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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

LAWRENCE P. CIUFFITELLI, for himself and as Trustee of CIUFFITELLI REVOCABLE TRUST; GREG and ANGELA JULIEN; JAMES and SUSAN MACDONALD, as Co-Trustees of the MACDONALD FAMILY TRUST; R.F. MACDONALD CO.; ANDREW NOWAK, for himself and as Trustee of the ANDREW NOWAK REVOCABLE LIVING TRUST U/A 2/20/2002; WILLIAM

Case No. 3:16-cv-00580-AC

PLAINTIFFS' OPPOSITION TO DEFENDANT EISNERAMPER LLP'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

ORAL ARGUMENT REQUESTED

RAMSTEIN; and GREG WARRICK, for himself and, with SUSAN WARRICK, as Co-Trustees of the WARRICK FAMILY TRUST, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DELOITTE & TOUCHE LLP; EISNERAMPER LLP; SIDLEY AUSTIN LLP; TONKON TORP LLP; TD AMERITRADE, INC.; and INTEGRITY BANK & TRUST,

Defendants.

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Plaintiffs submit this memorandum in opposition to *Defendant EisnerAmper LLP's Motion to Dismiss Plaintiffs' First Amended Complaint* [Dkt. No. 78] ("EisnerAmper Motion" and cited as "EA Motion"). Plaintiffs incorporate by reference their opposition to the *Joint Motion to Dismiss the First Amended Complaint Filed by Defendants Deloitte & Touche LLP, EisnerAmper LLP, Sidley Austin LLP, and Tonkon Torp LLP and Supporting Memorandum* [Dkt. No. 74] ("Joint Motion" and cited as "Jt. Motion"). Plaintiffs respond in this memorandum primarily to issues not addressed in the Joint Motion. Defendant EisnerAmper LLP is referred to as "EisnerAmper" and plaintiffs' First Amended Complaint is referred to as "FAC."

I. SUMMARY OF OPPOSITION

Plaintiffs allege that EisnerAmper is liable pursuant to ORS 59.115 for participating and materially aiding in Aequitas' unlawful sales of securities due to its role and visibility as auditor in connection with those sales. For more than two years, EisnerAmper was the audit firm for Aequitas' securities business, providing clean annual audit reports for each of the investment vehicles through which Aequitas sold hundreds of millions of dollars of securities to investors. Other than Aequitas' primary violations of the Oregon Securities Law, which plaintiffs address in detail in connection with the Joint Motion, the sole element of plaintiffs' claim against EisnerAmper is that EisnerAmper participated or aided in Aequitas' unlawful sales. *See* ORS 59.115(3). Plaintiffs do not contend that EisnerAmper itself engaged in fraud. Plaintiffs are required only to allege facts demonstrating that EisnerAmper participated or aided in Aequitas' sales of securities. Plaintiffs have done so.

As described in the FAC, EisnerAmper provided audit and accounting services to Aequitas for more than two years. In particular, from March 2011 to October 2013,

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EisnerAmper served as auditor for Aequitas' fundraising entities, providing audit reports for those entities for the years 2011 and 2012. Although the financial statements audited by EisnerAmper contained material misstatements, those financial statements and EisnerAmper's clean audit opinions were disseminated to investors and prospective investors. Offering documents for the Aequitas Securities identified EisnerAmper as Aequitas' auditor. Prospective investors also received other promotional materials, quarterly updates, and information that highlighted EisnerAmper's role as auditor.

EisnerAmper and the annual audit reports issued by EisnerAmper were important to Aequitas. Both the fact of EisnerAmper's involvement and its clean audit opinions were valuable sales tools that assured potential investors that Aequitas' financial statements were accurate. They gave Aequitas the cover it needed to use transfers and transactions with Aequitas Holdings and other entities outside the audited group in order to create and perpetuate the illusion of financial health within its audited fundraising group. Moreover, SEC rules required Aequitas to obtain and distribute an annual audit report for each of the Aequitas Funds. In short, without the audit opinions issued by EisnerAmper, Aequitas would have been unable to issue the hundreds of millions of dollars in securities that it sold between 2011 and 2016.

Under Oregon law, these factual allegations, which must be accepted as true on this motion and construed in the light most favorable to plaintiffs, amply state a claim for relief pursuant to ORS 59.115(3). *See, e.g.*, *Rembold v. Pac. First Fed. Sav. Bank*, 1989 WL 35914, at *3 (D. Or. 1989) (refusing to dismiss a claim under ORS 59.115(3) based on audited financial statements that were distributed to prospective investors as part of the offering materials); *Black & Co. v. Nova-Tech, Inc.*, 333 F. Supp. 468, 472 (D. Or. 1971) (holding that a professional firm

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which allowed its identity to be used in promotional materials was a "participant" under ORS 59.115(3)).

