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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' MEMORANDUM IN OPPOSITION TO DEFENDANT SIDLEY AUSTIN 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 Sidley Austin LLP's *Motion to Dismiss Plaintiff's First Amended Complaint* ("Sidley Motion"). Plaintiffs incorporate by reference plaintiffs' opposition to *Joint Motion to Dismiss the First Amended Complaint Filed by Defendants Deloitte & Touche LLP, EisnerAmper LLP, Sidley Austin LLP, and Tonkon Torp LLP* ("Joint Motion" and cited as "Jt. Motion"). Plaintiffs respond in this memorandum primarily to issues not addressed in the Joint Motion. Defendant Sidley Austin LLP is referred to as "Sidley" and plaintiffs' First Amended Complaint is referred to as "FAC."

I. SUMMARY OF OPPOSITION

Plaintiffs state an actionable claim against Sidley pursuant to ORS 59.115(3) for participation and material aid in Aequitas' unlawful sales of unregistered securities and sales of securities by means of false statements and omissions. Those claims arise from Sidley's participation and material aid in an ongoing, integrated securities offering conducted through at least seven Aequitas subsidiaries. Not only do plaintiffs allege that Sidley prepared the key documents required for Aequitas to sell the ACOF Interests, plaintiffs also allege that Sidley advised ACF, the parent entity of the issuers of five securities at issue and the manager of each of the Aequitas Funds, with respect to securities matters. Sidley's participation and aid extended beyond providing securities advice to preparing securities sales documents and legal opinions. Sidley's legal services were critical to Aequitas' securities business.

Sidley's principal argument—that "almost 99% of the hyperbolic allegations of the FAC concerning Aequitas have nothing to do with ACOF, or Sidley"—is wrong. Sidley describes ACOF as a private equity fund. Sidley Motion at 1. What Sidley does not disclose, in its effort to sidestep numerous omissions alleged in the FAC that relate to ACOF, is the nature of this so-

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called private equity fund. The initial assets of ACOF—the assets being pitched to prospective investors—consisted of equity in five portfolio companies or "Existing Portfolio Investments": CarePayment Technologies, Inc.; EDPlus Holdings, LLC; ETC Global Group, LLC; MotoLease, LLC; and Strategic Capital Alternatives, LLC. These facts are plain on the face of the private placement memorandum ("PPM") that Aequitas used to sell securities through ACOF (the "ACOF PPM"), which was written by Sidley.[1] The portfolio companies that make up the so-called private equity fund are described at pages 7-24 of the ACOF PPM. Plaintiffs allege numerous omissions affecting those portfolio assets. *See* FAC ¶¶ 103-35.

Sidley also attempts to write its participation and aid of Aequitas' securities business out of the FAC, but it is forced at least to acknowledge that plaintiffs allege Sidley's participation and material aid in Aequitas' sales of ACOF Interests. Thus, at a minimum, plaintiffs' claim for relief should not be dismissed as to Sidley's participation and material aid in unlawful sales of ACOF Interests. That Sidley prepared the PPM for the sales of ACOF Interests—a fact that cannot be disputed because it appears on the face of the ACOF PPM[2]—and prepared the subscription agreement for the sale of ACOF Interests and the documents employed to evidence the investments (FAC ¶ 57) are sufficient to allege a lawyer's participation and material aid. *See*,

[1] The ACOF PPM was submitted by Deloitte in connection with these motions to dismiss as Exhibit 14. *See* Masuda Decl. [Dkt. No. 79], ¶ 15 (describing Ex. 14 as the ACOF PPM); Grenley Decl. [Dkt. No. 86] (submitting exhibits to Masuda Decl., including Ex. 14). The ACOF PPM states at page 117 that Sidley prepared the document.

[2] Among other things, the ACOF PPM (Deloitte Ex. 14) states, at page 116, under the heading "Legal Matters", that "Sidley Austin LLP, Chicago, Illinois served as legal counsel to the General Partner and the Investment Advisor in connection with the preparation of this Memorandum" and that, "[i]n preparing this Memorandum, Sidley Austin LLP relied upon information furnished to it by the Partnership and/or the General Partner and the Investment Advisor, and did not investigate or verify the accuracy and completeness of information set forth herein . . . ." If necessary, plaintiffs will add the quoted language to their pleading.

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e.g., *Anderson v. Carden*, 146 Or. App. 675, 684 (1997) ("There is no question that a person who prepares documentation in connection with a sale of securities is a person who 'participates or materially aids' in the sale under ORS 59.115(3).").

