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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 MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AND SEPARATE MEMORANDUM OF LAW IN SUPPORT FILED BY DEFENDANT DELOITTE & TOUCHE LLP** **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.

TABLE OF CONTENTS

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Plaintiffs submit this memorandum in opposition to the *Motion to Dismiss the First Amended Complaint and Separate Memorandum of Law in Support Filed by Defendant Deloitte & Touche LLP* [Dkt. No. 85] ("Deloitte 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 Deloitte & Touche LLP is referred to as "Deloitte" and plaintiffs' First Amended Complaint is referred to as "FAC."

I. SUMMARY OF OPPOSITION

Plaintiffs allege that Deloitte is liable pursuant to ORS 59.115(3) 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, Deloitte 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 Deloitte is that Deloitte participated or aided in Aequitas' unlawful sales. *See* ORS 59.115(3). Plaintiffs do not contend that Deloitte itself engaged in fraud. Plaintiffs are required only to allege facts demonstrating that Deloitte participated or aided in Aequitas' sales of securities. Plaintiffs have done so.

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As described in the FAC, Deloitte provided audit and accounting services to Aequitas for more than two years. In particular, from 2013 to 2016, Deloitte served as auditor for Aequitas' fundraising entities, providing audit reports for each of those entities for the years 2013 and 2014. Although the financial statements audited by Deloitte contained material misstatements, those financial statements and Deloitte's clean audit opinions were disseminated to investors and prospective investors. Offering documents for the Aequitas Securities identified Deloitte as Aequitas' auditor. Prospective investors also received other promotional materials, quarterly updates, and information that highlighted Deloitte's role as auditor.

Deloitte and the annual audit reports issued by Deloitte were important to Aequitas. Both the fact of Deloitte'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 Deloitte, 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 fact 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.*

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Nova-Tech, Inc., 333 F. Supp. 468, 472 (D. Or. 1971) (holding that a professional firm which allowed its identity to be used in promotional materials was a "participant" under ORS 59.115(3)).

The sufficiency of Deloitte'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, Deloitte's motion should be denied.

II. DELOITTE WAS INTEGRAL TO AEQUITAS' SALE OF SECURITIES

Deloitte 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 Deloitte 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 October 2013 until at least 2016, Deloitte acted as the auditor for Aequitas' securities business. FAC ¶¶ 15, 30(b). During that time:

- Aequitas sold securities through Aequitas Commercial Finance LLC ("ACF"), and Deloitte was the auditor (FAC ¶¶ 27, 30(b), 34);
- Aequitas sold securities through Aequitas Income Protection Fund, LLC ("AIPF"), and Deloitte was the auditor (FAC ¶¶ 28, 30(b), 42);

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- Aequitas sold securities through Aequitas Income Opportunity Fund, LLC ("AIOF"), and Deloitte was the auditor (FAC ¶¶ 28, 30(b), 48);
- Aequitas sold securities through Aequitas Income Opportunity Fund II, LLC ("AIOF-II"), and Deloitte was the auditor (FAC ¶¶ 28, 30(b), 53);
- Aequitas sold securities through Aequitas Capital Opportunities Fund, LP ("ACOF"), and Deloitte was the auditor (FAC ¶¶ 28, 30(b), 58);
- Aequitas sold securities through Aequitas Enhanced Income Fund, LLC ("AEIF"), and Deloitte was the auditor (FAC ¶¶ 28, 30(b), 63);
- Aequitas sold securities through Aequitas ETC Founders Fund, LLC ("AETC"), and Deloitte was the auditor (FAC ¶¶ 30(b));
- Aequitas sold securities through Aequitas WRFF I, LLC, and Deloitte was the auditor (FAC ¶¶ 30(b));
- Aequitas sold securities through MotoLease Financial, LLC ("AMLF"), which Deloitte included in its audit of the consolidated financial statements of ACF (FAC ¶ 30(b)); and
- Aequitas sold securities through Aequitas Carepayment Fund, LLC, and Deloitte was the auditor (FAC ¶ 30(b)).

Deloitte focused on Aequitas' securities business—a distinct subset of subsidiaries within in 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.

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

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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 Deloitte to prospective and existing investors who were deciding whether to invest or re-invest in Aequitas Securities. FAC ¶ 15. Having Deloitte as the auditor of its securities business gave Aequitas clout with prospective and existing investors, and the Deloitte-audited financial statements were a material part of the information made available to prospective and existing investors. FAC ¶ 15. 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] Aequitas provided

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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 24, 2014, states:

> Each year, each of our Funds delivers to its investors the previous 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 Accounting Oversight Board audits our Funds' annual financial statements.

