UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CIVIL ACTION NO. _____

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. BRIAN DAVISON, BARRY M. RYBICKI, EQUIALT LLC, EQUIALT FUND, LLC, EQUIALT FUND II, LLC, EQUIALT FUND III, LLC, EA SIP, LLC, Defendants, and 128 E. DAVIS BLVD, LLC, 310 78TH AVE, LLC, 551 3D AVE S, LLC, 604 WEST AZEELE, LLC, 2101 W. CYPRESS, LLC, 2112 W. KENNEDY BLVD, LLC, 5123 E. BROADWAY AVE, LLC, BLUE WATERS TI, LLC, BNAZ, LLC, BR SUPPORT SERVICES, LLC, BUNGALOWS TI, LLC, CAPRI HAVEN, LLC, EA NY, LLC, EQUIALT 519 3RD AVE S., LLC, MCDONALD REVOCABLE LIVING TRUST, SILVER SANDS TI, LLC, TB OLDEST HOUSE EST. 1842, LLC, Relief Defendants.	)	UNDER SEAL

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S EMERGENCY *EX PARTE* MOTION AND MEMORANDUM OF LAW FOR

TEMPORARY RESTRAINING ORDER, ASSET FREEZE, AND OTHER INJUNCTIVE RELIEF SOUGHT

I. INTRODUCTION

The Commission brings this emergency action as the result of an ongoing unregistered securities offering fraud conducted by Defendant EquiAlt, LLC ("EquiAlt"), a private real estate investment company, its affiliated companies, its owner and CEO, Brian Davison, and its Managing Director, Barry Rybicki, who together victimized investors nationwide, many of whom invested their retirement savings. From January 2011 until the present, Davison, Rybicki, EquiAlt and the investment Funds it managed (collectively the "Defendants"), fraudulently raised more than $170 million from more than 1,100 investors. EquiAlt manages several investment funds, EquiAlt Fund I ("Fund 1), Equitalt Fund II ("Fund 2"), EquiAlt Fund III ("Fund 3") and EA SIP, LLC (the "EA SIP Fund") (collectively "the Funds"), which offer fixed-rate debentures. In connection with each investment, EquiAlt told investors it would pool their money to purchase under-valued real estate, rent or flip the properties, and pay them a fixed interest rate of 8-10% annually from revenues generated by the properties.

Contrary to EquiAlt's offering documents, which represented that the Funds were projected to use approximately 90% of the funds raised to invest in properties, less than 50% of the funds raised were used to invest in properties. Instead of investing the majority of investor money in real estate as represented in the offering documents, EquiAlt, Davison, and Rybicki used the monies raised from investors to pay themselves millions in undisclosed distributions, fees and commissions. They then used these distributions for

their own personal expenses, including lavish spending on luxury items such as Ferraris, watches, and trips on private jets.

Largely because of Davison and Rybicki's misappropriation and improper use of investor monies, the Funds' assets and projected earnings are insufficient to pay the interest and principal owned to current investors, and the business is almost solely reliant on new investor money to fund its operations. Indeed, as the Funds have lost money every year since inception, EquiAlt and the Funds have used new investor funds to pay interest and principal to existing investors.

Moreover, as of November 2019, the combined assets of the Funds consisted of $6.8 million in bank accounts and properties EquiAlt values at $145 million. By December of 2020, however, $167.3 million will be owed to investors in principal and interest (of that, $13.7 million will be due in interest alone). EquiAlt's Quickbook entries and the Funds' bank records reflect that in 2019 the Funds collected only $4.4 million in rental payments and property sales from their real estate portfolio. *Ex. 9.* Thus, it is unlikely that the Funds will be able to generate in one year the $13.7 million in interest owed to investors by the end of this year, much less cover the entire $15.4 projected deficit. EquiAlt and the Funds it manages simply will not have enough money to pay back investors the interest and principal owed to them.

Davison is EquiAlt's sole owner. In addition, he (or his relatives) control all but one of the Relief Defendants. Combined, Davison, EquiAlt and the Relief Defendants owned by Davison received more than $33 million in cash and assets paid for with investor funds. Similarly, Relief Defendant BR Support Services, LLC, which is owned and

controlled by Rybicki, received approximately $24 million of payments from investor funds. As shown below, Davison and Rybicki have already freely drawn from the Funds at whim, whether it be to pay back taxes to the IRS or to spend millions of dollars on automobiles. Without emergency relief, there is a great risk that Davison and Rybicki and the Defendants and Relief Defendants they control will dissipate significant amounts of investors' funds.

As discussed below, the Defendants violated the registration and anti-fraud sections of the securities laws, specifically Sections 5(a) and (c) and 17(a) of the Securities Act of 1933 ("Securities Act"), and Sections 10(b), 15 (a)(1) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 thereunder. Therefore, the Commission brings this motion to seek the specific emergency relief set forth in Section VIII below, including temporary restraining orders and asset freezes against Davison, Rybicki, EquiAlt, the Funds and all of the Relief Defendants.[1]

II. DEFENDANTS AND RELIEF DEFENDANTS

A. Defendants

1. **EquiAlt, LLC** is a Nevada limited liability company managed and owned by Defendant Brian Davison. *Ex. 2, EquiAlt's Corporate Filing.* EquiAlt's primary business is to manage the Funds. These Funds acquire distressed real estate, improve those properties, in order to generate a fixed return for investors by selling or renting the

[1] In a separate motion, the Commission asks the Court to appoint a Receiver over EquiAlt, the Funds and all Relief Defendants.

properties. Since 2011, EquiAlt's Funds have raised more than $170 million from approximately 1,140 investors. *Ex. 1 at ¶ 15, Declaration of Marc Dee.*