In addition to the facts demonstrating Sidley's participation and aid, plaintiffs allege facts demonstrating Aequitas' primary liability for unlawful sales of ACOF Interests. Plaintiffs allege that the ACOF Interests were not registered and that Aequitas made numerous false statements and omissions in connection with the sales of the ACOF Interests. FAC ¶¶ 56, 75, 82, 89, 96, 103-35, 140, 172. Sidley's efforts to contradict plaintiffs' factual allegations of false statements and omissions relating to Aequitas' sales of ACOF Interests are not well taken on a motion to dismiss. Plaintiffs' allegations are accepted as true on a motion to dismiss, and the materiality of those alleged facts cannot be tested at this stage. *See Am. Family Ass'n, Inc. v. City & Cnty. of S.F.*, 277 F.3d 1114, 1120 (9th Cir. 2002). Thus, at a minimum, plaintiffs plead facts to support all elements of a claim against Sidley pursuant to ORS 59.115(3) for Aequitas' sales of ACOF Interests. According to the PPM that Sidley prepared, that offering sought to raise $100 million, so that claim alone is very substantial.[3]

However, Sidley's liability is not limited to the ACOF Interests. Liability for participation and material aid is not limited to drafting securities documents. The FAC alleges that Aequitas conducted its securities business through a complex web of entities and manufactured an appearance of financial strength by manipulating the value of assets carried on its books, frequently through inter-company transactions. Sidley was integral to this series of

[3] It is plaintiffs' understanding that Aequitas actually raised more than $30 million from sales of ACOF Interests.

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offerings because of the extensive securities advice Sidley provided to ACF and the affiliated Aequitas entities—some of which were established solely to raise money from investors. *See* FAC ¶ 30(d). Sidley provided three legal opinions that were critical to Aequitas' ability to obtain a $100 million credit facility with Wells Fargo, which promoted the illusion of success and legitimacy that Aequitas required in order to perpetuate its ongoing efforts to take money from investors. *Id*.[4] Judge Youlee Yim You, shortly before becoming a U.S. Magistrate Judge in this District, upheld similar allegations in a substantial case discussed below. *See Cox v. Holcomb Family Ltd. P'ship*, No. 1308-12201 (Or. Cir. Ct. Dec. 14, 2015) (submitted as Exhibit A to EisnerAmper Motion).

Sidley's motion to dismiss should be denied in its entirety. In the alternative, plaintiffs should be given leave to re-plead to correct any perceived deficiencies in the FAC.

II. PLAINTIFFS PLEAD FACTS ESTABLISHING THAT SIDLEY PARTICIPATED AND MATERIALLY AIDED IN THE SALE OF THE AEQUITAS SECURITIES

Plaintiffs provide an extensive discussion and analysis of the standards for liability for participation and material aid pursuant to ORS 59.115(3) in plaintiffs' opposition to the Tonkon Motion, at Section III.C. It is significant that Sidley does not urge the extreme standards Tonkon puts forth. In fact, it appears from Sidley's description of the legal standards at page 8 of the Sidley Motion that Sidley agrees with plaintiffs that allegations that a lawyer prepared securities documents and opinions in connection with the sale of securities is sufficient to state a claim for relief. *See* Sidley Motion at 8 (citing *Anderson* as the legal standard).

[4] Paragraph 30(d) of the FAC refers to two of those legal opinions. The SEC Complaint, at paragraphs 69-76, describes a third legal opinion by an unnamed law firm. After the filing of the FAC, plaintiffs confirmed that the unnamed law firm referred to in the SEC Complaint is Sidley. Plaintiffs will amend to add the allegations concerning the third legal opinion, if necessary.

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A. The FAC Alleges Sidley's Participation and Material Aid in the Sale of all Aequitas Securities, Not Just the Sales Effected by Aequitas Through ACOF

Sidley asserts that plaintiffs have not and "cannot allege that Sidley played any substantive role" in connection with any of the Aequitas Securities other than those sold by Aequitas through ACOF, one of the numerous private funds created by Aequitas for the purpose of raising money from investors. Sidley Motion at 7-9. Sidley is wrong. The allegations of the FAC, as well as subsequent revelations, show that beginning at least as early as February 2014 (FAC ¶ 17), Sidley was in fact engaged by Aequitas to play a central role in Aequitas' securities business:

- The FAC alleges that Aequitas sold securities through ACOF, and that Sidley served as legal adviser to the general partner and investment adviser of that fund (FAC ¶¶ 28, 30(d));
- The FAC alleges that Aequitas sold securities through Aequitas Income Protection Fund, LLC ("AIPF"), a private fund created by Aequitas for the purpose of raising money from investors, and that Sidley served as legal adviser to the manager and investment adviser of that fund (FAC ¶¶ 28, 30(d));
- The FAC alleges that Aequitas sold securities through Aequitas Income Opportunity Fund, LLC ("AIOF"), a private fund created by Aequitas for the purpose of raising money from investors, and that Sidley served as legal adviser to the manager and investment adviser of that fund (FAC ¶¶ 28, 30(d));
- The FAC alleges that Aequitas sold securities through Aequitas Income Opportunity Fund II, LLC ("AIOF-II"), a private fund created by Aequitas for the purpose of

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raising money from investors, and that Sidley served as legal adviser to the manager and investment adviser of that fund (FAC ¶¶ 28, 30(d));

- The FAC alleges that Aequitas sold securities through Aequitas ETC Founders Fund, LLC ("AETC"), a private fund created by Aequitas for the purpose of raising money from investors, and that Sidley served as legal adviser to the manager and investment adviser of that fund (FAC ¶ 30(d));
- The FAC alleges that Aequitas sold securities through Aequitas Enhanced Income Fund, LLC ("AEIF"), a private fund created by Aequitas for the purpose of raising money from investors, and that Sidley served as legal adviser to the manager and investment adviser of that fund (FAC ¶ 30(d));
- The FAC alleges that Aequitas sold securities through Aequitas Private Client Fund, LLC, a private fund created by Aequitas for the purpose of raising money from investors, and that Sidley served as legal adviser to the manager and investment adviser of that fund (FAC ¶¶ 25, 30(d));
- The FAC alleges that Aequitas sold securities through Aequitas Carepayment Fund, LLC, a private fund created by Aequitas for the purpose of raising money from investors, and that Sidley served as legal adviser to the manager and investment adviser of that fund (FAC ¶ 30(d));
- The FAC alleges that Aequitas sold securities through Aequitas Hybrid Fund, LLC, a private fund created by Aequitas for the purpose of raising money from investors, and that Sidley served as legal adviser to the manager and investment adviser of that fund (FAC ¶ 30(d));

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- The FAC alleges that Aequitas sold securities through Aequitas WRFF I, LLC, a private fund created by Aequitas for the purpose of raising money from investors, and that Sidley served as legal adviser to the manager and investment adviser of that fund (FAC ¶ 30(d));
- The FAC alleges that Aequitas sold securities through Aequitas Commercial Finance, LLC ("ACF"), FAC ¶ 30(d), and facts discovered by plaintiff after the filing of the FAC reveal that Sidley provided securities-related legal services to ACF—specifically, Sidley provided ACF with an opinion stating (wrongly) that ACF was not required to register as an investment company under the Investment Company Act of 1940;
- The FAC alleges that Sidley advised Aequitas in connection with the sale of its tasecurities, including its sale of securities through ACOF (FAC ¶¶ 17, 30(d));
- The FAC alleges that Sidley prepared documents necessary for Aequitas to complete the sale of its securities, including its sale of securities through ACOF, and that such documents included offering documents, risk disclosures, and subscription agreements (FAC ¶¶ 17, 30(d));
- The FAC alleges that Sidley prepared such documents with knowledge that Aequitas would sell the subject securities, and that Sidley was essential to the sale of the Aequitas Securities (FAC ¶ 17); and
- The FAC alleges that Sidley provided other legal services to Aequitas, including legal opinions and other legal services that enabled Aequitas to isolate its health care receivable assets from investors in order to secure a $100 million loan facility that

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allowed Aequitas to create the illusion of success and legitimacy necessary to continue raising money from investors (FAC ¶ 30(d)).

Sidley contends that these allegations are deficient because plaintiffs have not alleged that Sidley represented any of the specific investment vehicles—*i.e.*, any of the private funds—through which Aequitas sold securities. Sidley Motion at 9. In other words, Sidley argues that its representation of a fund's manager and investment adviser is simply not enough. But Sidley did not represent ACOF, either—Sidley represented only the general partner and investment adviser of ACOF. *See* FAC ¶ 30(d); Masuda Decl. Ex. 14 at 117 ("Sidley Austin LLP does not represent and has not represented the prospective investors or [ACOF] in the course of the organization of [ACOF], the negotiation of its business terms, the offering of the [ACOF] Interests or in respect of its ongoing operations."). Sidley's specific status with respect to any particular Aequitas subsidiary is not conclusive, and may not even be instructive. What matters is the role Sidley played with respect to the offering of the Aequitas Securities as a whole.

