duty to settle all claims that may result in an amount in excess of the policy limits, while at least giving the same level of consideration to their Insured's interest as they give to their own.

187. Instead of complying with these duties, Defendants Forge and Starr acted in bad faith when, among other things, they did the following:

(a) The investors knew when they made their $21 million settlement demand that the Receivership Entity's 2015/2016 Insurers, representing $15 million in limit of liability, had denied coverage in connection with Investors' Claims. Consequently, the investors—whose counsel are presumably quite familiar with Oregon "bad faith" and "breach of the duty to settle" law—were looking to effectuate the $21 million settlement by recovering at least the $6 to $7 million in cash available under the 2014/2015 Policies issued by Defendants Forge and Starr and the right to recover (presumably through litigation) the balance of the $21 million settlement from the $15 million in limits of the 2015/2016 Policies. Neither Forge nor Starr made any inquiries about the specific terms of the proposed $21 million settlement demand, including how much of it the investors were willing to take in cash.

(b) Forge undertook no affirmative action following receipt of the $21 million settlement demand on February 16, 2018, by offering its then-available unexhausted limits (or any part of them) toward satisfying the demand. This was a breach of its affirmative duty to effectuate a settlement on its insured's behalf. Even after it received an express request to consent to the Investors' $21 million settlement on May 3, 2018, rather than immediately and unequivocally agreeing to provide its unexhausted limits of liability, it raised numerous specious positions refusing to unequivocally consent and agree to pay its unexhausted limits.

(c) Especially egregious here is that Forge did this while at the same time asserting its remaining limits of liability were being eroded by the **Defense Costs** the Individual Defendants' were incurring in defending the Enforcement Action. Once again this was a breach of Forge's duty to settle the Investors' Claims.

(d) Starr's actions are equally as egregious. Like Forge, it did nothing after it received the $21 million settlement demand. And after it received an express request for its consent, it delayed and asserted numerous specious conditions and qualifications to its consent, including when it would recognize the existence of **Loss**. Starr also subsequently refused to pay its $5 million in limits (or any part of them) based upon its reliance upon its inapplicable, unreasonable, and inappropriate Pending Or Prior Litigation Exclusion and “warranty” letter coverage defenses.

(e) Starr asserted its willingness to pay out the limits of its 2014/2015 Policy, but only if the investors gave up their rights to seek recovery from Starr regarding its 2015/2016 Policy, for which Starr had previously denied coverage.

(f) Starr, while denying it has any obligation to pay **Loss** under its 2014/2015 Policy as to the Receivership Entity, nevertheless has paid **Loss,** in the form of **Defense Costs**, to the Individual Defendants.

(g) Each of the aforementioned items of conduct attributable to Forge both alone and in combination constitute breaches of Forge’s duty to settle the Investors’ Claims. Likewise, each of the aforementioned items of conduct attributable to Starr, both alone and in combination, constitute breaches of Starr’s duty to settle the Investors’ Claims.

188. In breach of the implied covenant of good faith and fair dealing, Forge and Starr committed the acts alleged above for the purpose of consciously withholding from the Receivership Entity the contractual rights and benefits to which they are and were entitled under the policies. Those acts are inconsistent with the reasonable expectations of the insured Receivership Entity, are contrary to the well-established claims practices and legal requirements, are contrary to the express terms of the policies, and constitute bad faith.

189. The Receivership Entity is entitled to recover all attorneys’ fees that it reasonably incurred, and continues to incur, in its efforts to obtain the benefits of insurance that have been, and continue to be, wrongfully and in bad faith withheld by Defendants Forge and Starr.

190. As a proximate result of the wrongful failure to settle the Investors’ Claims within policy limits when a reasonable opportunity to do so existed for Defendants Forge and Starr, the Receivership Entity became liable in the amount of $30 million to settle the Investors’ Claims.

191. Accordingly, as a direct and proximate result of the acts of Defendants Forge and Starr, the Receivership Entity has been damaged in an amount in excess of the Court’s

jurisdictional limits. Indeed, the damages proximately caused by the bad-faith conduct of Defendants Forge and Starr include, but are not limited to, the extra-contractual losses sustained by the Receivership Entity as a consequence of the bad-faith conduct, which includes all portions of the $30 million settlement with the investors that the Receivership Entity does not recover from Defendants Catlin, Forge, Starr and Underwriters as part of their obligation to pay **Loss**.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

WITH RESPECT TO THE FIRST CAUSE OF ACTION:

1. For general, consequential, and compensatory damages incurred by the time of trial of an amount of $10 million, together with interest thereon at the legal rate, awarded to the Receivership Entity.