Id. at 25.

[3] For example, the ACOF PPM dated February 2014, states:

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investors and potential investors with Deloitte-audited financial statements for the years 2013 and 2014. FAC ¶¶ 34, 42, 48, 53.

Aequitas highlighted Deloitte's role as auditor in the materials Aequitas provided to prospective and existing investors. With Deloitte's knowledge and consent, the offering materials for the Aequitas Securities prominently identified Deloitte as the auditor in connection with the offer and sale of those securities. FAC ¶¶ 15, 34, 42, 48, 53, 58. Aequitas also highlighted Deloitte's role as auditor in promotional materials, quarterly updates, and other materials and information provided to prospective and existing investors. FAC ¶¶ 35, 43, 49, 54, 59. Furthermore, Aequitas identified Deloitte 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 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

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> Audited annual financial statements, unaudited quarterly reports and annual tax information will be provided to each Limited Partner.

Grenley Decl. [Dkt. No. 86], Ex. 14 at 57.

[4] Deloitte is identified as auditor in the *Form ADVs (Part 1A)* filed by the Aequitas adviser with the SEC dated March 24, 2014; May 27, 2014; and March 31, 2015.

[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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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 Deloitte's annual audits, nor could Aequitas have continued to sell securities without distributing the annual Deloitte-audited financial statements to investors.

Deloitte asserts that the FAC "effectively acknowledges that Deloitte played no role in the allegedly unlawful transactions at issue." Deloitte Motion at 10. Nothing could be further from the truth. As show above, plaintiffs have alleged that Deloitte played an integral role in Aequitas' sale of securities, and that Deloitte is therefore liable 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.)

"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,

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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, Deloitte) 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).

To avoid liability, however, Deloitte has created a new accountant-friendly legal standard that is contrary to the statutory text, the legislative framework behind the statute and the authorities interpreting it. The Court should reject this proposed new legal standard in favor of the actual standard that a party is liable under ORS 59.115(3) if the party "participates or materially aids in the sale" of securities.

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A. Deloitte Participated and Materially Aided in the Sales of Securities

Deloitte invents a new legal standard for secondary liability under ORS 59.115(3). Deloitte Motion at 14. But Deloitte's novel accountant-friendly standard has no basis in law. Attempting to justify its new creation, Deloitte selectively quotes one provision from *Prince v. Brydon*, that "it is a drafter's knowledge, judgment, and assertions reflected in the contents of the documents that are 'material' to the sale," 307 Or. at 149, and then draws the illogical conclusion that this provision "means that" in order for any auditor to be held secondarily liable under ORS 59.115(3), "at a minimum, the auditor's report on the issuer's financial statements (in other words, the auditor's work product) must be included in the offering documents given to and reviewed by the investor, and the auditor must consent to that inclusion." Deloitte Motion at 14. *That is not the law*, and the holding of *Prince* does not support Deloitte's proposed new standard.

Rather, the question of whether a party participated or materially aided in the sale of a security "depends on the *importance* of one's personal contribution to the transaction." *Prince*, 307 Or. at 149 (emphasis added). As the *Prince* court explained:

> Whether 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**. Typing, reproducing, and delivering sales documents may all be essential to a sale, but they could be performed by anyone; it is a drafter's knowledge, judgment, and assertions reflected in the contents of the documents that are "material" to the sale.

Id. (emphasis added). *Prince* did not deal with auditors or auditor reports, and it certainly did not set forth any of the requirements that Deloitte now imagines. Further, the statutory language of ORS 59.115(3), its legislative framework, and the authorities interpreting ORS 59.115(3) compel rejection of Deloitte's proposed new standard.

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First, the plain text of ORS 59.115(3) does not restrict any person's secondary liability in the manner suggested—there is *no requirement* under the statute that an auditor's report be included in offering documents, there is *no requirement* that an auditor's report be given to and reviewed by investors, and there is *no requirement* that any auditor consent to inclusion of any such auditor report in offering documents. Beyond the clear dictates of the statute itself, Oregon law imposes no further affirmative limitations on auditor liability.