The sufficiency of EisnerAmper's participation and the materiality of its aid are questions of fact. The Oregon Supreme Court has held that materiality "depends on the importance of one's personal contribution to the transaction." *Prince v. Brydon*, 307 Or. 146, 149 (1988) (en banc). There is no bright-line test that can be applied at the motion to dismiss stage to decide whether an auditor's role in connection with a client's sale of securities is sufficiently important.

For these and the other reasons addressed below, EisnerAmper's motion should be denied.

II. EISNERAMPER WAS INTEGRAL TO AEQUITAS' SALE OF SECURITIES

EisnerAmper did not act as the auditor of the entire Aequitas organization, a deliberately opaque and complex group made up of dozens of affiliated entities all under common control. FAC ¶¶ 21-25. Nor did EisnerAmper act as the auditor for the companies at the top of Aequitas' organizational structure: Aequitas Holdings, LLC ("Aequitas Holdings"), Aequitas Management, LLC ("Aequitas Management"), and Aequitas Capital Management, Inc. ("ACM"). *See* FAC ¶¶ 21-22, 24. Rather, for more than two years, from at least March 2011 until at least October 2013, EisnerAmper acted as the auditor for Aequitas' securities business. FAC ¶¶ 16, 30(a). During that time:

- Aequitas sold securities through Aequitas Commercial Finance LLC ("ACF"), and EisnerAmper was the auditor (FAC ¶¶ 27, 30(a), 33);
- Aequitas sold securities through Aequitas Income Protection Fund, LLC ("AIPF"), and EisnerAmper was the auditor (FAC ¶¶ 28, 30(a), 41);

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- Aequitas sold securities through Aequitas Income Opportunity Fund, LLC ("AIOF"), and EisnerAmper was the auditor (FAC ¶¶ 28, 30(a), 47);
- Aequitas sold securities through Aequitas ETC Founders Fund, LLC ("AETC"), and EisnerAmper was the auditor (FAC ¶ 30(a));
- Aequitas sold securities through Aequitas Carepayment Founders Fund, LLC, and EisnerAmper was the auditor (FAC ¶ 30(a));
- Aequitas sold securities through Aequitas Carepayment Fund, LLC, and EisnerAmper was the auditor (FAC ¶ 30(a));
- Aequitas sold securities through Aequitas Catalyst Fund, LLC, and EisnerAmper was the auditor (FAC ¶ 30(a));
- Aequitas sold securities through Aequitas Commodities Fund, LLC, and EisnerAmper was the auditor (FAC ¶ 30(a));
- Aequitas sold securities through Aequitas Hybrid Fund, LLC, and EisnerAmper was the auditor (FAC ¶ 30(a));
- Aequitas sold securities through Aequitas Income Fund, LLC, and EisnerAmper was the auditor (FAC ¶ 30(a)); and
- Aequitas sold securities through Aequitas Insurance Fund I, LLC, and EisnerAmper was the auditor (FAC ¶ 30(a)).

EisnerAmper focused on Aequitas' securities business—a distinct subset of subsidiaries within the large affiliated Aequitas group—because that was what Aequitas needed in order to continue raising investor funds through the sale of the Aequitas Securities.

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Aequitas needed the freedom to use transfers and transactions with Aequitas Holdings and other entities outside the audited fundraising group in order to create and perpetuate the illusion of financial health within its audited fundraising group. Aequitas needed the stamp of legitimacy provided by a "clean" audit opinion from an established and reputable audit firm in order to attract, secure, and retain investors and their funds. And Aequitas needed the audited annual reports in order to comply with an exception to the standard custody requirements of the Investment Advisers Act of 1940, an exception which allowed Aequitas to continue to raise and use investor funds free of outside scrutiny.

Aequitas provided the financial statements audited by EisnerAmper to prospective and existing investors who were deciding whether to invest or re-invest in Aequitas Securities. FAC ¶ 16. Having EisnerAmper as the auditor of its securities business gave Aequitas clout with prospective and existing investors, and the EisnerAmper-audited financial statements were a material part of the information made available to prospective and existing investors. FAC ¶ 16. The promise of audited annual financial statements was even an explicit part of the pitch made to prospective investors. *See, e.g.*, Aequitas Adviser's[1] Form ADV Part 2A[2]; AIPF PPM.[3]

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[1] Aequitas Investment Management, LLC ("AIM"), a wholly owned subsidiary (through ACM) of Aequitas Holdings, was an SEC-registered investment adviser whose sole purpose was to act as the investment adviser to various Aequitas fundraising vehicles, including the Aequitas Funds. FAC ¶ 25.