2. For reasonable attorneys' fees pursuant to ORS 742.061(1).

WITH RESPECT TO THE SECOND CAUSE OF ACTION:

3. For general, consequential, and compensatory damages incurred by the time of trial of an amount of $10 million, together with interest thereon at the legal rate, awarded to the Receivership Entity.

4. For reasonable attorneys' fees pursuant to ORS 742.061(1).

WITH RESPECT TO THE THIRD CAUSE OF ACTION:

5. For general, consequential, and compensatory damages incurred by the time of trial of an amount of $10 million, together with interest thereon at the legal rate, awarded to the Receivership Entity.

6. For reasonable attorneys' fees pursuant to ORS 742.061(1).

WITH RESPECT TO THE FOURTH CAUSE OF ACTION:

7. To the extent applicable, that this Court enter an Order awarding reimbursement of payments made by Defendants Catlin and Forge to the Individual Defendants' counsel for **Defense Costs** in the Enforcement Action that are (a) inconsistent in any way with the billing guidelines

generally relied upon by Defendants Catlin and/or Forge, (b) inconsistent with the interim or permanent Orders Appointing Receiver (Dkt. Nos. 30 and 156), (c) inconsistent with the terms of the policies issued by Defendants Catlin and/or Forge, and/or (d) inconsistent with Oregon law and/or public policy, because they are property of Receivership Estate and held pursuant to a constructive trust for the benefit of the Receivership Estate, for an amount equaling the amount of said improperly reimbursed monies. The Receiver further seeks an award of reasonable attorneys' fees, costs, and interest, in connection with efforts to recover such improperly reimbursed monies.

8. For reasonable attorneys' fees, costs, and interest, in connection with efforts to recover such improperly reimbursed monies.

WITH RESPECT TO THE FIFTH CAUSE OF ACTION:

9. For damages, plus interest, according to proof at the time of trial, together with interest thereon at the legal rate, awarded to the Receivership Entity.

10. For reasonable attorneys' fees pursuant to ORS 742.061(1).

WITH RESPECT TO ALL CAUSES OF ACTION:

For pre- and post-judgment interest according to proof, for costs of suit, and for such other and further relief and the Court may deem proper and just.

Dated this __ day of May, 2019

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

By: ______________________________

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Aequitas -- Meet & Confer Re Forge's, Starr's & Certain Underwriter's at Lloyd's Request to Lift Receivership Order Stay

Williams, John L. <JLWilliams@cozen.com> Thu, Apr 25, 2019 at 7:52 PM
To: Stanley Shure <sshure@shurelaw.com>
Cc: Salvatore Picariello <spicariello@gmail.com>, "Hess, Jordan A." <JHess@cozen.com>, "Buckner, Bonnie" <BBuckner@cozen.com>

Stan:

Thanks for your below email of yesterday evening. I called you earlier this afternoon. Per my voicemail, we cannot agree to your proposal that the stay be lifted for the limited purpose of allowing only the Receiver to sue my clients. Nor do we agree with your view that my clients do not have good cause to seek a lifting of the stay for the purpose of seeking declaratory relief or the suggestion that declaratory relief is belated, improper or "seeks relief that [is] unavailable as a matter of law." *See, e.g., State Farm Fire and Cas. Co. v. Reuter*, 294 Or. 446, 450 (1983); *Dasteur v. American Economy Ins. Co.*, 127 Or. App. 686, 690 (1994). As you know, my clients have held their request to lift the stay in abeyance since August 2018 in deference to the Receiver's request that they participate in mediation of the substantive dispute which ultimately proved unsuccessful. Further, *Fleshman v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist. LEXIS 95900 (D. Or. July 23, 2015), is inapplicable. In *Fleshman*, the plaintiffs asserted claims for breach of contract and sought duplicative declaratory relief for the same alleged breaches. Finally, we do not agree that my clients have breached or repudiated any obligations owed to their insureds. We do not believe, however, that the request to lift the stay is the appropriate platform to debate the merits of the parties' respective claims and will not do so here.