Sidley also contends that it could not possibly have participated or aided in the sale of securities for which another law firm (in this case, Tonkon Torp) prepared the offering materials. Sidley Motion at 9. But a lawyer's participation or aid can take forms other than the preparation of offering documents. *See, e.g.*, *Ainslie v. Spolyar*, 144 Or. App. 134, 145 (1996) (lawyer's actions to prevent the occurrence of events that could "seriously imped[e]" an ongoing offering was participation or material aid). Aequitas' offering and sale of securities was ongoing and continuous during the entire class period, and there was ample opportunity for Sidley to facilitate that ongoing offering, including, for example, by providing an opinion that ACF was not required to register as an investment company and that Aequitas could continue its securities

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sales through ACF unchecked and unhindered by the burden of registration and compliance with the investor-protection provisions of the Investment Company Act.

Sidley challenges the level of detail of plaintiffs' allegations of participation and aid, but plaintiffs are not required to plead participation or aid with specificity, and Sidley does not deny that it provided the legal services alleged. Sidley contends that plaintiffs are required to specify the legal services, but plaintiffs are not required to satisfy Rule 9(b) with respect to their allegations of non-fraudulent participation and material aid. To require the specificity Sidley demands would insulate lawyer from liability where the specifics of their legal services are not public. At the motion to dismiss stage, it is reasonable to infer the nature of the legal services provided based on the fact that ***Sidley provided legal advice and services to the manager and investment adviser of eleven different investment funds, which existed only to act as vehicles through which Aequitas could sell its securities and take money from investors***.

Sidley also challenges the materiality of plaintiffs' allegations, but disputes concerning the materiality or accuracy of factual allegations cannot be decided on a motion to dismiss. These issues should be addressed, if at all, at summary judgment, after a full development of the facts concerning Sidley's role in Aequitas' securities business.[5] The allegations of the FAC are sufficient to deny Sidley's motion.

In *Cox v. Holcomb Family Limited Partnership*, a ruling on which both Sidley and co-defendant EisnerAmper rely, Judge Youlee Yim You addressed claims that defendant Umpqua Bank participated and materially aided the sales of Berjac securities by repeatedly loaning

[5] Sidley's activities and documents relating to all of the securities are also discoverable as to plaintiffs' claims against the other defendants, regardless of the outcome of the present motion.

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money to Berjac to fund Berjac's securities business, which loans Berjac used to repay investors when investors withdrew money, and which loans gave Berjac the illusion of credibility.[6] As alleged in that case, the loans covered up Berjac's untrue statements and omissions, including its insolvency. *Cox*, Slip Op. at 6-7. Judge You denied Umpqua's motion to dismiss the ORS 59.115(3) claims:

> Plaintiffs have alleged facts showing that Umpqua's actions go beyond tasks such as mere preparation and execution of documents. Umpqua's actions were an important contribution to the transaction. Umpqua's loans, which were used to create the illusion of stability and credibility, were made "in connection" with the sale of Berjac securities. As alleged by plaintiffs, the sales "could not have been completed or consummated" without the loans from Umpqua. Defendant Umpqua's motion is therefore denied.

Id. at 7-8 (internal citations omitted). Judge You's analysis applies to plaintiffs' allegations of Sidley's participation.

Plaintiffs allege that the essence of the Aequitas scheme involved the interrelationships between an array of related Aequitas entities. None of those entities existed in isolation, and each depended on others in order to execute the scheme. Those facts are demonstrated throughout the FAC.

For example, the FAC alleges that "although they were represented by Aequitas as being separate and distinct from the Aequitas 'Private Note' program, the securities sold through the Aequitas Funds and AMLF were fundamentally integrated with the ACF Notes offering." FAC ¶ 29. The FAC describes that ACF owned other Aequitas entities, including ACOF. FAC ¶ 23. "The integrated nature of these offerings was reflected in the audited financial statements of

[6] Sidley cites *Cox* at page 12 of its motion. The *Cox* opinion is submitted as Exhibit A to the EisnerAmper Motion.

