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AEQUITAS MANAGEMENT, LLC; AEQUITAS HOLDINGS, LLC;  
AEQUITAS COMMERCIAL FINANCE, LLC; AEQUITAS  
CAPITAL MANAGEMENT, INC.; AEQUITAS INVESTMENT  
MANAGEMENT, LLC

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

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

Defendants.

No. 3:16-cv-00438-JR

RECEIVER’S MOTION FOR ORDER  
(1) APPROVING COMPROMISES OF  
CLAIMS, (2) APPROVING AND  
AUTHORIZING PERFORMANCE OF  
SETTLEMENT AGREEMENTS,  
(3) ENTERING CLAIMS BARS, and  
(4) REMOVING A RECEIVERSHIP  
ENTITY AND AN EXTENDED ENTITY



Local Rule 7-1 Certificate

On October 13, 2020, counsel for the Receiver circulated to the approximately 69 counsel of record, via email, a copy of this motion (and supporting declaration, proposed form of order, and limited judgment) that is substantially the same as this filed version. The conferral requested that counsel respond by 12:00 noon Pacific Time on October 20, 2020, as to whether their clients object or consent to the motion. As of the time of filing this motion, the undersigned had received four (4) consents and no objections.

MOTION

Ronald F. Greenspan, the duly appointed Receiver ("Receiver") for the Receivership Entity,<sup>1</sup> hereby moves this Court for the entry of an order (1) approving compromises of claims, (2) approving and authorizing performance of settlement agreements, (3) entering claims bars, and (4) removing ACC Funding Series Trust 2015-5 from the Receivership Entity as well as Aequitas International Opportunities, LP as an Extended Entity (the "Motion").

As detailed below, the Receiver, on behalf of the Receivership Entity, has entered numerous settlement agreements with counterparties that generally fall into four categories: (1) individual parties, (2) investor litigation groups, (3) professional service firms, and (4) insurance coverage litigants. All of the settlement agreements are expressly subject to approval of this Court.

This Motion is supported by the Declaration of Ronald F. Greenspan ("Greenspan Decl.") submitted herewith, and the following memorandum.

**I. Procedural and Factual Background**

A. Appointment of the Receiver

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<sup>1</sup> Capitalized terms not otherwise defined in this Motion shall have the meanings ascribed to them in the Order Appointing Receiver entered on April 14, 2016 (Dkt. 156) ("Final Receivership Order").

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

2. On March 16, 2016, pursuant to the Stipulated Interim Order Appointing Receiver, Mr. Greenspan was appointed as Receiver for the Receivership Entity on an interim basis (Dkt. 30) (“Interim Receivership Order”). On April 14, 2016, pursuant to the Final Receivership Order, Mr. Greenspan was appointed as Receiver of the Receivership Entity on a final basis. (Greenspan Decl., ¶ 2).

3. Pursuant to the Final Receivership Order, the Receiver is, among other things, charged with marshalling and preserving the assets of the Receivership Entity, and authorized to compromise and settle claims of the Receivership Entity, subject to Court approval.<sup>2</sup>

4. In addition, Article IX of the Final Receivership Order stays all Ancillary Proceedings, which include “[a]ll civil proceedings of any nature” that involve the Receiver, any Receivership Property, and any of the entities comprising the Receivership Entity.<sup>3</sup>

B. The Settlement Agreements

5. The Receiver, on behalf of the Receivership Entity, has entered 36 settlement agreements, described in greater detail below (each a “Settlement Agreement,” and collectively, the “Settlement Agreements”). By their terms, all of the Settlement Agreements are expressly subject to approval of this Court. Although each agreement is unique, as mentioned above, the counterparties generally fall into four categories: individuals, investor litigation groups, professional service firms, and insurance coverage litigants. (Greenspan Decl., ¶ 3).

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<sup>2</sup> Final Receivership Order, ¶¶ 6 and 26.

<sup>3</sup> *Id.*, ¶ 20.

(i) *Individuals*a. The Malloy Settlement Agreement

6. In January 2020, the Receivership Entity entered a Settlement Agreement with William M. Malloy III, Shenell S. Malloy, and Fortress Investment Management, LLC (“Fortress”) (collectively, the “Malloy Defendants”), as well as Accelerate-IT Advisors, LLC (“Accelerate”). Under the Settlement Agreement, the Malloy Defendants are jointly and severally obligated to pay the Receivership Entity \$1,000,000, in exchange for a release of the Receivership Entity’s claims. In addition, the Malloy Defendants release personal claims for distributions from the Receivership Entity. (Greenspan Decl., ¶ 4; Ex. 1).

7. As background, William Malloy, Fortress, and Accelerate were parties to certain agreements with the Receivership Entity, including but not limited to contracts governing purported consulting and employment relationships, lease of commercial office space, and the issuance of securities. (Greenspan Decl., ¶ 5).