2. **Brian Davison** is EquiAlt's owner and CEO. *Ex. 2, EquiAlt's Corporate Filing*; *Davison's Investigative Testimony ("Davison Testimony") at pp. 46, 72-73.* Davison managed the Funds and their assets through EquiAlt, and signed all checks on behalf of EquiAlt and the Funds including the checks paying investors' interest payments. *Ex. 3, EquiAlt Bank Account Signature Cards; Ex. 4, Davison's Testimony at pp. 72-76.* Davison, along with Barry Rybicki, controls EquiAlt's operations. *Ex. 4, Davison's Testimony at pp. 72-76.*

3. **Barry M. Rybicki** is EquiAlt's President of Arizona Operations and EquiAlt's "Managing Director." *Ex. 11, PPM for Fund 1.* In an August 13, 2019 amendment to Form D for Fund 1 Rybicki is listed as Executive Officer and Promoter. *Ex. 5, SEC Form D.* Rybicki was responsible for all investor relations and sales materials sent to investors. *Ex. 4, Davison Investigative Testimony, pp. 72-76, 88-89, 94-95.* Rybicki owns Relief Defendant BR Support Services, LLC, which provides investor-related services to EquiAlt. *Ex. 7, BR Support Services, Corporate Filings.* Since 2011, Rybicki and BR Support Services have received more than $24 million from the Corporate Defendants for "commissions." *Ex. 1 at ¶12, Declaration of Marc Dee.* Rybicki was separately paid $3.4 million from the Funds in "return of principal payments." *Id.*

4. **Fund 1** is a Nevada limited liability company formed in 2011, managed by EquiAlt. *Ex. 10, Fund 1's Corporate Filings.* Fund 1 purchases single family properties in certain distressed real estate markets in the U.S. with a view to resell or lease the properties.

Ex. 11, Fund I, Private Placement Memorandum ("PPM"). Fund 1 raised approximately $110 million from more than 733 investors during the period from January 2011 through November 2019. *Ex. 1 at ¶ 16, Declaration of Marc Dee.* Based on Fund 1's own books and records, Fund 1 has operated at a net loss every year since its inception. *Ex.1 at ¶ 20, Declaration of Marc Dee.* In 2017, Fund 1's net losses were $12 million and in 2018 its net losses were $2.7 million. *Id.* By December 2020, Fund I will owe to investors $106.7 million in interest and principal payments. *Ex. 1 at ¶22, Declaration of Marc Dee.*

5. **Fund 2**, a Nevada limited liability company formed in 2013, purchases single family properties in certain distressed real estate markets in the U.S. with a view to resell or lease the properties. *Ex. 12, Fund 2 PPM.* EquiAlt serves as its manager. *Id.* Fund 2 raised approximately $39 million from at least 266 investors during the period from 2013 through November 2019. *Ex.1 at ¶24, Declaration of Marc Dee.* Based on EquiAlt's books and records, Fund 2 has operated at a net loss every year since it was formed in 2013. *Ex. 1 at ¶ 27, Declaration of Marc Dee.* By the end of 2020, Fund 2 investors will be owed $40.5 million in interest and principal. *Ex. 1 at ¶29, Declaration of Marc Dee.* Even if the properties held by Fund 2 are valued at $27.3 million, by December 2020 there will be a shortage of what is owed to investors of $11.3 million. *Id.*

6. **Fund 3** is a Nevada limited liability company formed in 2013, managed by EquiAlt. *Ex. 13, Fund 3's Corporate Filings.* Fund 3 purchased single family properties in certain distressed real estate markets in the U.S. with a view to resell or lease the properties. Fund 3 raised approximately $2.6 million from investors during the period from July 2013 through December 2015. *Ex.1 at ¶ 30, Declaration of Marc Dee.* Fund 3 paid

back its investors their principal and interest due in December 2015, and EquiAlt closed Fund 3 in June 2016. *Id.* During the time it was open, Fund 3 only generated $359,000 in revenues and rents from its real estate projects. *Id.* However, Fund 3's expenditures during the same period were $3.2 million. *Id.*

7. **EA SIP LLC ("EA SIP Fund")** is a Nevada limited liability company formed in 2016, managed by EquiAlt. *Ex. 14, EA SIP Fund Corporation Fillings.* The EA SIP Fund purchases single family properties in certain distressed real estate markets in the U.S. with a view to resell or lease the properties. *Ex. 15, EA SIP Fund PPM.* The EA SIP Fund has raised $21.7 million from at least 138 investors during the period from April 2016 through November 2019. *Ex. 1 at ¶32, Declaration of Marc Dee.* Based on EquiAlt's books and records, the EA SIP Fund has operated at a net loss every year since it was formed in 2016. *Id.* at ¶*37.* By the end of 2020, the EASIP Fund will owe investors $19.9 Million in interest and principal payments. *Id. at ¶ 38.* Even if the properties held by the EA SIP Fund are valued at $13.5 million, there will be a shortage of what is owed to investors of at least $5.1 million. *Id.*

B. Relief Defendants

1. **128 E. Davis Blvd, LLC** is a Florida limited liability company managed by EquiAlt that owns real property listed in Fund I's portfolio and received at least $891,000 from the Funds. *Ex. 18.*

2. **310 78th Ave, LLC** is a Florida limited liability company managed by Davison and his company, BNAZ, LLC, that received at least $643,000 from the Funds. *Ex. 19.*

3. **551 3d Ave S, LLC** is a Florida limited liability company managed by the EA SIP Fund that received at least $1.4 million from the EA SIP Fund. *Ex. 20.*