COZEN O'CONNOR

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From: Stanley Shure <sshure@shurelaw.com>
Sent: Wednesday, April 24, 2019 5:31 PM
To: Williams, John L. <JLWilliams@cozen.com>
Cc: Salvatore Picariello <spicariello@gmail.com>
Subject: Aequitas -- Meet & Confer Re Forge's, Starr's & Certain Underwriter's at Lloyd's Request to Lift Receivership Order Stay

EXTERNAL SENDER

EXHIBIT 2
Page 1 of 3

John,

I apologize for not getting back to you earlier today, but I had a few unexpected matters come up. In anticipation of our further meet and confer discussion (hopefully tomorrow morning or, as soon thereafter as is convenient for you), I thought it would make sense to send you this short email to lay out some of our thoughts in response to your request, on behalf of Forge, Starr and Underwriters at Lloyd's London, that the Receiver agree to stipulate to a partial lifting of the stay imposed by the Order Appointing Receiver so that your client could file a declaratory relief.

As a preliminary matter, in entering the Order Appointing Receiver (Dkt. No. 156), the Court found that Mr. Greenspan's appointment was necessary and appropriate for the purposes of marshaling and preserving all assets of the Receivership Defendants. As you know, and as the Court has already found, the Receivership Defendants' insurance policies are assets of the Receivership Estate. Among other things, the Court's Order also imposes a stay of litigation, enjoins interference with the Receiver, and gives the Receiver powers to control whether and when to proceed with litigation.

Given this posture, we appreciate your invitation to discuss the possibility of partially lifting the stay so that your clients – consisting of all the 2014/2015 and 2015/2016 insurers except for Catlin Specialty – could seek relief from the Court. That said, we are perplexed that your clients' request to partially lift the stay is to file a complaint for declaratory relief. Declaratory relief, as I'm sure you are aware, by its nature operates prospectively; it serves to set controversies at rest before they lead to repudiation of obligations. Here, each of your clients have all already denied owing any coverage obligations to its Insureds. See, e.g., Fleshman v. Wells Fargo Bank, N.A., 2015 U.S. Dist. LEXIS 95900 (D. Or. July 23, 2015) ("When there is an accrued cause of action for past breach of contract or other wrong, declaratory relief is inappropriate. The purpose of a declaratory judgment is to set controversies at rest before they cause harm to the plaintiff, not remedy harms that have already occurred. If a party has a fully matured cause of action for money, the party must seek damages rather than declaratory relief.") Your clients would not be harmed by a failure to lift the stay, as they always have the ability to fully litigate the validity of their coverage defenses upon institution of a suit by the Receivership Entity.

Under the circumstances presented, we do not believe good cause exists to lift the stay based upon: (1) the various powers granted to the Receiver to, *inter alia,* determine when litigation should occur; (2) the ability of your clients to have the validity of their coverage defenses determined in connection with a breach of contract action brought by the Receivership Entity; the fact that your clients' request to lift the stay seeks relief that unavailable as a matter of law.

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, 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.

EXHIBIT 2
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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.

Regards,

Stanley H. Shure

Law Offices of Stanley H. Shure

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EXHIBIT 2
Page 3 of 3

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August 16, 2018

VIA EMAIL

Stanley H. Shure
LAW OFFICES OF STANLEY H. SHURE
2355 Westwood Blvd., Suite 374
Los Angeles, CA 90064

Re:	**Assured:**	**Aequitas Holdings, LLC**
	Policy:	**Excess Claims Made Private Equity Liability Insurance**
	Policy No.:	**B0146ERUSA1400543**
	Policy Period:	**July 1, 2014 to July 1, 2015 (subject to extension)**
	Policy Limit:	**$5 million in the aggregate excess of $5 million**
	Matter:	**Investor Demands**
	Our File No.:	**45001-14**

Dear Mr. Shure:

As you know, we have been instructed by Forge Underwriting Ltd. ("Forge"), which issued the referenced Excess Private Equity Management Liability Insurance Policy ("the 2014/15 Forge Policy") to Aequitas Holdings, LLC, to represent its interests in connection with the following: (1) the August 10, 2017 letter from Samuels Yoelin Kantor, LLP to the Receiver's counsel, Schwabe, Williamson & Wyatt, PC ("Schwabe"; (2) the September 7, 2017 letter from Miller Nash Graham & Dunn LLP to Schwabe; (3) the September 11, 2017 letter from Stoll Berne PC to Schwabe; and (4) the September 12, 2017 letter from Larkins Vacura Kayser LLP to Schwabe (collectively, the "Investor Demands").