8. In July 2019, the Receivership Entity filed a lawsuit against the Malloy Defendants and Accelerate.<sup>4</sup> The Receivership Entity alleged that it is entitled to recover damages from the Malloy Defendants and Accelerate, variously, for breach of a promissory note, money had and received, unjust enrichment, and avoidance of fraudulent transfers. The Receivership Entity also sought to subordinate all claims held by the Malloy Defendants and Accelerate against the Receivership Entity, to the claims of other creditors and investors. The Receivership Entity sought recovery of not less than \$1,028,702.99, plus additional accrued interest at the default rate of 12.25% (\$192.79/day) after April 30, 2019. (Greenspan Decl., ¶ 6).

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<sup>4</sup> *Ronald F. Greenspan v. William M. Malloy III, et al.* (U.S. District Court for the District of Oregon, Case No. 3:19-CV-001153-MO).

b. The Weider and Forman Settlement Agreement

9. In April 2019, the Receivership Entity entered a Settlement Agreement with Weider Health and Fitness, Inc. (“Weider”) and Bruce Forman (“Forman”). Under the Settlement Agreement, the Receivership Entity, on the one hand, and Weider and Forman, on the other hand, release each other from all claims, including any claim that Weider and Forman may have to participate in a Court-approved Distribution Plan. (Greenspan Decl., ¶ 7; Ex. 2, at ¶ 5).

10. As background, Weider and Forman, individually and at times in combination, were parties to certain contracts with the Receivership Entity, including contracts governing the issuance or sale of Aequitas securities. In addition, as of January 18, 2017, they claimed to hold perfected security interests in certain Receivership Property, as collateral for in excess of \$13.2 million in obligations purportedly owing to them.<sup>5</sup> The Receiver objected to both the purported security interests and the underlying obligations. (Greenspan Decl., ¶ 8).

11. As a result of the settlement, and subject to Court approval, Weider and Forman release their claims against Receivership Property (including termination of any UCC financing statements that encumber Receivership Property), and will not receive any distribution from the Receivership Estate. (*Id.*, ¶ 9, and Ex. 2, at ¶ 5.A.ii).

c. The Terrell Parties Settlement Agreement

12. In February 2019 the Receivership Entity entered a Settlement Agreement with Patrick Terrell, Richard Terrell, Kimberly Terrell, Meagan Terrell, Terrell Group Management, LLC (“TGM”), and PatRick Investments, LLC (together, the “Terrell Parties”). Pursuant to the Settlement Agreement, the Terrell Parties have paid \$4,431,621 to the Receivership Entity.

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<sup>5</sup> See Secured Creditors Weider Health and Fitness’s and Bruce Forman’s: (i) Limited Objections to Receiver’s Motion for Order Approving the Sale of Assets Free and Clear of All Liens, Claims, Encumbrances and Interest, and (ii) Request for Adequate Protection, at p. 2 (Dkt. 344, p. 12).

(Greenspan Decl., ¶ 10).

13. In September 2020, the Receivership Entity and the Terrell Parties entered an Amended and Restated Settlement Agreement (“Terrell Agreement”), revising certain obligations of the Receivership Entity in light of developments since February 2019. (Greenspan Decl., ¶ 11, and Ex. 3).

14. Under the Terrell Agreement, the Terrell Parties and the Receivership Entity release all claims against one another, the Receiver agrees to obtain releases from the plaintiffs in certain investor group litigation, and the parties agree to seek a claims bar order. (*Id.*, Ex. 3, at ¶¶ 5, 6 and 8). Given that the class, as certified in the matter captioned *Ciuffitelli, et al. v. Deloitte & Touche LLP, et al.*, District of Oregon, Case No. 3:16-cv-00580-AC (the “Class Action”), did not name the Terrell Parties in that action, a release was not possible. The Receiver has therefore agreed to defend and indemnify the Terrell Parties in the event any class member brings claims against them. The Receiver has secured releases of claims against Patrick Terrell from not only the other investor plaintiff groups referenced in the Terrell Agreement but also all of the professional service firms identified in Paragraph 34 below. (Greenspan Decl., ¶ 12).

15. As background, the Terrell Parties individually, and at times in combination, were parties to certain contracts with the Receivership Entity, including but not limited to contracts governing the issuance or sale of securities by certain entities included within the Receivership Entity. As of January 2017, TGM alleged that it was owed approximately \$7.7 million, plus accruing interest and attorney fees, from Aequitas Commercial Finance, LLC (“ACF”) and Aequitas Corporate Lending, LLC (“ACL”), and that those obligations were secured by

substantially all of the assets of ACL.<sup>6</sup> (Greenspan Decl., ¶ 13).