[2] For example, the Aequitas adviser's *Form ADV Part 2A* (the firm disclosure brochure) dated March 30, 2012, states at page 26:

> Within 120 days after the end of each year, each of our Funds delivers to its investors that year's audited financial statements, including a balance sheet, an income statement, and a statement of investors' capital. An independent accounting firm that is registered with and subject to inspection by the Public Company Accounting Oversight Board ("PCAOB") audits our Funds' annual financial statements.

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Aequitas provided investors and potential investors with EisnerAmper-audited financial statements for the years 2011 and 2012. FAC ¶¶ 33, 41, 47.

Aequitas highlighted EisnerAmper's role as auditor in the materials Aequitas provided to prospective and existing investors. With EisnerAmper's knowledge and consent, the offering materials for the Aequitas Securities prominently identified EisnerAmper as the auditor in connection with the offer and sale of those securities. FAC ¶¶ 16, 33, 41, 47. Aequitas also highlighted EisnerAmper's role as auditor in promotional materials, quarterly updates, and other materials and information provided to prospective and existing investors. FAC ¶¶ 35, 43, 49. Furthermore, Aequitas identified EisnerAmper as the auditor for the Aequitas Funds in public disclosures filed with the SEC. *See* Aequitas Adviser's Form ADV.[4]

Because it acted as its own investment adviser, Aequitas was subject to the Investment Advisers Act of 1940 and the rules issued thereunder, including Rule 206(4)-2. 17 C.F.R. § 275.206(4)-2. That rule generally requires that client assets[5] be maintained with a "qualified

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Substantially identical language is included in the March 30, 2011, and April 1, 2013, versions of the same document.

[3] For example, the AIPF PPM dated June 1, 2012, states:

> The Manager will provide investors with (a) quarterly unaudited performance updates, including Capital Account balances; (b) an audited financial statement; and (c) an annual report on Schedule K-1.

Declaration of Philip Van Der Weele [Dkt. No. 87], Ex. 3 at 33.

[4] EisnerAmper is identified as auditor in the *Form ADVs (Part 1A)* filed by the Aequitas adviser with the SEC dated March 30, 2011; March 30, 2012; June 30, 2012; September 11, 2012; April 1, 2013; and October 23, 2013.

[5] Because the Aequitas adviser and the Aequitas Funds were all part of the integrated group of affiliated Aequitas companies, the Aequitas adviser was deemed to have custody of client assets and was therefore subject to the requirements of Rule 206(4)-2. *See* 17 C.F.R. §§ 275.206(4)-2 (d)(2) and 275.206(4)-2(a).

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custodian" and subjected to annual surprise audits, the results of which are reported to the SEC. 17 C.F.R. § 275.206(4)-2(a)(1), (4). Given its business and fundraising model, Aequitas could not adhere to this requirement. Instead, Aequitas took advantage of the only available exemption to the rule, which required Aequitas (i) to obtain an annual audit for each of the Aequitas Funds by an independent PCAOB-inspected accounting firm, and (ii) to distribute the annual audited financial statements to investors. 17 C.F.R. § 275.206(4)-2(b)(4). In other words, Aequitas could not have continued to sell securities without EisnerAmper's annual audits, nor could Aequitas have continued to sell securities without distributing the annual EisnerAmper-audited financial statements to investors.

In light of the foregoing, plaintiffs have alleged that EisnerAmper played an integral role in Aequitas' sale of securities, thereby subjecting itself to liability for those sale under ORS 59.115(3).

III. PLAINTIFFS STATE A CLAIM UNDER ORS 59.115(3)

Any person may be held secondarily liable under the Oregon securities laws for participating or *materially aiding* in the unlawful sale of securities. ORS 59.115(3) provides in relevant part:

> Every person who directly or indirectly controls a seller liable under subsection (1) of this section, . . . **and every person who participates or materially aids in the sale** is also liable jointly and severally with and to the same extent as the seller, unless the nonseller sustains the burden of proof that the nonseller did not know, and, in the exercise of reasonable care, could not have known, of the existence of facts on which the liability is based.

(Emphasis added.)

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"The Oregon courts have given the emphasized language in ORS 59.115(3) a very broad and literal reading." *Mann v. St. Laurent*, 229 F. Supp. 2d 1133, 1138 (D. Or. 2002). Moreover, the Oregon Supreme Court has declared that because of its remedial nature, the Oregon Securities Law is to be "liberally construed to afford the greatest possible protection to the public." *Adams v. Am. W. Sec., Inc.*, 265 Or. 514, 524 (1973); *see also Adamson v. Lang*, 236 Or. 511, 516 (1964); *Spears v. Lawrence Sec., Inc.*, 239 Or. 583, 587 (1965), *Gonia v. E.I. Hagen Co.*, 251 Or. 1, 3 (1968); *Ahern v. Gaussoin*, 611 F. Supp. 1465, 1491 (D. Or. 1985), *abrogated on other grounds as stated in Sec. Inv. Prot. Corp. v. Poirier*, 653 F. Supp. 63 (D. Or. 1986)..