We write on behalf of Forge in response to (1) your July 24, 2018 letter regarding the policy forms used in the 2014/15 Forge Policy and the related surplus lines issues; and (2) your August 9, 2018 letter regarding the Investors' purported $30 million demand to settle their claims against the Receivership, as well as Schwabe's August 15, 2018 letter regarding the demand.[1]

[1] This letter is limited to Forge's position under the referenced 2014/15 Excess Policy. Forge will separately address the Investors' $30 million under Forge's 2015/16 Policy under separate cover.

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I. Policy Forms and Surplus Lines Issues

Forge has reviewed the Receivership's July 24, 2018 letter regarding the policy forms used in the 2014/15 Forge Policy. Notably, the Receivership does not dispute that PartnerRe (which Forge issued the 2014/15 Policy on behalf of) is a surplus lines insurer or that the 2014/15 Forge Policy is a surplus lines policy. Rather, the Receivership argues that the 2014/15 Forge Policy "[is]not entitled to the protections afforded under Oregon surplus lines laws" because (1) the policy does not include the required bold-type language informing insureds that they were buying surplus lines insurance; (2) the U.S. producer, Woodruff-Sawyer, is not licensed in Oregon; and (3) the policy did not contain any reference to calculation of, or payment of, surplus lines taxes. The Receivership further argues that the "defense within the limits" provision in the 2014/15 Forge Policy is unenforceable, and that any amounts paid as Defense Costs are not included within the 2014/15 Forge Policy's limit of liability. Forge disagrees.

As explained in Forge's June 14, 2018 letter, PartnerRe is a surplus lines insurer in the State of Oregon and the 2014/15 Forge Policy is a surplus lines insurance policy. PartnerRe was thus exempted from having to file its policy forms with the Oregon's Director of the Department of Consumer and Business Services (the "Director").

Forge also disagrees with the Receivership's position that the 2014/15 Forge Policy did not comply with Oregon's surplus lines laws. Attached please find copies of the following: (1) the Cover Note regarding the 2014/15 Forge Policy which contains the bold-type language described ORS 735.435(6); (2) the Oregon Insurance License for the Woodruff-Sawyer Account Executive who placed the 2014/15 Forge Policy; and (3) the surplus lines tax payment details regarding the 2014/15 Forge Policy. Thus, the Receivership's technical arguments that the 2014/15 Forge Policy was not a surplus lines policy are without merit.

Forge also notes that, under Oregon law, an insurer's failure to file an insurance form with the Director does not render the insurance form unenforceable. See, *Baylor v. Cont'l Cas. Co.*,190 Ore.App. 25, 32 (2003) (holding that an insurer's failure to file an endorsement which excluded coverage for deaths resulting from illegal drug use did not create coverage for deaths resulting from illegal drug us); see also, *Gifford v. Western Aviation Ins. Group*, 77 Ore.App. 645, 649-50 (1986) (holding that the legislature did not provide that unfiled policies and endorsements are deemed void and also that the failure to file an endorsement does not nullify it). Therefore, even if PartnerRe was required to file its policy forms with the Director (which it was not), such failure would not invalidate the "defense within the limits" provision.

II. The 2014/15 Forge Policy's $5 Million Limit of Liability Has Been Exhausted

On July 20, 2018, Forge notified the Receivership that it had paid out $5 million under the 2014/15 Forge Policy for the Individual Defendants' Defense Costs in the SEC Action. The 2014/15 Forge Policy's Insuring Agreement provides that Forge will "indemnify the Assured for

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claim or claims first made against the Assured during the Period of Insuring hereon up to this Policy's amount of liability … in the aggregate [$5 million] …." Accordingly, the 2014/15 Forge Policy's $5 million limit of liability has been exhausted an Forge is no longer obligated to pay any amounts under the 2014/15 Forge Policy.