4. **604 West Azeele, LLC** is a Florida limited liability company managed by EquiAlt that received at least $400,000 from Fund 2. *Ex. 21.*

5. **2101 W. Cypress, LLC** is a Florida limited liability company managed by EquiAlt that received at least $196,000 from Fund 1. *Ex. 22.*

6. **2112 W. Kennedy Blvd, LLC** is a Florida limited liability company managed by Davison that owns 2112 W. Kennedy Blvd, Tampa, EquiAlt's office headquarters and the address for other entities owned by Davison. *Ex.16, 2112 W. Kennedy Corp. Fillings.* This entity received at least $10,000 from Fund 2. *Ex.23.*

7. **5123 E. Broadway Ave, LLC** is a Florida limited liability company managed by Davison Capital that received at least $1.95 million from the Funds. *Ex. 24.*

8. **BR Support Services, LLC** is an Arizona limited liability company owned by Barry Rybicki that provides investor related services to EquiAlt. *Ex. 7, BR Support Services Corporate Filings.* Since approximately 2011, BR Support Services has received nearly $24 million in "commissions" from the Funds. *Ex. 1 at ¶12, Declaration of Marc Dee.*

9. **Blue Waters TI, LLC** is a Florida limited liability company managed by Fund 1. It owns several properties listed in Fund 1's portfolio and received at least $2.3 million from the Funds. *Ex. 25.*

10. **BNAZ, LLC** is a Nevada limited liability company formed in December 2016 and managed by EquiAlt. *Ex. 26, BNAZ Corporate Filings.*

11. **Bungalows TI LLC** is a Florida limited liability company managed by Fund 1, owns several properties listed in Fund 1's portfolio, and received at least $105,000 from Fund 1. *Ex. 27.*

12. **Capri Haven, LLC** is a Florida limited liability company managed by Fund 1, that owns several properties listed in Fund 1's portfolio. *Ex. 31*

13. **EA NY, LLC** is a New York limited liability company managed by Davison that owns a condominium unit located at 21 W. 20th Street, #5, New York, NY that was purchased for $2.7 million in February 2017 with investor funds. *Ex. 33.* The property has never been rented and has not produced any income for Defendants. Davison and his family, however, have stayed at the property on previous visits to New York. *Ex. 4, Davison Investigative Testimony at pp. 186-189.*

14. **EquiAlt 519 3d Ave S., LLC** is a Florida limited liability company managed by the EA SIP Fund that owns property purchased with monies from the Funds. *Ex. 28.*

15. **McDonald Revocable Living Trust** received at least $1.3 million from Fund 1 for alleged "principal reduction." *See Exhibit 17, Checks to McDonald Revocable Trust from Fund 1.* Davison stated that the Trust is his grandfather's. At least one check written to the Trust was endorsed by Davison. *Id.*

16. **Silver Sands TI, LLC** is a Florida limited liability company that owns several properties listed in Fund 1's portfolio and received at least $250,000 from Fund 1. *Ex. 29.*

17. **TB Oldest House Est. 1842, LLC** is a Florida limited liability company that owns real property listed in Fund 1's portfolio and received at least $232,000 from Fund 1. *Ex. 30.*

III. JURISDICTION AND VENUE

The Court has jurisdiction over this action pursuant to Sections 20(b), 20(d), and 22(a) of the Securities Act, 15 U.S.C. §§77t(b), 77t(d), and 77v(a), and Sections 21(d), 21(e), and 27 of the Exchange Act, 15 U.S.C. §§78u(d), 78u(e), and 78aa. The Court has personal jurisdiction over the Defendants and Relief Defendants and venue is proper in the Middle District of Florida as Davison resides in the District and EquiAlt, the Funds and the Relief Defendants conducted their business in this District and all but one of the Relief Defendants (BR Services) used corporate addresses in this District. In particular, EquiAlt's operations were located in the Middle District, and Davison, EquiAlt and the Funds conducted, supervised, and managed most aspects of the business from EquiAlt's Tampa based headquarters.

IV. EQUIALT'S BUSINESS

EquiAlt's primary business is to manage the Funds, which purportedly acquire distressed or under-valued real estate, substantially improve those properties, and generate a return for investors by selling or renting the properties. *Exs. 11, 12, & 15, PPMs of Fund 1, 2 and the EA SIP Fund.* Since its inception, EquiAlt has been owned and controlled by Davison. *Ex. 4, Davison Investigative Testimony at pp. 46, 72-73.* During most of the relevant period, Davison managed all of EquiAlt's Funds. *Id.* Davison also had signature authority over EquiAlt's bank accounts and signed almost all of the checks from the Funds'

accounts. *Ex. 3.* Davison identified and purchased the properties underlying the investments and managed the real estate portfolio. *Ex. 4, Davison Investigative Testimony at pp. 72-76.*

Along with Davison, Rybicki was a principal and Director of the Funds. *Exs. 11, 12, & 15, Fund PPMs.* Rybicki handled investor relations, including the relationships with the various financial advisors who promoted the Funds. *Ex. 4, Davison Investigative Testimony, pp. 72-76, 88-89, 94-95.* Rybicki was also responsible for managing the relationships between the Funds and third-party financial advisors who were selling the Finds. *Ex. 4, Davison Investigative Testimony, pp. 82-83.* Rybicki also spoke directly with prospective investors about investing in the EquiAlt Funds. *Ex. 6, Investor Quetionaires; Ex. 4, Davison Investigative Testimony, pp. 94-95.* Almost all of the commission payments were made to Rybicki's company, BR Support Services. *Ex. 1 at ¶11, Declaration of Marc Dee.*