16. In negotiating the settlement, the Receiver carefully presented the facts supporting the Receivership Entity's fraudulent transfer and other possible claims against the Terrell Parties. As indicated above, in recognition of those possible claims, the Terrell Parties have paid \$4,431,621 to the Receivership Entity. (Greenspan Decl., ¶ 14).

d. Compromise of "Lux" Claims

17. As previously addressed in the Receiver's report for the quarter ending March 31, 2020,<sup>7</sup> the Receivership Entity is involved in a complex trust structure related to several series of bonds offered on the Luxembourg Stock Exchange to non-U.S. investors. The issuer of the bonds is Aequitas Income Opportunities (Luxembourg) S.A. ("Issuer"), which is not part of the Receivership Entity. The Issuer purchased limited partnership interests in Aequitas International Opportunities LP, a Cayman Islands limited partnership ("Cayman"). Cayman is an Extended Entity under the Final Receivership Order. (Greenspan Decl., ¶ 15).

18. Cayman holds certificates of beneficial interest of ACC Funding Series Trust 2015-5 ("ACC Trust") sold by ACC Holdings 5, LLC ("ACCH-5"). ACCH-5 is wholly owned by Aequitas Holdings, LLC ("Holdings"), and both of those entities are part of the Receivership Entity. ACCH-5 established a series of Grantor Trusts that purchased and currently hold certain loan portfolios, as well as proceeds from the ongoing monetization of those portfolios. (Greenspan Decl., ¶ 16).

19. After considerable investigation and negotiation, on January 17, 2020, the Receiver reached a settlement agreement with the Issuer and certain of its bondholders to resolve

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<sup>6</sup> See Limited Objection to Receiver's Motion for Entry of a Final Order Approving Sale of Assets (CCM Capital Opportunities Fund, LP) (Dkt. 349, at p. 2).

<sup>7</sup> Report of Ronald F. Greenspan, Receiver, dated April 30, 2020, at p. 12 (Dkt. 826, at p. 12).

the claims by and against the Receivership Entity. The principal terms of the agreement are as follows:

- a. Aequitas International Holdings, LLC (“AIH”) resigns as the General Partner of Cayman and transfers its general partnership interest in Cayman to the successor general partner nominated by Issuer;
- b. Cayman releases ACF from all obligations under certain promissory notes evidencing a line of credit with a principal balance of nearly \$3.8 million;
- c. Removal of Cayman as an Extended Entity;
- d. ACF resigns as the Grantor of ACC Trust and assigns its rights and obligations under the ACC Trust Agreement to the successor grantor nominated by Issuer;
- e. ACF releases the funds held in a segregated bank account maintained by the Receivership Entity to the ACC Trust (approximately \$9,205,446 as of December 31, 2019);
- f. ACC Trust pays the Receivership Entity any accrued and unpaid management fees, determined as of May 31, 2019, and subject to an agreed credit amount;
- g. Removal of the ACC Trust from the Receivership Entity;
- h. Cayman terminates the Repurchase Obligations of Aequitas Enterprise Services, LLC (“AES”);
- i. Aequitas Enhanced Income Fund, LLC (“AEIF”) transfers all Convertible Preferred Equity Certificates (“CPECs”) to Issuer’s nominee;
- j. AES and Issuer terminate the Administrative Services Agreement;
- k. Issuer pays the Receivership Entity any accrued and unpaid administrative services fees, determined as of May 31, 2019, and subject to an agreed credit amount; and
- l. Each Party to the Settlement Agreement releases the other parties for substantially all claims, including but not limited to any claim under the Court-approved Distribution Plan.

(Greenspan Decl., ¶ 17, and Ex. 4, at Article III).



e. Net Winner Settlement Agreements

20. The Receiver deems investors in Aequitas securities who received distributions during the Ponzi period in excess of their investment balance, determined as of July 1, 2014, to be “net winners.” It is well settled that net winners in a Ponzi scheme such as Aequitas are obligated to repay the net winnings and, in most cases, interest on those net winnings to the receivership estate. *E.g., Donell v. Kowell*, 533 F.3d 762 (9<sup>th</sup> Cir. 2008). Accordingly, the Receiver is pursuing recovery of the net winnings received by Aequitas investors. (Greenspan Decl., ¶ 18).

21. The Receiver issued written pre-litigation demand letters to net winners, offering to release the Receivership Entity’s claims relating to the net winnings in exchange for repayment of 90% of the net winnings. (Greenspan Decl., ¶ 19).

22. Many of the net winners have accepted the Receiver’s pre-litigation offer and made the required repayment (“Settling Net Winners”). As of the filing of this motion, the combined recovery totals \$786,617.41. The Receivership Entity and the Settling Net Winners have executed Settlement Agreements acknowledging the repayments and mutually releasing claims. (Greenspan Decl., ¶ 20, and Exs. 5 – 24).