Auditors—like any other persons—may be held secondarily liable under ORS 59.115(3) based on a primary violation by the seller. The auditor (in this case, EisnerAmper) becomes liable because it has "participated" or "materially aided" in the sale (in this case, by Aequitas), "not because it has violated any law." *Mann*, 229 F. Supp. 2d at 1138. "[W]hether one's assistance in the sale is 'material' does not depend on one's knowledge of the facts that make it unlawful; ***it depends on the importance of one's personal contribution to the transaction***." *Prince*, 307 Or. at 149 (emphasis added). "These provisions may place upon persons besides a seller's employees or agents who materially aid in an unlawful sale of securities ***a substantial burden*** to exonerate themselves from liability for a resulting loss, ***but this legislative choice was deliberate***." *Id.* at 150 (emphasis added).

A. <u>EisnerAmper Participated and Materially Aided in the Sales of Securities</u>

EisnerAmper contends that in order to plead "participation" or "material aid" under ORS 59.115(3), plaintiffs must allege that EisnerAmper took "some affirmative action directed toward

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the particular securities offering at issue." EA Motion at 7. That is not the law.[6] ORS 59.115(3) only requires that a person either "participates or materially aids in the sale" of securities. Even if that were the standard, however, the allegations of the FAC clearly establish that EisnerAmper did, in fact, take "affirmative actions directed toward" the offering of the Aequitas Securities.

The reach of secondary liability under ORS 59.115(3) is far greater than contemplated by EisnerAmper. Oregon courts have emphasized that liability as a participant or a provider of material aid depends on the extent and importance of the defendant's involvement. *See, e.g.*, *Prince*, 307 Or. at 149; *Ainslie v. First Interstate Bank*, 148 Or. App. 162, 184 (1997). For example, ministerial actions such as typing, reproducing, and delivering sales documents probably would not be considered a material aid to the sale. *Id*. But one who plays a substantive role in facilitating, advancing, or removing obstacles to an offering of securities is subject to liability under ORS 59.115(3). *See, e.g.*, *Adamson*, 236 Or. at 515 (making a loan for the purpose of allowing the offering to proceed was participation or material aid)[7]; *Ainslie v. Spolyar*, 144 Or. App. 134, 144–45 (1996) (taking action to prevent events that would have

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[6] EisnerAmper's lone authority, *Mann v. St Laurent*, offers no support. In fact, the holding in *Mann* is the **opposite** of the holding described by EisnerAmper in its brief—the motion to dismiss the ORS 59.115(3) claim against the "defendant who was merely a business advisor and stockholder in the seller's business generally and had not participated in the particular sale," EA Motion at 9, was **denied** by the court, which explained:

> For the purposes of this motion to dismiss the Oregon Securities Law claims, this showing is enough. Although the plaintiffs have failed to allege that [defendant] committed the alleged fraud, the remedy against nonseller participants is not contingent on the nonseller's violation of any law.

Mann, 229 F. Supp. 2d at 1139 (citations and quotation marks omitted). The court further explained that the liability provisions of ORS 59.115(3) must be given "a very broad and literal reading." *Id*. at 1138 (emphasis added).

[7] Construing an earlier version of the secondary liability statute (then, ORS 59.250)

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seriously impeded the offering was participation or material aid); *First Interstate Bank*, 148 Or. App. at 185-86 (1997) (modifying an escrow agreement with the seller to facilitate the completion of the offering was participation or material aid); *Prince*, 307 Or. at 150 (preparing offering documents and the legal documents necessary to create the entity whose securities were sold was participation or material aid).[8]

Indeed, in *Rembold v. Pacific First Federal Savings Bank*, Judge Frye denied a motion to dismiss ORS 59.115(3) claims against an accountant that had certified audited financial statements (alleged to be false) contained in offering documents, finding that the accountant's actions constituted "material aid" in the sale of the securities. 1989 WL 35914, at *3, *6.

Moreover, under certain circumstances, a person may participate or materially aid in the sale of securities by allowing its identity—and the reputation and credibility associated with that identity—to be used in the offering of securities. For example, in *Black & Co. v. Nova-Tech, Inc*., Judge Goodwin held that the appearance of a law firm's name on corporate documents furnished in connection with the sale of securities was sufficient, standing alone, for liability under ORS 59.115(3).