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ACF, which were done on a consolidated basis and encompassed ACF, AIPF, AIOF, AIOF-II, AEIF, ACOF, and AMLF, as well as numerous other Aequitas entities." FAC ¶ 29.

The inseparable connections between the Aequitas investments is apparent from plaintiffs' allegations that the financial performance of the various Aequitas entities depended on the performance of each other and upon transactions among each other. The FAC makes specific allegations about ACOF's role in the integrated business:

> Aequitas created ACOF for the purpose of swapping investor funds for ownership interests in certain Aequitas entities—Aequitas caused ACF and [Aequitas Holdings, LLC ("Holdings")] to contribute those ownership interests to ACOF at inflated values, and Aequitas then caused investor funds to be distributed out of ACOF to ACF and Holdings based on those inflated contributions. Many of the ACOF portfolio companies were entirely dependent on ongoing ACF financing.

FAC ¶ 29. Holdings, ACF, and ACOF did not just act in concert with one another, they acted as one. Treating ACOF as a discrete entity, and treating the participants in Aequitas' offering and sale of securities through ACOF as uninvolved in the integrated Aequitas group of affiliated companies, would ignore the reality of Aequitas' scheme and the manner in which Aequitas took money from investors.

The FAC also alleges that "Sidley provided legal services to [Aequitas Investment Management ("AIM")] in connection with AIM's role as an SEC-registered investment adviser and the manager of numerous Aequitas investment vehicles, including . . . ACOF . . . ." (AIM was manager of ACOF's general partner.) FAC ¶ 30(d). Sidley's role in providing legal services to AIM directly affected the investment entities controlled by AIM and the investor assets held by Aequitas through those entities. The FAC specifically alleges the connection between AIM and the investments in the AIPF Notes (FAC ¶ 40), the AIOF Notes (FAC ¶ 46), the AIOF-II Notes (FAC ¶ 52); and the AEIF Notes (FAC ¶ 61).

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Plaintiffs allege that "Sidley provided other legal services to Aequitas, including legal opinions and other legal services that enabled Aequitas to isolate its health care receivable assets from investors and to pledge those assets as collateral securing Aequitas' $100 million loan facility with Wells Fargo Bank, NA, which promoted the illusion of success and legitimacy that Aequitas required in order to perpetuate its ongoing efforts to take money from investors." FAC ¶ 30(d). Thus, plaintiffs' theory of Sidley's participant/aider liability is similar to the *Cox* plaintiffs' theory that Judge You upheld.

Sidley argues that plaintiffs' "throwaway" allegations that Sidley provided legal opinions to enable Aequitas to secure the $100 million loan with Wells Fargo, FAC ¶ 30(d), "cannot possibly support a claim" that it participated or materially aided in the unlawful securities sales. Sidley Motion at 9. In fact, Sidley's role was critical in allowing Aequitas to sell securities. Like the loans at issue in *Cox*, the Wells Fargo loan gave Aequitas credibility and allowed it to raise money through the sale of securities, making Aequitas appear to be financially stable.

In short, the legal services Sidley provided were critical to the loan. If necessary, plaintiffs can provide additional detail. The collateral for the loan had to be isolated in a special purpose entity (SPE) set up specifically for that purpose, so that the lender could prevent creditors of the SPE's affiliates from going after the collateral. Aequitas set up an SPE named CP Funding I Trust, the nominal borrower on the Wells Fargo loan, and Aequitas transferred to CP Funding I Trust receivables that should have been available to benefit investors, to serve as collateral for the loan.

Sidley gave two legal opinions in connection with these transactions. First, Sidley gave a substantive consolidation opinion, to assure Wells Fargo that the SPE would not be consolidated

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with the bankruptcy of its affiliates. This type of opinion required Sidley to examine and evaluate the corporate separateness of the SPE from its Aequitas affiliates and the specific relationship between the SPE and its parent companies and any other controlling entity. Second, Sidley gave a true sale opinion which addressed the nature of the transfer of the collateral assets to the SPE, including whether there is anything about the transfer that would impair the lender's rights in, and ability to easily foreclose on, those collateral assets. Under the facts alleged in this case, the collateral assets were material to many of the Aequitas securities at issue. Sidley represented the SPE in making these two opinions.