(ii) *Investor Litigation Groups*

23. In February 2019, four investor groups (together, the “Investor Litigation Groups”) and the Receivership Entity executed a binding settlement agreement in the initial form of a settlement term sheet (“Settlement Term Sheet”). (Greenspan Decl., ¶ 21, and Ex. 25). As reflected in the Settlement Term Sheet, the Investor Litigation Groups had initiated litigation against the Receivership Entity’s professional service providers in the wake of the Aequitas financial collapse, but the stay of litigation prevented also bringing claims against the

Receivership Entity and its former directors and officers.<sup>8</sup> Pursuant to the terms of the settlement, and subject to Court approval, the Investor Litigation Groups are to receive \$30,000,000 in the aggregate (“Tort Settlement Payment”) from the Receivership Entity and, in exchange, the investors release all tort claims against the Receivership Entity and all claims that are covered by the duty to indemnify provided by the Receivership Entity’s insurance policies. (“Tort Claims Settlement”). The investors’ release excludes any claims based on an express or implied contract and any claim arising from a right to share in any distribution of assets from a Receivership Entity. (*Id.*, Ex. 25, at pp. 1, 4-5).

24. Subsequently, three of the Investor groups—the *Albers* Investors, *Wurster* Investors, and *Pommier* Investors—executed separate, individual Settlement Agreements with the Receivership Entity. As addressed in greater detail below, following the recent mediation of the claims presented in the consolidated insurance coverage action, the same three investor groups executed Amended and Restated Settlement Agreements with the Receivership Entity, affording the Individual Defendants as well as the other former directors and officers conditional releases. (Greenspan Decl., ¶ 22, and Exs. 26-28).

25. As set forth in the binding Settlement Term Sheet, the *Ciuffitelli* Investors are comprised of the class certified in the *Ciuffitelli* Class Action. Pursuant to the binding agreement reflected in the Settlement Term Sheet, the certified class is to receive \$20,910,000 of the \$30,000,000 Tort Settlement Payment. (Greenspan Decl., ¶ 23).

26. As set forth in the Court-approved Distribution Plan, regardless of how the four Investor Litigation Groups internally allocate their portion of the Tort Settlement Payment among

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<sup>8</sup> The investor groups, as defined in the Settlement Term Sheet, are as follows: (1) the *Ciuffitelli* Investors, (2) the *Albers* Investors, (3) the *Wurster* Investors, and (4) the *Pommier* Investors.

their respective members, for purposes of calculating additional distributions under the Distribution Plan, the Receiver will apply the Tort Settlement Payment as if it were allocated among the members of each of the groups in accordance with the rising tide methodology of the Distribution Plan. That treatment preserves equity, to the extent within the Receiver's control, between those investors who were members of the four Investor Litigation Groups that were party to the Tort Claims Settlement and those investors who were not. (Greenspan Decl., ¶ 24).

27. The Tort Claims Settlement is addressed in the Court-approved Distribution Plan. Additionally, related issues of execution are addressed in the Receiver's (Second) Motion to Approve Classification of Certain Claimants (Administrative, Former-Employees, Convenience Class, Defrauded Investors, Creditors, Individual Defendants, And Pass-through Investors), and Allow and Approve Distributions to Certain of Those Claimants that may be decided contemporaneously with this Motion. (Greenspan Decl., ¶ 25).

28. At the time the Settlement Term Sheet was executed, class counsel contemplated undertaking the significant tasks associated with securing approval of a class action settlement with the Receivership Entity. Subsequently, class counsel concluded that doing so would actually reduce the total amount of funds available to class members. (Greenspan Decl., ¶ 26).

29. The distribution methodology set forth in the Court-approved Distribution Plan differs from the combined effect of the *Ciuffitelli* class definition and plan of allocation. Both were developed well after the Settlement Term Sheet was executed. (Greenspan Decl., ¶ 27).

30. In recognition of these circumstances, class counsel and the Receiver have agreed that the class portion of the Tort Claims Settlement (\$20,910,000) will simply be distributed in accordance with the Court-approved Distribution Plan. (Greenspan Decl., ¶ 28).

31. The Receiver greatly appreciates the professionalism and sacrifice of class counsel, as it makes more funds available to distribute to Defrauded Investors who are members

of the certified class. In the Class Action, the Court awarded attorney fees of 24.6%. The class portion of the Tort Claims Settlement is \$20,910,000. Obviously, a similar fee award would greatly reduce the funds that would otherwise be distributed to Defrauded Investors in the certified class. (Greenspan Decl., ¶ 29).

(iii) *Professional Firms*

32. The Investor Litigation Groups brought suits, including the Class Action, against professional firms that provided services to the companies comprising the Receivership Entity prior to initiation of the SEC enforcement action and this resulting receivership proceeding (“Professional Firms”). Pursuant to the Final Receivership Order, litigation directly between the Receivership Entity and the Professional Firms was stayed. (Greenspan Decl., ¶ 30).