> The other Nossaman [law firm] defendants argue that they did not have a hand in the preparation of documents, but it is undisputed that the Nossaman firm authorized Nova-Tech to include its name as corporate counsel on Nova-Tech's 1968 and 1969 annual reports. In line with the Oregon court's broad construction of the Blue Sky Law, I hold that the Nossaman firm's designation on Nova-Tech's published reports as Nova-Tech's corporate counsel is enough, for purposes of ORS 59.115(3) and 59.155, to make the firm's partners "participants" in any unlawful securities transaction in which the annual reports were used for promotional purposes.

[8] *See also Cox v. Holcomb Family Ltd. P'ship*, No. 1308-12201 (Or. Cir. Ct. Dec. 14, 2015), attached as Exhibit A to the EA Motion.

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Nova-Tech, 333 F. Supp. at 472 (emphasis added) (internal citations omitted); *see also*, *e.g.*, *Gonia*, 251 Or. at 7 (noting that "the decisive factor in all the sales was the confidence of the purchasers in [the participant/aider], with whom they were acquainted, either personally or by reputation") (emphasis added); *Kelly v. McKee & Assocs. Inv. Real Estate, Inc.*, 928 F.2d 1137 (9th Cir. 1991) (unpublished table decision) ("It was only through [the participant/aider] that [the seller] had the credibility and base necessary to induce the sale."). Plaintiffs similarly allege that EisnerAmper knowingly consented to the use of its identity and reputation in connection with the offering of Aequitas Securities, FAC ¶¶ 33, 41, 47, and that EisnerAmper's name and role as auditor in connection with the offering of the Aequitas Securities were prominently displayed in private placement memoranda and promotional materials, FAC ¶¶ 16, 33, 35, 41, 43, 47, 49.

EisnerAmper misstates its role as the auditor of Aequitas' securities business in an attempt to portray its actions as being no different from the simple copying, typing, or delivery that courts have not found to be a material aid to the sales of securities. EA Motion at 8. In doing so, EisnerAmper baldly asserts that it "merely provided ordinary professional services" to Aequitas—*i.e.*, that it did nothing to aid in the sale of securities. EA Motion at 9. As explained above, the *Mann* decision cited by EisnerAmper does not support the argument that auditors perform only ministerial or unimportant duties.

As the auditor, EisnerAmper did far more than simply type, copy, or deliver the Aequitas financial statements. EisnerAmper provided its professional knowledge and judgment about the Aequitas investment vehicles to Aequitas, EisnerAmper made use of that knowledge and judgment in auditing the financial statements of the subsidiaries through which Aequitas sold its

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securities, and EisnerAmper enabled Aequitas to use the audited financial statements—and offering documents that identified EisnerAmper as auditor—in selling the Aequitas Securities to prospective investors. This goes well beyond merely providing ordinary professional services that have no connection to the sale of securities. EisnerAmper and its audit opinions were integral to the offering of the Aequitas Securities. They were essential to allowing Aequitas to continue and expand its fundraising through the numerous Aequitas Funds. That is, EisnerAmper's professional contributions were important to Aequitas in the sale of the securities at issue, thereby subjecting EisnerAmper to liability under ORS 59.115(3).

Lastly, EisnerAmper argues for dismissal because at least "two courts have found similar or even stronger allegations insufficient to state a claim against an auditor under ORS 59.115(3)." EA Motion at 9-10. But the two authorities it cites are inapposite. In *Monroe v. Hughes*, 860 F. Supp. 733 (D. Or. 1991), a case involving allegations that an audit report was materially misleading, the district court granted summary judgment because the plaintiffs had failed to raise a genuine issue of fact even as to a primary violation of the securities laws. *Id*. at 740 ("[S]ince I find that plaintiffs have failed to identify any material misrepresentations or omissions, they have failed to raise a genuine issue even under the strict liability provision of § 11 or the Oregon Securities laws."). On appeal—notwithstanding EisnerAmper's argument to the contrary, EA Motion at 10—the Ninth Circuit did not evaluate whether the auditor "materially aided" a sale of securities under ORS 59.115(3). Rather, the court found merely that the allegations did not state a claim for primary liability, thus precluding the possibility of secondary liability. *Monroe v. Hughes*, 31 F.3d 772, 774 (9th Cir.1994) (affirming dismissal of primary liability claims).