The Funds supposedly own some 260 properties. *Ex. 34.* EquiAlt's internal records value these properties in two ways: by "market value" and by "Best Value." *Id.* The "Best Values" appear to be highly inflated (when compared to the market values listed by EquiAlt or the original purchase price). *Id.* Moreover, several properties are vacant pieces of land generating no income. Even using these inflated numbers to value the properties, the Funds are operating from a position of negative equity and negative net income, and there is a significant deficit in the values of the Fund portfolios compared to the amount owed to investors (a fact that was not disclosed to investors). *Ex. 1 at ¶¶ 39 & 40, Declaration of Marc Dee.* Indeed, the Funds have all lost money every year as the revenues produced by

the properties are insufficient to cover the expenses and amounts owed to investors. *Ex. 1 at ¶¶ 20, 27 & 37, Declaration of Marc Dee.*

V. EQUIALT'S OFFERING

From 2011 through the present, EquiAlt, at the direction of Davison and through the sales of fixed debentures by the Funds, raised approximately $170 million from some 1,100 investors.[2] *Ex. 1 at ¶ 40, Declaration of Marc Dee.* Many of the investors were retired at the time they invested, and they used their pensions and IRAs to fund their investments. *Ex. 36, Investor Questionnaires.* Many were not accredited investors at the time they invested (even though EquiAlt purportedly limited each of the Fund Offerings to accredited investors). *Id.*

All of the Funds' PPMs generally provided for a 3- or 4-year term of investment with an 8% to 10% annual return paid monthly. *Ex. 11, 12, & 15, PPMs.* In the PPMs for each of the offerings, EquiAlt represented to investors that the majority of their money would be used to purchase real estate, and their returns would be generated by the sales of these properties, as well as participation in "opportunistic lending." *Id.*

On its website and in marketing materials, EquiAlt claims to have a multimillion-dollar portfolio of revenue-generating condominiums and homes. *Ex. 32, Marketing Materials; and Ex. 8, EquiAlt Website.* On its website, EquiAlt also claims to "provide a predictable stream of returns." *Ex. 8.* One marketing brochure sent to potential investors claims EquiAlt has conducted $795 million worth of real estate transactions and its

[2] Of the $170 Million raised, about $25 million was raised from investors between 2011 through 2014.

programs "protect against market corrections" and are "not susceptible to interest rate hikes & lending trends." *Ex. 32, EquiAlt Marketing Materials.* EquiAlt also claims to provide commercial lending investments to construction and development projects, "filling in the gaps left by local community banking systems." *Ex. 8, EquiAlt Website.* Investors were also told by financial planners, insurance agents, and in some cases Rybicki, that EquiAlt's investments were "secure," "safe," "low risk," and "conservative." Many of the investors were attracted by these representations regarding the Funds' security and by assurances that EquiAlt could not go bankrupt. *Ex. 38, Investor Declaration.*

EquiAlt also used in-house employees and unlicensed external sales agents to solicit investments from the general public through cold calling campaigns, social media, websites, and in-person meetings. Although the private placement memorandum ("PPMs") provided to many investors stated that the Funds "may" pay commissions or fees to registered broker/dealers or other financial intermediaries, the Funds *always* paid commissions of anywhere between 10%-14%. In fact, over a period of several years the Funds have used investor money to pay commissions (primarily to Rybicki or his company BR Support Services) totaling approximately $24 million. *Ex. 1 at ¶ 12 (and Ex. 4 thereto), Declaration of Marc Dee.*

VI. EQUIALT'S FRAUDULENT CONDUCT

A. The Defendants Are Conducting a Ponzi Scheme

The Funds have operated as a Ponzi scheme almost since their inception. More specifically, in a classic Ponzi-scheme fashion, the Funds are paying existing investors their monthly interest payments with funds raised from new investors. While Fund 3 is

now closed, the other Funds continue to raise millions of dollars from investors. *Ex. 1 at ¶14, Declaration of Marc Dee.*

Notably, since the beginning of their operations the Funds have suffered significant financial losses with monthly costs and expenses, including the interest owed to investors, greatly exceeding revenues generated from the Funds' business operations. *Ex. 1 at ¶¶ 20, 27, 37, Declaration of Marc Dee.* Furthermore, the combined assets of Fund 1, Fund 2 and the EA SIP Fund are insufficient to pay back investors the principal and interest that is due at the end of this year. *Ex. 1 at ¶39 and Exhibit 6 to Declaration of Marc Dee.* Even if the Funds were somehow able to sell all of their real estate properties at the highest values stated in their own internal books and records, there would still remain a deficit of $15.4 million owed to investors at the end of the year. *Id.* Last year the Funds generated revenues of about $3.4 million. If the Funds make similar revenues this year, an $11 million deficit would still remain to pay investors what will be owed to them by December 2020.

B. Misappropriation of Investor Funds

Defendants Davison and Rybicki have misappropriated millions of dollars from the Funds for their own personal benefit. In April 2017 alone, Davison without any legitimate basis, wrote checks to EquiAlt from several of the Funds totaling about $1.8 million and days later used the monies to pay back taxes owed for his income to the Internal Revenue Service for the years 2014-2016. *Ex. 40, Transfers from Funds, & Checks to IRS.* In fact, between 2017 and 2018, Davison and Rybicki received cash distributions from the

Funds totaling more than $11 million. *Ex. 1 at ¶11 and Exhibit 4 to Declaration of Marc Dee*. And in 2019, Davison and Rybicki took improper cash distributions from the Funds of $6.1 million and $1.2 million, respectively, purportedly for the repayment of loans to the Funds. *Id.*