33. From the outset of the Receivership, the Receiver and his team have expended considerable time and effort to facilitate successful resolution of the claims of the Investor Litigation Groups against the Professional Firms. In particular, development of the Receivership Entity’s consolidated database, preparation of the Receiver’s Report Regarding the Investigation of the Receivership Entity’s Business Conduct, and orchestration of multiple large-scale, multi-day mediation sessions helped pave the way for the following:

- a. Payments from the Professional Firms to the class totaling \$234,613,000, as well as multiple additional seven and eight figure payments to the other Investor Litigation Groups that are presently subject to confidentiality agreements;
- b. Releases of contribution and other claims of the Professional Firms against the Receivership Entity, including the release of a \$50 million contribution claim presented by Deloitte & Touche LLP (“Deloitte”); and
- c. Contingent releases of contribution and other claims of the Professional

Firms against the Individual Defendants, Advisory Board members, and other former Aequitas directors and officers, that ultimately proved necessary to secure the favorable resolution of the insurance coverage litigation as addressed below.

(Greenspan Decl., ¶ 31).

34. The Receivership Entity executed settlement agreements with seven of its professional service providers. Subsequently, to help facilitate a favorable resolution of the Receivership Entity's claims against certain of its insurance carriers, the Receivership Entity executed Amended and Restated Settlement Agreements with each of the following Professional Firms (together, the "Professional Firm Settlement Agreements"):

- a. Tonkon Torp, LLP and certain related individuals (together, "Tonkon");
- b. Integrity Bank & Trust, and Integrity Trust (together, "Integrity");
- c. EisnerAmper LLP ("EisnerAmper");
- d. Sidley Austin LLP ("Sidley");
- e. TD Ameritrade, Inc. ("TD Ameritrade");
- f. Duff & Phelps, LLC ("Duff"); and
- g. Deloitte.

(Greenspan Decl., ¶ 32, and Exs. 29-35).

35. The Receiver leveraged the claims of the Receivership Entity against the Professional Firms, to maximize the direct recoveries of the Investor Litigation Groups. All of the Professional Firms have reached settlement agreements with the Investor Litigation Groups on terms that the Receiver believes represent, in the aggregate, an exceptional measure of recovery. (*Id.*, ¶ 33).

36. The principal terms of the Professional Firm Settlement Agreements with the Receivership Entity are as follows:

a. The Receivership Entity and each Professional Firm mutually release each other from the defined “Released Claims”;<sup>9</sup> and

b. Each Professional Firm provides a contingent release of claims against each of the “Individual Released Parties.”<sup>10</sup> The releases are contingent upon an Individual Released Party executing a release in favor of the counterparty Professional Firm as well as either executing the final written settlement agreement with the parties to the insurance coverage litigation captioned *Forge Underwriting Limited, et al. v. Greenspan, et al.*, U.S. District Court for the District of Oregon, Case No. 3:19-cv-00810-JR and *Greenspan v. Catlin Specialty Insurance, et al.*, U.S. District Court for the District of Oregon, Case No. 3:19-cv-817-JR (“Consolidated Coverage Action”) or, in the case of an Individual Released Party who was not named in the Consolidated Coverage Action, releasing all claims to the proceeds of insurance coverage maintained at any time by any of the entities now comprising the Receivership Entity.<sup>11</sup>

37. Given the Receiver’s assessment that the Professional Firms reached settlement agreements with the Investor Litigation Groups on terms that represent, in the aggregate, an exceptional measure of recovery, the Receiver agreed to seek a claims bar, barring certain

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<sup>9</sup> “Released Claims” is defined in the Professional Firm Settlement Agreements to include, without limitation, claims based on: (i) the purchase, issuance, sale, recommendation, or solicitation of the sale of any Aequitas Securities, (ii) the services provided by the Professional Firm to the Receivership Entity and certain other parties, (iii) Receivership Property and other assets of the Receivership Entity, including but not limited to any claim under the Court-approved Distribution Plan, and (iv) contribution claims relating to the foregoing. (Greenspan Decl., Exhibit 29, at p. 4, and Exhibits 30-35, at p. 3).

<sup>10</sup> “Individual Released Parties” include “Individual Defendants,” “Advisory Board Members,” and “Directors and Officers,” as those terms are defined in Article I of the Professional Firm Settlement Agreements. (Greenspan Decl., Exhibits 29-35).