Because the 2014/15 Forge Policy's $5 million limit of liability is fully exhausted, Forge must respectfully decline to contribute any amounts under the 2014/15 Forge Policy toward the Investors' $30 million settlement demand.

Forge's investigation has been and is pursuant to a full and complete reservation of all rights and defenses under Forge Excess Policy, the Catlin Primary Policy, applicable law, and at equity, and is entirely without prejudice to such rights and defenses. Specification of certain coverage issues or defenses, or in any prior communications with the Receiver or others, is not a waiver of any potential coverage defenses premised upon any of the terms or conditions of the Forge Excess Policy, the Catlin Primary Policy, applicable law, or at equity. Forge reserves the right to assert additional coverage, legal, and equitable defenses as they may be ascertained.

Should you have any questions, please contact us.

Very truly yours,

SEVERSON & WERSON

By
Eryk R. Gettell

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BAILEY | CAVALIERI

DAVID A. MULLER
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August 16, 2018

VIA E-MAIL ONLY (sshure@shurelaw.com and tgreenfield@schwabe.com)

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Re:	Insured:	Aequitas Holdings, LLC
	Insurer:	Starr Indemnity & Liability Company
	Policy Nos.:	SISIXFL21175714 (the "2014 Starr Excess Policy")
		SISIXFL21175715 (the "2015 Starr Excess Policy")
	File No.:	FLSIL0391391

Dear Messrs. Greenfield and Shure:

On behalf of Starr Indemnity & Liability Company ("Starr"), we are in receipt of the August 9, 10 and 15, 2018 letters issued on behalf of the Receiver for Aequitas Holdings, LLC and related entities (collectively, the "Receivership Entity") regarding purported settlement negotiations between the Receivership Entity and certain investors of Aequitas associated funds and entities (the "Investors").

According to those letters, the Receivership Entity "has elicited a $30 million demand from the Investors to settle the Investors' Claim against the Receivership Entity" (although it is unclear what circumstances resulted in the Receivership Entity eliciting that demand). In the August 9 letter, the Receivership Entity requested that Starr "consent to and agree to contribute its $5 million in limits of liability [under the 2014 Starr Excess Policy], less any monies [Starr] may currently be obligated to pay to the Individual Defendants for Defense Costs incurred in connection with the defense of the SEC Enforcement Action, toward the $30 million settlement with the Investors." In the August 10 letter, the Receivership Entity requested that Starr "consent to and agree to contribute its $5 million in limits [under the 2015 Starr Excess Policy] towards the $30 million settlement with the Investors.[1] In the August 15 letter, defense counsel for the Receivership Entity states that the Investors' "offer to settle … should be accepted at the earliest opportunity."

A. 2014 Starr Excess Policy

By communications dated April 27 and May 7, 2018, Starr informed the Receivership Entity that: (1) Starr would agree not to raise lack of consent as a coverage defense under the 2014 Starr Excess Policy with respect to any settlement with the Investors, and (2) Starr would not object to the proceeds of the 2014 Starr Excess Policy being used to fund a settlement with the Investors, subject

[1] The Receivership Entity requested a response to its letters by the following Thursday.

to the entry of an appropriate order by the Court in the SEC Lawsuit (*i.e.*, the Court presiding over the Receivership Entity) authorizing the use of such proceeds for such a settlement and a continuing reservation of Starr's rights. Thus, the August 15 letter incorrectly states that the Receivership Entity lacked the necessary authority from Starr to accept the Investors' prior $21 million settlement offer.

Aside from any obligations Starr has pursuant to the "Priority of Payments" provision, Starr's position under the 2014 Starr Excess Policy has not changed. Accordingly, the Receivership Entity was and remains free to enter into and finalize a settlement with the Investors, subject to Starr's reservation of rights (other than consent) and the understanding that Starr cannot pay any proceeds from the 2014 Starr Excess Policy to anyone until such time as the Court in the SEC Lawsuit enters an order authorizing any such payment(s). Further, because the Underlying Insurance is now reportedly exhausted (an issue which is apparently disputed by the Receivership Entity),[2] any amounts available for advancement from the 2014 Starr Excess Policy towards any settlement with the Investors must be reduced to satisfy amounts owed to the Insured Persons pursuant to the Priority of Payments provision in the Primary Policy.[3]