The SEC Complaint identifies a third opinion that Sidley issued to enable the Wells Fargo transaction to be completed. Sidley's opinion, and the misconduct of Aequitas relating to the opinion, are described in paragraphs 69-76 of the SEC Complaint. As a condition for the line of credit, Wells Fargo required ACF to provide an opinion letter that ACF need not register as an investment company under the Investment Company Act of 1940. SEC Complaint ¶ 69. Aequitas executives knew that if ACF registered as an investment company, it could no longer make intercompany loans or invest in other registered investment advisory firms that recommended Aequitas investments, which were essential to Aequitas' securities business. *Id.* ¶ 70. Sidley's opinion letter erroneously represented to Wells Fargo that ACF was not required to register as an investment company. Sidley represented ACF in giving this third opinion. At the time plaintiffs filed the FAC, they had not been able to confirm that Sidley issued this third opinion. However, plaintiffs have now confirmed that fact and could add allegations similar to those of the SEC Complaint, if necessary.

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In summary, the facts surrounding Aequitas' securities business are very complicated. Aequitas created a tangled web of entities and inter-company transactions. Sidley was at the center, advising these related entities on matters that affected the securities offered by Aequitas. It is not appropriate for Sidley to ask the Court to make merits rulings regarding these transactions and Sidley's activities on a pre-discovery motion to dismiss.

B. The FAC Alleges Sidley's Participation and Material Aid in Aequitas' Sale of Securities Through ACOF

Plaintiffs allege the following facts directed to Sidley's participation and material aid in Aequitas' sale of securities through ACOF: (i) Sidley drafted portions of the PPM used by Aequitas to sell its securities through ACOF (FAC ¶ 57); (ii) Sidley performed a legal review of its contents (FAC ¶ 57); (iii) Sidley prepared or reviewed the subscription agreement used by Aequitas to sell its securities through ACOF (FAC ¶ 57); (iv) Sidley prepared or reviewed the documents evidencing the ACOF investors' investments (FAC ¶ 57); and ACOF investors received promotional and other investment materials that identified Sidley as Aequitas' securities lawyer and highlighted the services Sidley performed (FAC ¶ 59).

Sidley's acts of participation and aid, as alleged in the FAC, are the type of acts that were found sufficient in *Adams v. Am. W. Sec., Inc.*, 265 Or. 514 (1973), *Prince v. Brydon*, 307 Or. 146 (1988), and other Oregon cases addressing liability of lawyers under ORS 59.115(3). *See* Plfs. Opp. to Tonkon Motion at Section III.C. If necessary, plaintiffs can plead additional detail from the documents already referenced in the FAC. For example, plaintiffs could specify that the ACOF PPM states that the memorandum was prepared by Sidley.

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

Sidley's argument that Rule 9(b) applies to plaintiffs' allegations of participation and material aid should be denied for the reasons set forth in plaintiffs' opposition to the Joint Motion, at Section III.A and in plaintiffs' opposition to the Tonkon Motion at Section II. With respect to Sidley's assertion that it stands in a different position than other defendants, even if accepted, there is no basis in law to apply a special pleading standard to Sidley.

IV. SCIENTER IS NOT REQUIRED AS TO SIDLEY, AND IS REQUIRED ONLY FOR ONE OF THREE BASES FOR AEQUITAS' PRIMARY LIABILITY

Sidley argues that "the FAC contains no specific allegation that ACOF intentionally sold securities by means of a material misstatement or omission." Sidley Motion at 12. As explained in Section IV.C.5 of plaintiffs' opposition to the Joint Motion, even where scienter is an element of the claim, scienter may be averred generally. Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."); *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir. 1994) (en banc) ("[P]laintiffs may aver scienter generally, just as [Rule 9(b)] states—that is, simply by saying that scienter existed.").

In this case, scienter is an element of only one of plaintiffs' three asserted bases for Aequitas' primary liability, that Aequitas violated ORS 59.135(2). Sidley appears to agree that its argument regarding pleading scienter applies only to plaintiffs' allegation that Aequitas violated ORS 59.135(2). *See* Sidley Motion at 12 ("As discussed in the Joint Motion, all claims under ORS 59.135 require pleading and proving scienter.").

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V. PLAINTIFFS STATE A CLAIM FOR SIDLEY'S PARTICIPATION IN AEQUITAS' UNLAWFUL SALES 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, that some or all of the securities satisfied all of the requirements for an exemption from registration. As discussed herein, plaintiffs also plead facts to demonstrate Sidley's participation and material aid in Aequitas' sales of ACOF and other securities. Accordingly, plaintiffs state a claim pursuant to ORS 59.115(3), and Sidley's motion should be denied.