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Similarly, Judge You's decision in *Cox v. Holcomb Family Ltd. Partnership*, No. 1308-12201 (Or. Cir. Ct. Dec. 14, 2015) (*see* EA Motion Ex. A), addressed claims against an accounting firm based only on the "scant" allegation that the firm had provided reviewed (*i.e.*, unaudited) financial statements to the seller's bank:

> As Jones & Roth contends, the allegations against it are "scant." They are essentially articulated in one sentence: "Beginning in 2002, Jones & Roth provided reviewed financial statements for Berjac that the banks making the loans required of Berjac and its related borrowers."

Slip Op. at 9. Unlike the current case, there were no allegations that the accounting firm ever undertook any audit of any financial statements of any entity, there were no allegations that any financial statements were ever provided to any investor, and there were no allegations that the accounting firm was ever identified in any materials ever provided to any investor. As Judge You explained:

> The one sentence allegation against Jones & Roth is vague. It is unclear what the scope of the "reviewed financial statement" was, to whom it was provided, etc. Otherwise stated, the complaint does not provide ultimate facts regarding the extent and importance of Jones & Roth's involvement or its connection to the underlying sales. Accordingly, Jones & Roth's motion to dismiss is granted.

Slip Op. at 9. In stark contrast, the FAC pleads precisely the sort of detailed facts that were not pleaded in *Cox*—facts that reflect the extent and importance of EisnerAmper's role as auditor of Aequitas' securities business, including: (i) that the financial statements audited by EisnerAmper were disseminated to investors and prospective investors (FAC ¶¶ 16, 33, 41, 47); (ii) that with EisnerAmper's knowledge and consent, private placement memoranda identified EisnerAmper as the auditor in connection with the offering and sale of Aequitas Securities (FAC ¶¶ 16, 33, 41,

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47); and (iii) that Aequitas highlighted EisnerAmper's role as auditor in other promotional materials provided to prospective investors (FAC ¶¶ 35, 43, 49).

Although the allegations against the accountant in the *Cox* case are readily distinguishable, Judge You's decision with respect to another defendant in that action, Umpqua Bank, supports plaintiffs' claims. In *Cox*, the plaintiff investors alleged that the bank, by loaning money to the seller, participated and materially aided in the seller's unlawful sale of securities. *Cox*, Slip Op. at 6-8. Although the existence of the bank and its loans were never disclosed to investors, the plaintiffs alleged that the liquidity provided by the loans gave the seller the illusion of credibility and allowed the seller to conceal significant financial problems from investors that would otherwise have caused them to forego their securities purchases. *Id*. at 7. Judge You did not dismiss the ORS 59.115(3) claim against the bank, finding that the bank's actions "were an important contribution to the transaction" and that the bank's loans were integral to the seller's sales of securities. *Id*. at 7-8. As explained above, EisnerAmper played an even more integral role in Aequitas' sales of securities.

B. Plaintiffs Are Not Required to "Connect" Their Purchases to EisnerAmper

EisnerAmper explicitly asserts reliance as an element of a cause of action under ORS 59.115, citing—remarkably—the Oregon Supreme Court's decision in *State v. Marsh & McLennan Cos., Inc.*, 353 Or. 1 (2012), for the proposition that "reliance may be presumed for claims under ORS 59.137 . . . but not for direct, face-to-face transactions challenged through ORS 59.115." EA Motion at 12 n.10. EisnerAmper is again wrong on the law and on its authority. As explained in plaintiffs' opposition to the Joint Motion (*see* Section IV.C.2), reliance is not an element of a cause of action under ORS 59.115. And contrary to

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EisnerAmper's assertion, the *Marsh* decision held that ORS 59.137—**in contrast to ORS 59.115**—includes a reliance element. *See Marsh*, 353 Or. at 11 (distinguishing ORS 59.115 from ORS 59.137).

Plaintiffs are not required to plead a "connection between EisnerAmper and their particular purchases." EA Motion at 11. Nor does ORS 59.115(3) impose liability only if plaintiffs "saw audited financial statements" or "actually had in hand" information relating to EisnerAmper "before making any particular purchase." EA Motion at 11. Reliance is not required, and it is well-established that the question of participation and material aid is independent of a plaintiff's purchase decision. *See, e.g.*, *Adamson*, 236 Or. at 517 (holding that defendant participated or aided in the sale of securities by lending money to the seller); *First Interstate Bank*, 148 Or. App. at 185-86 (holding that the defendant escrow agent participated or aided in the sale of securities by modifying its escrow agreement with the seller).[9]

C. EisnerAmper Participated and Materially Aided in the Aequitas Securities Offering and Its Liability Extends to the Entire Aequitas Securities Offering

Aequitas relied on EisnerAmper's services—and the reputation associated with its name and role as auditor—to create the illusion of stability and legitimacy and to help grow, for years to follow, the Aequitas securities business. EisnerAmper provided the audit opinions and legitimacy that Aequitas used to attract, secure, and retain investors. Aequitas induced those