If the Receivership Entity disagrees with any of the foregoing, Starr believes it is prudent under the circumstances to postpone further discussion until after the two-day global mediation conference, which was unilaterally scheduled by the Receivership Entity for next week on August 22 and 23, 2018.[4]

B. <u>2015 Starr Excess Policy</u>

As you know, Forge Underwriting ("Forge"), the primary insurer for the November 1, 2015 to November 1, 2016 policies, issued a series of letters on November 28, 2017, which, among other things, informed the Receivership Entities that Forge Private Equity Management Liability Insurance Policy No. B0146ERUSA1500543 (the "2015 Forge Primary Policy") does not afford coverage for the Investors' Claim because the Investors' Claim constitutes a Claim deemed first made during the July 1, 2014 to November 1, 2015 policy period.

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[2] Starr understands that the Receivership Entity has recently argued that the policies underlying the 2014 Starr Excess Policy are not "wasting limits" policies. If the Receivership Entity's contention is correct, Starr would not have any obligation to advance Defense Costs or contribute toward a settlement until $10 million is paid (either by Catlin and Forge, or the Insureds) in connection with an otherwise covered settlement or judgment. Accordingly, Starr expressly reserves its rights as to whether the underlying insurance below the attachment point of the 2014 Starr Excess Policy has in fact been exhausted.

[3] The Receivership Entity tacitly acknowledges the applicability of the Priority of Payment provision by asking Starr to withhold from any settlement advancement "any monies [Starr] may currently be obligated to pay to the Individual Defendants for Defense Costs incurred in connection with the defense of the SEC Enforcement Action."

[4] On June 28, 2018, the Receivership Entity informed Starr for the first time that a mediation had been scheduled to: (1) "explore the possibility of a universal settlement of the claims and potential claims that exist among" the Receivership Entity, the Investors, and the Insured Persons, and (2) discuss a "resolution of any insurance coverage disputes that currently exist between the Receivership and each carrier about their respective policies." The Receivership Entity rejected Starr's request to have input on the selection of the mediator and the timing and location of the mediation. The Receivership Entity informed Starr that the mediation would go forward even if Starr could not attend. As a result, Starr has agreed to attend that mediation.

By letter dated February 7, 2018, Starr adopted Forge's coverage position, and thus informed the Receivership Entities that the 2015 Starr Excess Policy does not afford coverage for the Investors' Claim. Because Starr previously concluded the 2015 Starr Excess Policy does not afford coverage for the Investors' Claim, Starr is not liable under the 2015 Starr Excess Policy for any amount paid in settlement of the Investors' Claim.

Without waiver of the foregoing, Starr is not liable under the 2015 Starr Excess Policy for any Loss until after the exhaustion by payments of all applicable underlying limits solely as a result of payment of losses covered thereunder, jointly or severally, by: (i) Forge and Aspen (collectively the "2015 Underlying Insurers"), and/or (ii) in place or on behalf of the 2015 Underlying Insurers, the Insureds and/or any other source, in accordance with the terms, conditions, limitations and other provisions of the 2015 Forge Primary Policy. Starr understands that the underlying limits have not been exhausted through the payment of losses covered under the Forge and Aspen policies by the 2015 Underlying Insurers, the Insured or any other source. Accordingly, it appears Starr currently has no potential liability under the 2015 Starr Excess Policy. Starr reserves its rights with respect to the exhaustion provision of the 2015 Starr Excess Policy.

Please provide Starr with copies of any communications issued by or on behalf of the 2015 Underlying Insurers with respect to the request in the August 10, 2018 letter when available.

* * *

Starr continues to reserve all of its rights and defenses under the 2014 Starr Excess Policy, the 2015 Starr Excess Policy, the applicable Underlying Insurance, and available at law with respect to this matter. Nothing herein shall be construed by you or any other person as a waiver of any rights or defenses that Starr now has or hereafter may have with respect to coverage for these matters.

Please contact us with any questions or concerns about this matter.

Sincerely,

BAILEY CAVALIERI LLC

David A. Müller

David A. Muller

cc (via e-mail only): Jim Byun (Starr)
Joe Lipps (Bailey Cavalieri)
Salvatore Picariello (Law Offices of Stanley Shure)
Colin Lindsey (Woodruff-Sawyer & Co.)