VI. PLAINTIFFS ALSO STATE A CLAIM FOR SIDLEY'S PARTICIPATION IN AEQUITAS' SALES OF SECURITIES BY MEANS OF UNTRUE STATEMENTS AND OMISSIONS

Sidley contends that plaintiffs have failed to adequately allege that Aequitas sold securities by means of untrue statements and omissions. Sidley Motion at 11. In particular, Sidley asserts that the FAC "identifies only one omission" related to the securities sold through ACOF. Sidley Motion at 11. Sidley is wrong. As explained in plaintiffs' opposition to the Joint Motion at Section IV.C, the FAC includes extensive allegations regarding the false statements and omissions by Aequitas with respect to all of the Aequitas Securities, including those sold through ACOF. Nonetheless, in order to demonstrate the extent to which Sidley misstates the FAC's allegations, set forth below are examples of the allegations of the FAC relating to the securities sold by Aequitas through ACOF.

As discussed in greater detail in plaintiffs' opposition to the Joint at Section IV.C, Aequitas sold securities through numerous investment vehicles, including ACOF, as part of a single integrated offering. *See also* FAC ¶ 29. For example, the FAC alleges:

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- Aequitas' offering and sale of securities through ACOF was fundamentally integrated with Aequitas' offering and sale of securities through ACF the other Aequitas Funds (FAC ¶ 29);
- Aequitas created ACOF for the purpose of raising investor funds that Aequitas caused to be transferred to ACF and Holdings (FAC ¶ 29);
- Many of ACOF's subsidiaries were entirely dependent on ongoing ACF financing (FAC ¶ 29);
- ACF claimed as valuable assets both the inflated value of its ownership interest in ACOF and its loans to the ACOF subsidiaries (FAC ¶¶ 105, 111, 128);
- ACF claimed as collateral purporting to support the Aequitas Securities both the inflated value of its ownership interest in ACOF and its loans to the ACOF subsidiaries (FAC ¶¶ 105, 111, 128); and
- Aequitas sought to maintain the illusion of financial health through in-kind distributions and transfers of assets at inflated values, including transfers and distributions amongst ACOF, ACF, and Holdings (FAC ¶ 172).

Aequitas sold securities through ACOF by means of a PPM, including the ACOF PPM prepared by Sidley dated February 2014. FAC ¶ 57. By means of the ACOF PPM, Aequitas made representations concerning, among other things, (i) the availability of exemptions from the securities registration requirements under federal and state law (*see, e.g.*, Masuda Decl. Ex. 14 at iv); (ii) the Aequitas affiliate and ACOF subsidiary Carepayment Technologies, Inc. ("CPTI"); (iii) the Aequitas affiliate and ACOF subsidiary EDPlus Holdings, LLC ("EDPlus"); (iv) the Aequitas affiliate and ACOF subsidiary MotoLease, LLC ("MotoLease"); (v) the Aequitas

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affiliate and ACOF subsidiary ETC Global Group, LLC ("ETCGlobal"); and (vi) the Aequitas affiliate and ACOF subsidiary Strategic Capital Alternatives, LLC ("SCA"). The FAC alleges that those statements were misleading because, among other things:

- The securities sold through ACOF were required to be registered under the Oregon Securities Law (FAC ¶ 75);
- 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 securities through ACOF (FAC ¶ 82);
- Aequitas did not disclose (i) that repayment of investors purchasing securities through ACOF was largely dependent on Aequitas' ability to bring in new investor funds, or (ii) that a substantial portion of new investor funds realized from the sale of securities through ACOF would be used to repay other investors in Aequitas Securities (FAC ¶ 96);
- Aequitas did not disclose that it created ACOF for the purpose of raising and funneling investor funds to ACF and Holdings (FAC ¶ 29);
- Aequitas did not disclose that 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 was the source of the funds used by CPTI to pay those fees to ACM (FAC ¶ 103);
- Aequitas did not disclose that it had acquired and "capitalized" CPTI with debt and illusory "intangible assets," or that it had then caused CPTI to create and distribute to Aequitas stock interests based on an inflated valuation (FAC ¶ 166);

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- Aequitas did not disclose that CPTI was dependent on ongoing ACF financing (FAC ¶¶ 29, 103, 104);
- 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"), 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 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);
- Aequitas did not disclose (i) that the claimed value of EDPlus was based largely on the Corinthian student loan receivables purchased and owned by ACF through its wholly-owned subsidiary, ASFG, LLC ("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 failed to disclose nearly all material facts relating to the actual cost to Aequitas, including to ACF and ASFG, of Aequitas' Corinthian student loan program (FAC ¶¶ 150-54);