<sup>11</sup> Greenspan Decl., Exs. 29-35, at ¶¶ 3.3–3.4.

potential claimants from asserting Contribution Claims (as that term is defined in the Professional Firm Settlement Agreements) against the Professional Firms.<sup>12</sup>

(iv) *Insurance Coverage Litigants*

38. As detailed in the Settlement Term Sheet, in October 2016, the Receiver notified the Receivership Entity's insurers (the "Insurers," as that term is defined in the Settlement Term Sheet) of potential covered claims for the 2014-2015 and 2015-2016 policy years. In August and September 2017, the Investor Litigation Groups made demands on the Receivership Entity, which exceeded \$605 million, in the aggregate. The claims of the Investor Litigation Groups included, but were not limited to, breach of fiduciary duties, aiding breaches of fiduciary duties, and elder abuse. In August and September 2017, the Receiver notified the Insurers of the claims made by the Investor Litigation Groups, and the Insurers disclaimed or denied coverage of the claims under the insurance policies ("Policies," as that term is defined in the Settlement Term Sheet). (Greenspan Decl., ¶ 34, Ex. 25, pages 1-3).

39. In February 2018, the Investor Litigation Groups offered to settle claims covered by the Policies for \$21 million. On May 4, 2018, the Investor Litigation Groups collectively sent a demand stating that if the offer was not accepted by May 8, 2018, it would be deemed withdrawn and the Investor Litigation Groups would increase their collective settlement demand to \$45 million. The Receiver notified the Insurers of the offer, but the Insurers refused to indemnify the Receivership Entity and thereby fund the offered settlement. (Greenspan Decl., ¶ 35, and Ex. 25, at p. 3).

40. The Receiver then sought to negotiate a settlement of the Investor Litigation

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<sup>12</sup> Unlike the other Professional Firm Settlement Agreements, the Second Amended and Restated Settlement Agreement with Tonkon is expressly conditioned on Court approval of the claims bar in substantially the form attached as Exhibit B to the Second Amended and Restated Settlement Agreement. (Greenspan Decl., Ex. 29, at ¶¶ 2.1 and 4.1, and Exhibit B).

Groups' tort claims, including claims covered by the Policies. The Investor Litigation Groups, the Receivership Entity, a number of the Individual Insureds and the Insurers participated in unsuccessful mediation sessions in August and November 2018. Subsequently, the Receivership Entity and the Investor Litigation Groups reached a settlement, as memorialized in the Settlement Term Sheet. (Greenspan Decl., ¶ 36, and Exhibit 25, at pp. 4-5).

41. On May 23, 2019, Forge Underwriting Limited, Forge Private Equity Management Liability Insurance and PartnerRE Ireland Insurance DAC (collectively, "Forge"), Certain Underwriters at Lloyds, London ("Underwriters"), and Starr Indemnity & Liability Company ("Starr") (collectively, the "Settling Insurers") filed a complaint for declaratory relief against the Receiver, Aequitas Holdings, LLC, Robert J. Jesenik, Brian A. Oliver, N. Scott Gillis, Olaf Janke, Andrew MacRitchie, William Glasgow, Keith Barnes, Edmund Jensen, Patrick Terrell, William McCormick, and Does 1-50, captioned *Forge Underwriting Limited, et al. v. Greenspan, et al.*, Case No. 3:19-cv-00810-SI (D. Or.), later identifying Brian Rice as Doe 1. (Greenspan Decl., ¶ 37).

42. On May 24, 2019, the Receiver filed a complaint against the Insurers captioned *Greenspan v. Catlin Specialty Insurance Co., et al.*, Case No. 3:19-cv-00817-BR (D. Or.), seeking, among other things, coverage under the Policies for the Tort Claims Settlement. (Greenspan Decl., ¶ 38).

43. The two actions were ultimately consolidated and, as set forth above, are referred to herein as the Consolidated Coverage Action. (*Id.*, ¶ 39).

44. On June 5, 2020, the parties to the Consolidated Coverage Action participated in mediation with Bruce Friedman ("Mediator"), in an effort to resolve their respective rights, obligations, claims, and defenses. (*Id.*, ¶ 40).

45. Following an exhaustive mediation session and weeks of subsequent negotiations,



the Settling Insurers, the Receivership Entity, and the Individual Insureds agreed to resolve all claims as more particularly set forth in the parties' Settlement Agreement. (*Id.*, ¶ 41, and Exhibit 36).

46. The principal terms of the Settlement Agreement reached in the Consolidated Coverage Action are as follows:

- a. The Settling Insurers shall pay the sum of Four Million Eight Hundred Thousand Dollars (\$4,800,000) to the Receivership Entity;
- b. Starr shall distribute Two Million Two Hundred Thousand Dollars (\$2,200,000) of interpleaded funds to the Receivership Entity and shall distribute the remaining Two Million Five Hundred Thirteen Thousand Eight Hundred Fifty-One Dollars and 89/100 (\$2,513,851.89) of interpleaded funds in a lump sum for the benefit of the designated Individual Insureds;
- c. The Receiver and counsel secure necessary amended and restated settlement agreements with the individually-named investor plaintiff groups and the Professional Firms; and
- d. The parties mutually release their claims.