Second, the legislative framework behind ORS 59.115(3) precludes the imagined limitations on auditor liability. As noted above, the "participates or materially aids" provision must be given a very broad and literal reading as well as liberally construed to afford the greatest possible protection to the public. *See Mann*, 229 F. Supp. 2d at 1138; *see also Adams*, 265 Or. at 524. Deloitte's proposed new legal standard, however, flies in the face of the legislative framework by narrowly construing the "materially aids" provision and creating implied limitations on auditor liability that do not come from a literal reading of the statute.[6]

Third, Deloitte effectively seeks to impose a "reliance" requirement under ORS 59.115(3), although no such requirement exists. As explained in greater detail below (*see infra* Section II.B.) and 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**. *See also Everts v. Holtmann*, 64 Or. App. 145, 152 (1983); *State v. Marsh & McLennan Cos., Inc.*, 353 Or. 1, 9-11 (2012). Therefore, contrary to Deloitte's argument, it makes no difference under ORS 59.115(3) whether or not Aequitas investors reviewed and relied on any auditor report.

[6] In practical effect, Deloitte seeks to limit an auditor's secondary liability under ORS 59.115(3) to opinions rendered in public securities offerings. Of course, the desired limitation on secondary liability would offer less protection to the public under the securities laws.

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Finally, the case law establishes that the reach of secondary liability under ORS 59.115(3) is far greater than contemplated by Deloitte. 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. *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. *Prince*, 307 Or. at 149. 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 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.

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

[8] *See also Cox v. Holcomb Family Ltd. P'ship*, No. 1308-12201 (Or. Cir. Ct. Dec. 14, 2015), attached as Exhibit A to *Defendant EisnerAmper LLP's Motion to Dismiss Plaintiffs' First Amended Complaint* [Dkt. No. 78].

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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.

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 Deloitte knowingly consented to the use of its identity and reputation in connection with the offering of Aequitas Securities (FAC ¶¶ 34, 42, 48, 53, 58, 63), and that Deloitte'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 ¶¶ 15, 34, 35, 42, 43, 48, 49, 53, 58, 59, 63.

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In performing their audits, Deloitte did far more than simply "type, copy, or deliver" the Aequitas financial statements. Deloitte concedes that the services it provided to Aequitas were the product of considerable judgment and knowledge, explaining that "although ultimately expressed in shorthand form, the report is the final product of a complex process involving discretion and judgment on the part of the auditor at every stage." Deloitte Motion at 19 (emphasis added) (citation, quotation marks, and alteration omitted). Deloitte admittedly provided its professional knowledge and judgment about the Aequitas investment vehicles to Aequitas, Deloitte made use of that knowledge and judgment in auditing the Aequitas financial statements, and Deloitte enabled Aequitas to use the Deloitte-audited financial statements (as well as the offering documents that identify Deloitte as the auditor) in conjunction with the sale of Aequitas securities to prospective and existing investors. These professional activities reflect precisely the type of "knowledge, judgment, and assertions reflected in the contents of the documents that are 'material' to the sale" that the Oregon Supreme Court determined reflect "material aid." *Prince*, 307 Or. at 149.

Deloitte seeks to avoid this conclusion by pointing to three cases that touch upon auditor liability for securities violations: *Monroe v. Hughes*, 31 F.3d 772 (9th Cir. 1994); *Ahern*, 611 F. Supp. 1465; and *Rembold*. Deloitte's reliance on these cases is not well-founded. One of the cases did not even address liability under ORS 59.115(3), and none of the three cases supports Deloitte's proposed new legal standard that would allow an auditor to avoid liability under ORS 59.115(3) as long as the seller did not use a prospectus or private placement memorandum ("PPM"), or as long as any prospectus or PPM used by the seller did not itself contain the

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auditor's entire audit report (regardless of whether the seller separately provided the audit report to prospective investors).[9]

Although Deloitte argues that *Monroe* provides "useful guidance" regarding the application of ORS 59.115(3) to auditors, it was decided on entirely different grounds. In *Monroe*, the district court did not address liability under ORS 59.115(3) because it found that plaintiffs had failed to raise a genuine issue of fact even as to a primary violation of the securities laws. *See Monroe v. Hughes*, 860 F. Supp. 733, 740 (D. Or. 1991) ("[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 Deloitte's argument to the contrary (Deloitte Motion at 14)—the Ninth Circuit did not evaluate whether the auditor "materially aided" a sale of securities under ORS 59.115(3). Nor did the court even suggest, much less require, that an auditor must include an auditor's report in offering documents in order for secondary liability to arise. Rather, the Ninth Circuit found merely that the allegations did not state a claim for primary liability, thus precluding the possibility of secondary liability. *See Monroe*, 31 F.3d at 774 (affirming dismissal of primary liability claims).