Davison and Rybicki often spent this money on luxury automobiles and jewelry. Davison alone spent more than $2.7 million on luxury automobiles, watches and chartering private jets. *Ex. 41.* Rybicki made similar purchases of expensive sports cars such as Ferraris and Porsches. In addition to these improper cash distributions, when visiting New York, Davison stayed on multiple occasions at one of the Funds most expensive properties, a $2.7 million Manhattan condominium which has never generated any income for the Funds, despite having been purchased several years ago with investor money. *Ex. 4, Davison Investigative Testimony at pp. 186-189.*

C. Misrepresentations and Omissions to Investors

1. False Claims About Use of Investor Funds

The Defendants misrepresented to investors how their money would be used by the Funds. For example, the PPMs for Fund 1, Fund 2, and the EA SIP Fund indicate that approximately 90% of investor funds would be used to "invest in property." *Exs. 11, 12, & 15 PPMs*. Yet, less than 50% of investor funds were actually used for that purpose. *Ex. 1 at ¶10 and Exhibit 5 to Declaration of Marc Dee.* Instead of investing their funds as promised, the Defendants have misused millions of dollars in several distinct ways—all of which are inconsistent with the PPMs provided to investors. These ways include: (a) money from one fund being used to purchase real estate for another fund or for third party entities

owned by Davison; (b) money from one fund being used to pay investors in another fund; (c) substantial undisclosed commissions paid to unregistered sales agents; (d) substantial undisclosed fees such as due diligence fees, management fees, success fees, auction fees, underwriting fees, purchase discount fees, and bonuses paid to EquiAlt and Davison; and (e) substantial improper cash distributions to Davison and Rybicki. The misuse of investor funds was not an isolated event but rather was continuous over a period of several years.

More specifically, the PPMs for the Funds include a detailed chart of "projected sources and uses of cash." *Exs. 11, 12, & 15 PPMs.* The chart, however, identified only the following six specific uses of that cash: investments in property, accounting and tax preparation, legal costs, investor relations and communications expenses, marketing and sponsorship event fees, and miscellaneous expenses and reserves. *Id.* While the private placement memoranda for these Funds state that "All uses of proceeds are estimated and subject to change," only the above six specific uses of investor proceeds are delineated in the document. *Id.* An example of one of the charts included in the private placement memorandum for Fund 1 is set forth below:

SOURCES:	
Debentures:	
TOTAL SOURCES:	$50,000,000.00

USES:	
Investment in Property	$45,000,000.00
Accounting and Tax Preparation	$550,000.00
Legal Costs	$250,000.00
Investor Relations and Communications Expenses	$2,500,000.00
Marketing and Sponsorship Event Fees	$200,000.00
Miscellaneous Expenses and Reserves	$1,500,000.00

TOTAL USES:	**$50,000,000.00**

Ex. 11, PPM Fund 1.

(a) Money From One Fund Being Used to Purchase Real Estate for Another Fund or Davison Owned Entities

In at least two instances, Davison transferred money via check and wires from the Funds' accounts to purchase properties titled in the name of third party entities owned by Davison or EquiAlt. *Ex. 39.* The Funds' records classify these payment as loans or promissory notes. *Id.* However, the interest and principal on these so-called "loans" was generally not paid back to the Funds. Two of these "loans" alone were for nearly $3 million. *Id.* In other instances, one Fund would purchase property using money transferred to it from another Fund. *Id.*

(b) Money From One Fund Being Used to Pay Investors in Another Fund

As described above, the Defendants also failed to disclose to investors that more than $6.6 million of investor money would be transferred between the Funds with the money raised by one Fund being used to pay the debts and obligations of other Fund. For example, on December 17, 2015, Fund 1 and 2 transferred, respectively $1.29 million and $1.08 million to Fund 3, which Fund 3 used to pay approximately $2.3 million in principal and interest to its investors. *Ex. 1 at ¶8, Declaration of Marc Dee.* Fund 3 could not have made these payments without the cash infusion from Fund 1 and 2. *Id.*

(c) Undisclosed Commissions

The Defendants also failed to adequately disclose to investors that their funds would be used to pay commissions to unlicensed third party sales agents. Many of the

subscription agreements signed by investors stated that investments in the Funds were being sold without the payment of a commission. *Ex. 42, Example of Investor Subscription Agreement.* Furthermore, while the private placement memoranda provided to investors stated that the Funds "may" pay commissions to sales agents, in reality commissions were *always* paid in connection with the sale of the Funds' investments. In addition, the PPMs' "Projected Sources and Uses of Cash" never mentions investor funds being used to pay commissions. *Exs. 11, 12 & 15, PPMs.*

(d) Substantial Undisclosed Fees, and Bonuses paid to EquiAlt and Davison

This list of purported uses did not disclose that the Funds would use investor money to pay EquiAlt the extraneous fees described above totaling millions of dollars. Specifically, from January 2011 to November 2019, the Funds paid $25.4 million to Davison and EquiAlt to pay for purported expenses and various "fees" described as acquisition, discount, due diligence, equity, rehab, and success fees. *Ex. 1 at Exhibit 4 to Declaration of Marc Dee.* For example, although not disclosed to investors, the Funds paid EquiAlt a so-called "discount fee" or the difference in the listed sales price for a particular property and the ultimate purchase priced paid by the Fund to acquire such property. *Ex. 43.* Instead of benefiting from a lower ultimate sales price for the property, the Funds paid the actual cost savings to EquiAlt as a discount fee. No aspect of this fee was ever disclosed to investors who were already paying substantial management and other fees to EquiAlt to supposedly manage the Funds.