(Greenspan Decl., ¶ 42).

(v) *Claims Bars*

47. As set forth above, the Professional Firm Settlement Agreements and the Terrell Agreement obligate the Receiver to seek claims bars on behalf of counterparties, with just the Second Amended and Restated Settlement Agreement with Tonkon contingent upon entry of a claims bar. (Greenspan Decl., ¶ 43).

48. The claims bar provisions in each of the Professional Firm Settlement Agreements provides that the Receiver will seek an injunction barring any Individual

Defendant, Director, Officer, Advisory Board Member or Registered Investment Adviser from asserting any Contribution Claim (as those terms are defined in the Settlement Agreements) against the Professional Firm counterparty. (Greenspan Decl., ¶ 44, and Exs. 29-35).

49. The claims bar provision in the Terrell Agreement similarly provides that the Receiver will seek an injunction barring any Individual Defendant, Director, Officer, Advisory Board Member or Registered Investment Adviser from asserting any Contribution Claim against the Terrell Parties. The Terrell Agreement is not contingent upon entry of a claims bar. (Greenspan Decl., ¶ 45, and Ex. 3).

50. The scope of the requested injunctions was carefully tailored by the Receiver to bar only Contribution Claims of parties who were very closely affiliated with Aequitas and/or involved in the efforts to sell Aequitas Securities. After diligent review and consideration, the Receiver has determined that the Professional Firms and the Terrell Parties have all made reasonable and in many cases generous payments benefiting the Defrauded Investors, the vast majority of whom are members of one of the Investor Litigation Groups. In other words, in the Receiver's business judgment, the Professional Firms and the Terrell Parties have paid their fair share. (Greenspan Decl., ¶ 46). Additionally, the Professional Firms have afforded the Individual Defendants, former Directors and Officers, and former Advisory Board Members contingent releases.

51. The injunctions requested by the Receiver are presented in the Proposed Limited Judgment as to the Professional Firms and the Terrell Parties ("Limited Judgment"), which was contemporaneously filed with this Motion. (Greenspan Decl., ¶ 47).

52. Copies of this Motion, the Proposed Order, and the Proposed Limited Judgment were mailed to each of the Individual Defendants, Directors, Officers, Advisory Board Members and Registered Investment Advisers (or their attorneys where applicable) known to

the Receiver and who would be subject to the proposed injunction barring Contribution Claims against the Professional Firms and Terrell Parties. (Greenspan Decl., ¶ 48).

(vi) *Reasonableness and Best Interests*

53. The terms of the Settlement Agreements outlined above are the result of good faith negotiations among the Receiver on behalf of the Receivership Entity and the various counterparties. After diligent investigation by the Receiver and, in the exercise of the Receiver's business judgment, the Settlement Agreements are in the best interests of the creditors of, and investors in, the Receivership Entity. (Greenspan Decl., ¶ 49).

**II. Points and Authorities**

A. Approval of the Settlement Agreements

Pursuant to the Final Receivership Order, the "Receiver may, without further Order of this Court ... compromise ... Receivership Property, other than real estate, in the ordinary course of business, on terms and in the manner the Receiver deems most beneficial to the Receivership Entity ...." (Receivership Order, ¶ 26). Here, the compromise of the claims and the removal of a Receivership Entity and an Extended Entity are outside of the ordinary course of business, and the Settlement Agreements are conditioned on Court approval. Accordingly, the Receiver seeks this Court's approval of, and authority to perform, the Settlement Agreements.

The Receiver's compromises under the Settlement Agreements are comparable to a bankruptcy trustee's compromise of claims in a bankruptcy proceeding under Federal Rule of Bankruptcy Procedure 9019. That rule authorizes a bankruptcy trustee to seek court approval of a settlement, after notice and a hearing. FRBP 9019(a). A bankruptcy trustee is to "proceed in settling [an estate's] accounts on whatever grounds he, in his informed discretion, believes will net the maximum return for the creditors." *In re Mailman Steam Carpet Cleaning Corp.*, 212 F3d 632, 635 (1<sup>st</sup> Cir.), *cert. denied*, 531 US 960, 120 SCt 2661 (2000). Here, the Receiver has

investigated the claims asserted by and against the counterparties to the Settlement Agreements and believes, in the exercise of his discretion and business judgment, that the various recoveries, releases, and other consideration provided in each of the subject settlement agreements represent fair compromises that are in the best interests of the Receivership Entity, and its creditors and investors.