In *Ahern*, the court denied the summary judgment motion of an auditor of financial statements that were included in a company's registration statement and prospectus, finding that the auditor could be found secondarily liable under ORS 59.115(3). *Ahern*, 611 F. Supp. at

[9] Indeed, Deloitte argues that even though plaintiffs allege that Aequitas provided investors and prospective investors with the Deloitte-audited financial statements, plaintiffs have failed to state a claim under ORS 59.115(3) because they do not allege that the Aequitas PPMs—the actual documents themselves—contained the Deloitte-audited financials. *See* Deloitte Motion at 17. That is a distinction without a difference, and a ridiculous one at that.

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1491. But the court *did not* hold that an auditor's report *must* be included in offering documents in order for secondary liability to arise under ORS 59.115(3). Similarly, in *Rembold*, the court denied the motion to dismiss of an auditor alleged to have certified audited financial statements that a company included in its "Subscription Offering Circular," finding that the plaintiffs had stated a claim against the auditor under ORS 59.115(3). 1989 WL 35914, at *3, *6. But, again, the court *did not* hold that an audit report *must* be included in offering documents for liability under ORS 59.115(3) to accrue.

Deloitte 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, Deloitte's professional contributions were important to Aequitas in the sale of the securities at issue, thereby subjecting Deloitte to liability under ORS 59.115(3).

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

Deloitte explicitly asserts reliance as an element of a cause of action under ORS 59.115. Remarkably, Deloitte relies on the Oregon Supreme Court's decision in *Marsh* to support its position. Deloitte Motion at 11 (citing *Marsh* for the proposition that reliance is required, and may not be presumed, under ORS 59.115). Deloitte 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 Deloitte'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).

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Plaintiffs are not required to "connect" their purchases to Deloitte. They are not required to allege "what Deloitte's specific role was with respect to" their particular purchases or what "information they received in connection with their purchases . . . [and] whether Deloitte had anything to do with that information." Deloitte Motion at 13. Nor does ORS 59.115(3) impose liability only if plaintiffs actually received Deloitte-audited financial statements. Deloitte Motion at 11-12, 17.

As described above, ORS 59.115(3) provides for secondary liability for every person that participates or material aids in the sale of a security. The FAC alleges that Deloitte played an integral role in Aequitas' offering and sale of the Aequitas Securities. Individual reliance on anything written by Deloitte is not an element of this claim. Moreover, 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); *Cox v. Holcomb Family Ltd. P'ship*, No. 1308-12201 (Or. Cir. Ct. Dec. 14, 2015) (denying a motion to dismiss ORS 59.115(3) claims against banks that made loans to the seller).[10]

C. 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 (*see* Section IV.B), plaintiffs need only allege that the Aequitas Securities were not registered in order to establish Aequitas'

[10] *See supra* note 8.

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primary liability under ORS 59.115(1)(a). 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 Deloitte's participation and material aid in Aequitas' sales of the Aequitas Securities. Accordingly, plaintiffs state a claim pursuant to ORS 59.115(3) and Deloitte's motion should be denied.

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

As shown in plaintiffs' Opposition to the Joint Motion (*see* Section IV), the allegations of the FAC establish Aequitas' primary liability under ORS 59.115(1)(b) and under ORS 59.115(1)(a) for violations of ORS 59.135(2). As discussed above, plaintiffs plead facts demonstrating Deloitte's participation and material aid in Aequitas' sales of the Aequitas Securities. Accordingly, plaintiffs state a claim pursuant to ORS 59.115(3) and Deloitte's motion should be denied.

IV. RULE 9(B) DOES NOT APPLY TO ALLEGATIONS OF PARTICIPATION AND MATERIAL AID, WHICH DO NOT SOUND IN FRAUD

Deloitte's argument that Rule 9(b) applies to plaintiffs' allegations of participation and material aid should be denied for the reasons set forth in Section III of plaintiffs' opposition to the Joint Motion and in Section II of plaintiffs' opposition to *Defendant Tonkon Torp LLP's Individual Motion to Dismiss First Amended Complaint* [Dkt. No. 80].

V. CONCLUSION

For the reasons stated above, Deloitte's motion to dismiss should be denied.

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