Many investors were also misled about the payment of management fees to EquiAlt. Although EquiAlt collected substantial management fees from the Funds, many investors

were expressly told that no such fees would be paid. *Exs. 6 & 36.* Moreover, although the PPMs for all the Funds state that "the Manager will receive Management Fees as set forth in the Operating Agreement and as described more fully below," there is no description elsewhere in the PPMs or in the Operating Agreements of what or how the management fees would be paid. *Ex. 11, 12, & 15, PPMs.* Nowhere in the offering materials is there any disclosure to investors that EquiAlt and Davison would receive more than $6.6 million in "management fees" from the Funds or the millions of dollars in other fees described above. *Id.*

e) Substantial Cash Distributions to Davison and Rybicki.

Nor were investors informed in the PPMs or elsewhere of the substantial cash distributions Davison and Rybicki have misappropriated as described above. *Ex. 1 at Exhibit 4 to Declaration of Marc Dee.*

2. <u>False Statements About Risk</u>

Investors were misled about the safety and risk of their investments. While pitching investments in the Funds, the Defendants represented that the investments were "low risk," "safe, and "conservative." Investors were even told that the Funds had "never lost investor dollars since inception." The investments, however, were anything but low risk, safe or conservative. In fact, the Funds have suffered substantial financial losses since their inception. *Ex. 1 at ¶¶ 20, 27 & 37 and Exhibit 6 to Declaration of Marc Dee.* Furthermore, Davison and Rybicki have depleted the Funds' assets through a years-long scheme involving outright misappropriation and misuse of investor funds.

3. <u>False Statements About Registration With the Commission and Compliance with Applicable Laws</u>

EquiAlt falsely told investors in at least one Fund (Fund 2) that it was registered with the Commission since 2009. *Ex. 6 & 36.* In truth, neither EquiAlt nor the Funds have ever been registered with the Commission in any capacity. Written sales materials provided to investors also stated that "payments to licensed brokers and/or finders may be made in compliance with applicable federal and state securities laws." In reality, during a period of several years the Funds paid unlawful commissions to unlicensed sales agents deployed by EquiAlt to market and promote the Funds' investments.

4. **False Statements About Fund Management**

Investors were even misled about the persons involved in managing the Funds. At least two different versions of the private placement memoranda for Fund 1 and Fund 2 identified "Diane Dutton, MBA, CPA" as EquiAlt's Chief Financial Officer. *Ex. 11, PPM for Fund 1.* The description of Ms. Dutton's professional background highlighted her prior experience at a Big-Four accounting firm, with SEC reporting requirements, as a CFO of a $100 million real estate mortgage and title company, and as an author. *Id.* However, Ms. Dutton has never worked as EquiAlt's CFO.

VII. MEMORANDUM OF LAW

As explained below, the Court should enter the following *ex parte* relief:

(1) A Temporary Restraining Order against all Defendants to prevent: (a) them from further violating Section 17(a) of the Securities Act and Sections 15(a)(1), 10(b) and Rule 10b-5 of the Exchange Act; and (b) Davison and Rybicki from further violating Section 20(a) of the Exchange Act as control persons;

(2) An Order Freezing the Assets of all Defendants and all of the Relief Defendants; and sworn accountings from each;

(4) An Order Prohibiting Destruction of Documents against all Defendants and all of the Relief Defendants; and

(5) An Order to Show Cause: why a preliminary injunction should not be granted against Defendants to prevent: (a) them from further violating Section 17(a) of the Securities Act and Sections 15(a)(1), 10(b) and Rule 10b-5 of the Exchange Act; and (b) Davison and Rybicki from further violating Section 20(a) of the Exchange Act as control persons; why the asset freeze should not be continued against Defendants and Relief Defendants; and why the order against destruction of records should not continue.

A. Standard for Obtaining a Temporary Restraining Order

Section 20(b) of the Securities Act, 15 U.S.C. § 77t, and Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d), provide that in Commission actions the Court shall grant injunctive relief upon a proper showing. *SEC v. Shiner*, 268 F. Supp. 2d 1333, 1340 (S.D. Fla. 2003). This "proper showing" has been described as "a justifiable basis for believing, derived from reasonable inquiry or other credible information, that such a state of facts probably existed as reasonably would lead the SEC to believe that the defendants were engaged in violations of the statutes involved." *SEC v. Gen. Int'l Loan Network, Inc.*, 770 F. Supp. 678, 688 (D.D.C. 1991).

The Commission is entitled to a temporary restraining order if it establishes (1) a prima facie case showing the Defendants have violated the securities laws, and (2) a reasonable likelihood they will repeat the wrong. Shiner, 268 F. Supp. 2d at 1340. The

Commission appears "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." *SEC v. Lauer*, 03-80612-CIV-MARRA, 2008 WL 4372896 (S.D. Fla. Sept. 24, 2008), *aff'd*, 478 Fed. Appx. 550 (11th Cir. 2012). The Commission therefore faces a lower burden than a private litigant when seeking an injunction, and need not meet the requirements for an injunction imposed by traditional equity jurisprudence. *Hecht Co. v. Bowles,* 321 U.S. 321, 331 (1944); *SEC v. J.W. Korth & Co.*, 991 F. Supp. 1468, 1472 (S.D. Fla. 1998). Unlike private litigants, the Commission need not demonstrate irreparable harm or the unavailability of an adequate remedy at law. *Hecht*, 321 U.S. at 331; *J.W. Korth*, 991 F. Supp. at 1473. Nor is it required to show a balance of equities in its favor. *SEC v. U.S. Pension Trust Corp.*, 07-22570-CIV-MARTINEZ, 2010 WL 3894082 (S.D. Fla. Sept. 30, 2010) *aff'd sub nom.*; *SEC v. U.S. Pension Trust Corp.*, 444 Fed. Appx. 435 (11th Cir. 2011).