B. Entry of Claims Bars

This Court has authority to approve the various Settlement Agreements as well as enter the Limited Judgment, pursuant to its extremely broad, equitable power to supervise an equity receivership and to determine appropriate action to be taken and appropriate relief to be granted. In *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005), the Ninth Circuit Court of Appeals described that broad power as follows:

“[A] district court’s power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad.” *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir.1986). “[T]he district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership.” *SEC v. Lincoln Thrift Ass’n*, 577 F.2d 600, 606 (9th Cir.1978). “The basis for this broad deference to the district court’s supervisory role in equity receiverships arises out of the fact that most receiverships involve multiple parties and complex transactions.” *Hardy*, 803 F.2d at 1037.

In addition to the language from *SEC v. Hardy* quoted in *Capital Consultants*, the Ninth Circuit Court of Appeals elaborated on the rationale for a court’s broad discretionary power in the context of receiverships as follows:

[W]e have acknowledged that a primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors. [Citations omitted.] Accordingly, we generally uphold reasonable procedures instituted by the district court that serve this purpose.

We reemphasize these basic principles. A district judge supervising an equity receivership faces a myriad of complicated problems in dealing with the various parties and issues involved in administering the receivership. Reasonable administrative procedures, crafted to deal with the complex circumstances of each case, will be upheld. A district judge simply cannot effectively and successfully supervise a receivership and protect the interests of its beneficiaries absent broad discretionary power. We would be remiss were we to interfere with a district court's supervision of an equity receivership absent a clear abuse of discretion.

*SEC v. Hardy*, 803 F.2d at 1038.

Consistent with this broad authority, Judge Garr King, in an SEC enforcement action, approved a partial settlement between a receiver and a defendant that included an injunction barring non-settling defendants from asserting contribution claims. That decision is described in Judge Acosta's Findings and Recommendation on Preliminary Approval of Tonkon's settlement agreement in the *Ciuffitelli* Class Action.<sup>13</sup>

Likewise, the Fifth Circuit Court of Appeals has approved claims bars in SEC equitable receivership proceedings, in order to "channel investors' recovery into the receivership distribution process" without improperly extinguishing the investors' rights. *Zacarias v. Stanford Int'l Bank, Ltd.*, 931 F.3d 382, 398 (5th Cir. 2019). In upholding a claims bar, the Fifth Circuit further explained as follows:

[T]he receivership solves a collective-action problem among the Stanford entities' defrauded creditors, all suffering losses in the same Ponzi scheme. It maximizes assets available to them and facilitates an orderly and equitable distribution of those assets. Allowing creditors so circumvent the receivership would dissolve this orderly process – circumvention must be foreclosed for the receivership to work. It was no abuse of discretion for the district court to enter the bar orders to effectuate and preserve the coordinating function of the receivership.

*Zacarias*, 931 F.3d at 399.

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<sup>13</sup> Greenspan Decl., ¶ 50, and Ex. 37, at p. 3 (ECF No. 481, at p. 19, n. 3).

“[N]umerous district courts have entered a claims bar order” in receivership actions to preclude litigation of certain claims against third parties. *See, e.g., SEC v. DeYoung*, 850 F.3d 1172, 1183 n.5 (10th Cir. 2017) (collecting examples of such cases). District courts often set forth the claims bar in partial judgments entered pursuant to Rule 54(b). *SEC v. Alleca*, No. 1:12-cv-3261-WSD, 2016 U.S. Dist. LEXIS 64218, at \*4-5 (N.D. Ga. May 16, 2016).

As detailed above, the scope of the requested injunctions is carefully tailored to bar only Contribution Claims of parties who were very closely affiliated with Aequitas and/or involved in the efforts to sell Aequitas Securities. Further, the beneficiaries of the injunctions—the Terrell Parties and the Professional Firms—have made substantial payments benefiting the Defrauded Investors, the vast majority of whom are members of one of the Investor Litigation Groups. In addition, if any party subject to the injunction barring Contribution Claims is sued by an Aequitas Investor, that party will receive the benefit of the earlier settlement between that Aequitas Investor and the Professional Firm or Terrell Party that would otherwise be subject to a contribution claim, in the form of a reduction of any judgment entered against that party. (Limited Judgment, ¶¶ 6 and 9). In the Receiver’s business judgment, the Professional Firms and the Terrell Parties should be afforded the claims bars as set forth in the Limited Judgment.

### **III. Conclusion**

For the foregoing reasons, the Receiver respectfully requests that the Court enter an order (1) approving the compromises of claims set forth in the Settlement Agreements, (2) approving and authorizing performance of the Settlement Agreements, (3) approving the claims bars, and

entry of the Limited Judgment, and (4) removing (a) ACC Funding Series Trust 2015-5 from the Receivership Entity, and (b) Aequitas International Opportunities, LP, as an Extended Entity.

Dated this 22nd day of October, 2020.

Respectfully submitted,

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