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- Aequitas failed to disclose material risks associated with Aequitas' Corinthian student loan program and the Corinthian student loan receivables (FAC ¶¶ 114-15, 156, 157);
- Aequitas did not disclose (i) that the claimed value of MotoLease was based largely on its ability to continue to sell vehicle leases to ACF (through ACF's wholly owned subsidiary, MotoLease Financial, LLC) (FAC ¶ 125); or (ii) that it was exposed to the entire credit risk associated with the MotoLease vehicle leases, and that it had no recourse to any third party with respect to any default or nonperformance under any of those leases (FAC ¶127);
- Aequitas did not disclose (i) that the claimed value of ETCGlobal was based entirely on the continuing operations and performance of its indirect subsidiary Electronic Transaction Clearing, Inc. ("ETC"), a registered broker-dealer, in compliance with applicable laws and regulations (FAC ¶ 131); or (ii) numerous administrative, regulatory, and legal difficulties that were undermining and diminishing the viability of ETC's continuing operations and performance (FAC ¶ 132);
- Aequitas did not disclose regulatory and legal issues related to SCA and its affiliates (FAC ¶ 133); and
- In mid-2014, Aequitas caused ACOF to swap its interest in SCA for an interest in SCA Holdings, LLC ("SCAH"), a company created by Aequitas to hold SCA and other affiliated investment advisory firms, but Aequitas did not disclose (i) that the value of SCAH depended in part on the successful funneling of investor funds to Aequitas by the direct and indirect subsidiaries of SCAH, including SCA, or (ii) that

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the value of ACF's loans to SCAH depended in part on the successful funneling of investor funds to Aequitas by the direct and indirect subsidiaries of SCAH.

Despite these numerous allegations of untrue statements and omissions relating to ACOF, Sidley is willing to acknowledge only "one omission" alleged in paragraph 140 of the FAC. *See* Sidley Motion at 11. Sidley contends that even that allegation is insufficient, because plaintiffs allegedly do not "identify any affirmative statement that was rendered misleading due to this alleged omission, or why any such statement was misleading when it was made." *Id*. These arguments are addressed in plaintiffs' opposition to the Joint Motion, at Section IV.C, and are incorporated herein. Sidley's argument should be rejected.

Sidley also contends that the Aequitas securities sold through ACOF are different than the securities sold by Aequitas through the other Aequitas Funds; that plaintiffs' allegations regarding Aequitas' omissions regarding the Corinthian student loans and inflated value of its receivables assets and supporting collateral "do not identify or involve ACOF"; and that plaintiffs' allegations regarding Aequitas' omissions relating to its insolvency do not "identify any misconduct by ACOF," Sidley Motion at 12 n.9—despite plaintiffs' allegations that those omissions do apply to ACOF. The Court should not attempt to decide these factual disputes on a motion to dismiss.

If the Court does address these fact disputes, Sidley's contentions are not correct. With respect to the omissions concerning the Corinthian student loans and inflated value of receivables and supporting collateral, those omissions do involve ACOF. As explained previously, the initial assets of ACOF—what investors invested in—consisted of equity in five portfolio companies including CarePayment (healthcare receivables) and EDPlus (student loan

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receivables).[7] As the preceding summary of pertinent allegations shows, a number of plaintiffs' alleged omissions relate directly to these portfolio businesses. It is certainly reasonable to infer, if not obvious, that falsely inflated values of these assets are material to these investments. Plaintiffs connect Aequitas' concealment of its insolvency to ACOF in paragraph 172 of the FAC. Sidley criticizes plaintiffs for not identifying any misconduct by ACOF in those allegations, but the very omission of this information is misconduct.

Furthermore, Sidley does not move against plaintiffs' allegation that 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 ACOF Interests. FAC ¶ 82. Nor can Sidley nullify Aequitas' extensive omissions relating to the use of investor funds, including to repay other investors, by arguing that ACOF Interests are a different type of security than the other Aequitas securities in the series. It is reasonable to infer that it would be important to an investor to know that her investment was being used to repay other investors, including investors in other securities, rather than to fund the business of ACOF.

VII. CONCLUSION

For the reasons set forth in this memorandum, and in plaintiffs' oppositions to the Joint Motion and to the other defendants' motions, Sidley's motion to dismiss should be denied.

[7] Plaintiffs can add this information by amendment if necessary.

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