The Commission's evidence in this case warrants entry of the requested injunctive relief on all applicable grounds. The declarations, account records, and other exhibits attached to this motion demonstrate that Defendants are violating the anti-fraud and registration provisions of the federal securities laws, and will continue to violate them if the Court does not immediately restrain and enjoin them.

C. The Defendants Violated The Federal Securities Laws

As shown in the ensuing sections, the Court has more than an adequate basis to make a threshold finding that EquiAlt, Davison, and Rybicki violated the federal securities laws in fraudulently offering and selling the Funds unregistered securities to investors.

1. EquiAlt's Offerings are Securities

EquiAlt offered fixed-rate debentures issued by the Funds that promised to pay annual returns. As the Supreme Court noted in *Reves v. Ernst & Young*, 494 U.S. 56, 66 (1990), "[i]f the seller's purpose is to raise money for the general use of a business enterprise . . . and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a 'security.'" Here, each Fund stated in its offering materials that its purpose was to raise money for the general use of the business enterprise. Thus, by their own stated purpose, the debentures should be deemed to be securities.

In addition, the Funds filed Form Ds with the Commission, which also indicate the offers of these debentures constituted securities offerings. As a result, it is clear that the Funds that Defendants were offering and selling are considered securities. *Diaz Vicente v. Obenauer*, 736 F. Supp. 679, 693 (E.D. Va. 1990) (absent countervailing factors leading one to question the characterization, documents own characterization as investment is probative of status as a security under the law) (citing *Reves*, 494 U.S. at 68).

Moreover, Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act define a "security" to include, among other things, "any note, . . . bond, [or] debenture." Thus, the debentures EquiAlt sold are considered securities. *See Reves*, 494 U.S at 65-67 (1990) (noting a "presumption that every note is a security," which may be rebutted only by a showing that the note bears a strong "family resemblance" to instruments that are not recognized as securities).

Here, the debentures do not bear strong resemblance to non-security instruments and clearly involve an "investment of money." First, investors were unquestionably interested in the debentures because of the high (and steady) rate of return offered. Second,

the debentures were sold in a widespread distribution to more than 1,100 investors nationwide who collectively invested over $170 million, and the investors had no role in selecting or analyzing the underlying properties. Third, the reasonable expectations of the investing public were that these debentures were investments. Fourth, the expected profitability of 8% to 10% annual interest from the investments was derived solely from the efforts of EquiAlt, Davison, and Rybicki. The investors at issue were entirely passive, and once investors sent their money, they had no control over how EquiAlt would use it. Finally, there are no risk-reducing factors indicating that the debentures are not in fact securities. *Reves*, 494 U.S. at 69. As such, EquiAlt's investments are properly categorized as securities and thus subject to federal securities regulation.

2. Defendants Violated Sections 5(a) and 5(c) of the Securities Act

Absent an exemption from registration, Section 5(a) of the Securities Act makes it unlawful for any person to use any means or instruments of transportation or communication in interstate commerce or of the mails to sell a security for which a registration statement is not in effect. Similarly, Section 5(c) makes it unlawful to offer for sale a security for which a registration statement has not been filed with the Commission. A prima facie case for a violation of Section 5 is established by showing that: (1) the defendant sold or offered to sell securities; (2) no registration statement covered the securities; and (3) the sale or offer was made through the use of interstate facilities or mails. *SEC v. Randy*, 38 F. Supp. 2d 657, 667 (N.D. Ill. 1999). Scienter is not required to establish a violation of Section 5. *SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1256 (9th Cir. 2013); *SEC v. Holschuh*, 694 F.2d 130, 137 n.10 (7th Cir. 1982). The

defendant need not have personally sold securities as long as "the defendant was a 'necessary participant' or 'substantial factor' in the sale." *SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004).

Once the Commission establishes a *prima facie* case of a violation, the defendant assumes the burden of proving that the securities offering qualified for an exemption from registration. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953). Courts narrowly construe the exemptions from the registration provisions to provide full and fair disclosure and to prevent frauds. *SEC v. Murphy*, 626 F.2d 633, 641 (9th Cir. 1980); *Quinn and Co. v. SEC*, 452 F.2d 943, 946 (10th Cir. 1971).

In this case, the Commission can establish a *prima facie* case against the Defendants for violations of Sections 5(a) and 5(c) of the Securities Act. Each Fund at issue, directly or indirectly, offered and sold securities to the general public by email, telephone, the internet, and other instruments of interstate commerce to approximately 1,100 investors who were located throughout the U.S. No registration statement was in effect or had been filed with the Commission in connection with the securities. As a result, Defendants violated Securities Act Sections 5(a) and 5(c) by engaging in the unregistered offering of securities.

Here, no exemptions were available for EquiAlt's offering. The exemptions from registration pursuant to Section 4(a)(2) of the Securities Act and Rules 504, 505,[3] and 506(b) of Regulation D thereunder were unavailable to the Proposed Defendants because, among other reasons, the offerings involved general solicitation (including cold-calling,

[3] The exemption under Rule 505 was repealed as of May 22, 2017.

and using a website and social media to solicit interested investors to contact management). Because there were sales made to investors in at least 35 states, the intrastate offering exemptions of 3(a)(11), Rule 147, and Rule 147A are not available.