[9] EisnerAmper cites *In re Nat'l Century Finan. Enter., Inc.*, 846 F. Supp. 2d 828 (S.D. Ohio 2012), but that case is not to the contrary—the court merely held that the conduct of the defendant, who was at least twice-removed from the seller, did not rise to the level of participation or material aid. *Id*. at 908 (explaining that plaintiffs sought to impose liability based on allegations that "[defendant] Credit Suisse made a misrepresentation to the credit rating agencies, the agencies assigned inaccurate ratings, and plaintiffs later relied on the ratings when purchasing notes (from brokers other than Credit Suisse).").

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investors to reinvest their distributions and purchase additional Aequitas Securities. Those investors included, among many others, plaintiffs Ciuffitelli, the Juliens, RFMC, the MacDonalds, Nowak, Ramstein, and the Warricks, all of whom initially invested in Aequitas Securities under EisnerAmper's watch and continued to invest in Aequitas Securities after EisnerAmper quietly terminated its engagement with Aequitas. *See* FAC ¶¶ 64, 65, 66, 67, 68, 69.

Stated another way, EisnerAmper participated and materially aided Aequitas in building its façade, behind which it operated for years. EisnerAmper helped build the foundation of the Aequitas securities business, which Aequitas then used to deceive the investors that EisnerAmper's services helped it to retain. And, by providing the cover that Aequitas needed to allow it to deceive those investors, EisnerAmper enabled Aequitas to expand its securities business, broadening the sphere of impact caused by the Aequitas' violations of the Oregon Securities Law. Plaintiff's allegations, taken as true and construed in plaintiffs' favor, more than suffice to state a claim that EisnerAmper participated or materially aided Aequitas' unlawful sales of securities after 2013.[10] Without EisnerAmper, those sales would not have occurred.

Once again, the decision in *Cox v. Holcombe Family Limited Partnership*, is instructive. In *Cox*, defendant Umpqua Bank moved to dismiss the plaintiff's second amended complaint,

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[10]The Oregon Court of Appeals has explained:

> [A]lthough proof of direct unlawful activity by a defendant or its participation in the seller's unlawful acts themselves, as distinct from the sale generally, is not essential to establish its liability as a participant or material aider . . . ; the extent and importance of the defendant's involvement in a sale can be shown by evidence of its connection with unlawful activities as much as with any other aspects of the sale.

First Interstate Bank, 148 Or. App. at 184-85.

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arguing that unlawful sales forming the basis of the plaintiff's claims had occurred after Umpqua had terminated its relationship with the seller. Judge You disagreed, however, noting that the line of credit that Umpqua extended to the seller, which Umpqua knew the seller was using to repay investors, "creat[ed] the illusion of stability and credibility" and was necessary in order for the securities sales to "b[e] completed or consummated." *Cox*, Slip Op. at 8. As explained above, such is exactly the case here. In *Cox*, Judge You rejected precisely the same argument that EisnerAmper makes here, and this Court should likewise reject it.

D. Plaintiffs Allege an Actionable Claim Under ORS 59.115(3) Based On Aequitas' Unlawful Sale of Unregistered Securities

As discussed in plaintiffs' opposition to the Joint Motion, to establish Aequitas' primary liability pursuant to ORS 59.115(1)(a), plaintiffs need only allege that the securities were not registered. It is defendants' burden to prove, by affirmative defense, an exemption from registration. Plaintiffs allege that the Aequitas Securities were not registered under the Oregon Securities Law (FAC ¶ 26), and, as discussed above, plaintiffs plead facts demonstrating EisnerAmper's participation and material aid in Aequitas' sales of the Aequitas Securities. Accordingly, plaintiffs state a claim pursuant to ORS 59.115(3) and EisnerAmper's motion should be denied.

E. Plaintiffs Allege Actionable Claims Under ORS 59.115(3) Based On Aequitas' Violations of ORS 59.115(1)(b) and 59.135(2)

As explained above, EisnerAmper served as auditor of Aequitas' securities business for more than two years, from at least March 2011 until at least October 2013. EisnerAmper contends that plaintiffs "allege virtually no facts at all" regarding the false statements and omissions made by Aequitas during that period. EisnerAmper is wrong. As explained in

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plaintiffs' opposition to the Joint Motion (*see* Sections IV.C.3-4), the FAC alleges false statements and omissions by Aequitas during the entire class period, including during the period from June 2011 to October 2013. ***For example***, the FAC alleges that during the 2011-2013 period:

- Aequitas did not disclose that the Aequitas Securities were required to be registered under the Oregon Securities Law (FAC ¶¶ 72-78).
- Aequitas omitted material facts concerning the nature and extent of the commissions and other compensation paid by Aequitas that was directly linked to the sale of Aequitas Securities (FAC ¶¶ 79-85);
- Aequitas did not disclose (i) that repayment of the Aequitas Securities was largely dependent on Aequitas' ability to bring in new investor funds, or (ii) that a substantial portion of new investor funds would be used to repay other investors in Aequitas Securities (FAC ¶¶ 86-99);
- Aequitas did not disclose that its Carepayment Technologies, Inc., affiliate ("CPTI") had no *bona fide* economic function, that all of the operations and functions of CPTI were performed by ACM in exchange for certain fees, and that ACF—an EisnerAmper-audited affiliate—was the source of the funds used by CPTI to pay those fees to ACM (FAC ¶ 103);
- Aequitas did not disclose (i) that the value of the "non-marketable common stock" disclosed in the EisnerAmper-audited 2011 and 2012 financial statements for ACF was created through financial engineering conducted outside the EisnerAmper-audited group, or (ii) that Aequitas created that "non-marketable common stock" by

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acquiring by acquiring and "capitalizing" CPTI with debt and illusory "intangible assets" and then causing CPTI to create and distribute to Aequitas stock interests based on an inflated valuation (FAC ¶ 166);

- Aequitas did not disclose (i) that the claimed value of CPTI was based largely on healthcare receivables owned by ACF through its wholly owned subsidiary Carepayment, LLC ("CPLLC")—an affiliate included in the EisnerAmper-audited consolidated ACF financials (*see* FAC ¶ 30(a)), or (ii) that the value of ACF's loans to CPTI depended largely on the receivables owned by ACF (through CPLLC) and Aequitas' continued use of CPTI as a means to funnel investor funds from ACF to ACM (FAC ¶ 104);
- Aequitas did not disclose that ACF claimed as valuable assets (i) ACF's ownership interest in CPTI, and (ii) the receivables owned by ACF (through CPLLC), in addition to (iii) the amounts outstanding on ACF's direct loans to CTPI (FAC ¶ 105);
- Aequitas did not disclose that the claimed collateral purporting to support the Aequitas Securities included (i) ACF's ownership interest in CPTI, and (ii) the receivables owned by ACF (through CPLLC), in addition to (iii) the amounts outstanding on ACF's direct loans to CTPI (FAC ¶ 106);
- Aequitas did not disclose that its EDPlus Holdings, LLC, affiliate ("EDPlus") had no *bona fide* economic function, that all of the operations and functions of EDPlus were performed by ACM in exchange for certain fees, and that ACF was the source of the funds used by EDPlus to pay those fees to ACM (FAC ¶ 108);

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- Aequitas did not disclose that Corinthian Colleges, Inc. ("Corinthian") was its sole source of student loan receivables (FAC ¶¶ 107, 148);
- Aequitas failed to disclose nearly all material facts relating to the actual cost to Aequitas, including to ACF and its wholly owned subsidiary, ASFG, LLC ("ASFG")—an affiliate included in the EisnerAmper-audited consolidated ACF financials (*see* FAC ¶ 30(a))—of the Aequitas' Corinthian student loan program, which ran from June 2011 to January 2014 (FAC ¶¶ 146, 150-154);
- Aequitas did not disclose (i) that the claimed value of its EDPlus affiliate was based largely on the Corinthian receivables purchased and owned by ACF through ASFG, or (ii) that the value of ACF's loans to EDPlus depended largely on the Corinthian student loan receivables and Aequitas' continued use of EDPlus as a means to funnel funds from ACF to ACM (FAC ¶ 108);
- Aequitas did not disclose that ACF claimed as valuable assets (i) ACF's ownership interest in EDPlus, and (ii) the Corinthian receivables owned by ACF (through ASFG), in addition to (iii) the amounts outstanding on ACF's direct loans to EDPlus (FAC ¶ 109); and
- Aequitas did not disclose that the claimed collateral purporting to support the Aequitas Securities included (i) ACF's ownership interest in EDPlus, and (ii) the Corinthian receivables owned by ACF (through ASFG), in addition to (iii) the amounts outstanding on ACF's direct loans to EDPlus (FAC ¶ 110).

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In other words, EisnerAmper's argument lacks merit. The FAC clearly alleges primary violations throughout the class period sufficient to support EisnerAmper's liability under ORS 59.115(3).

IV. CONCLUSION

For the reasons stated above, the Court should deny EisnerAmper's Motion to Dismiss Plaintiffs' First Amended Complaint.

DATED this 1st day of August, 2016.

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