Moreover, Rule 506(c) requires both that "all purchasers of securities sold [pursuant to this exemption] ... are accredited investors" and, separately, that issuers "take reasonable steps to verify that the purchasers of the securities are accredited investors." Rule 506(c) of Regulation D, 17 C.F.R. § 230.506(c). Here, many of the Funds' investors were unaccredited and unsophisticated, and it appears that EquiAlt took *no steps* to verify independently that its investors were accredited before accepting investor funds. Although some of the investors did complete so-called accredited investor certifications, many did not, and regardless, self-certifications like these do not constitute reasonable steps to verify. *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A*, Rel. No. 33-9415, at 33-34, 2013 WL 3817300, *14 (Jul. 10, 2013) (adopting release) ("We do not believe that an issuer will have taken reasonable steps to verify accredited investor status if it, or those acting on its behalf, required only that a person check a box in a questionnaire or sign a form, absent other information about the purchaser indicating accredited investor status.").

No other exemptions from registration was available. As a result, the Defendants violated Securities Act Sections 5(a) and 5(c) through their failure to register these offerings with the SEC.

3. Violations of Section 17(a) of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act

Section 10(b) of the Exchange Act and Rule 10b-5(b) prohibit the making of (1) a false statement or omission, (2) of material fact, (3) with scienter, (4) in connection with the purchase or sale of a security. *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 766 (11th Cir. 2007). A fact is material if there is a "substantial likelihood that a reasonable [investor] would consider it important in deciding how to [invest]." *Basic Inc.* v. *Levinson,* 485 U.S. 224, 231 (1988). The Eleventh Circuit has concluded scienter may be established by a showing of knowing misconduct or severe recklessness. *SEC v. Carriba Air Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982). For purposes of Rule 10b-5(b). the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. *See Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011).[4] For the Commission's case, reliance, damages, and loss causation are not required elements. *SEC v. Morgan Keegan & Co.,* 678 F.3d 1233, 1244 (11th Cir. 2012).

Section 17(a)(2) of the Securities Act prohibits any person, in the offer or sale of a security, from directly or indirectly obtaining money or property by means of an untrue statement of a material fact or an omission to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading. A violation of Section 17(a)(2) can be shown by negligent conduct. *See Aaron v. SEC*, 446 U.S. 680, 701-02 (1980). Liability under Section 17(a)(2) is not contingent on

[4] *Janus* does not apply to Section 17(a) of the Securities Act or Rules 10b-5(a) or (c) of the Exchange Act. *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 795-98 (11th Cir. 2015); *SEC v. Monterosso,* 756 F.3d 1326, 1334 (11th Cir. 2014).

whether one has "made" a false statement. Rather, liability under Section 17(a)(2) turns on whether one has obtained money or property "by means of" an untrue statement.

These antifraud provisions reach beyond misrepresentations or omissions and encompass any wrongdoing by any person that rises to the level of a deceptive practice. *Superintendent of Insurance v. Bankers Life and Casualty Co.*, 404 U.S. 6, 10 (1971). A defendant engages in a fraudulent scheme in violation of the antifraud provisions of the securities laws and violates Sections 17(a)(1) and (3) of the Securities Act and Rules 10b-5(a) and (c) of the Exchange Act when he commits any manipulative or deceptive act or acts that are part of a fraudulent or deceptive course of conduct, or are in furtherance of a scheme to defraud. *SEC v. Huff,* 758 F. Supp. 2d 1288, 1347-48 (S.D. Fla. 2010). To state a claim based on conduct violating these provisions, the Commission must establish: (1) the defendant committed a deceptive or manipulative act; (2) in furtherance of the alleged scheme to defraud; (3) with scienter. *In re Alstom SA Securities Litigation,* 406 F. Supp. 2d 433, 474 (S.D.N.Y. 2005) (citing *In re Global Crossing*, 322 F. Supp. 2d 319, 336 (S.D.N.Y. 2004)).

a. ***Misrepresentations and Omissions***

As detailed above, Defendants made materially misleading statements and omissions necessary to make statements made not misleading both in the offer and sale and in connection with the purchase or sale of securities. Specifically, EquiAlt, Davison and Rybicki made a number of material misrepresentations and omissions in both the Funds PPMs and the subscription agreements. EquiAlt's employees and sales agents also made material misrepresentations and omissions, orally and in writing, using information they

obtained from EquiAlt, Davison and Rybicki. These materially misleading statements and omissions concerned, among other things:

a) the purported use of investor proceeds;
b) the financial condition of the company and its Funds;
c) the existence and qualifications of EquiAlt's CFO;
d) the safety of the investments and their exposure to market fluctuations; and
e) EquiAlt's registration with the SEC.

EquiAlt, Davison and Rybicki together exercised control over the various offerings, were at least reckless in not knowing that the Funds' PPMs and subscription agreements contained material misrepresentations and omissions, and are therefore liable for these statements and omissions.

Through these misrepresentations and omissions, Davison and Rybicki, violated Section 17(a)(2) of the Securities Act in that they "obtain[ed] money or property by means of any untrue statement of a material fact or any [material] omission." 15 U.S.C. § 77q(a)(2). The misrepresentations and omissions listed above each enabled Davison and Rybicki to persuade investors to invest in the Funds, from which they each extracted significant monies for themselves. Furthermore, the misstatements and omissions listed above violated Section 10(b) and Rule 10b-5(b) of the Exchange Act in that they constituted untrue statements of material fact or material omissions.

b. Materiality

A false statement or omission must be material for a Defendant to be liable for it. The test for materiality is "whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action." *Merchant Capital,* 483 F.3d at 766 (citation omitted). Put another way, information is material if a reasonable investor

would consider it significant to making an investment decision. *Levinson,* 485 U.S.at 230. A false statement or omission need not be outcome determinative for it to be considered material; rather it simply must be significant to the investor's decision. *SEC v. City of Miami,* 988 F. Supp. 2d 1343, 1357 (S.D. Fla. 2013) ("to be material, a fact need not be outcome-determinative, that is, it need not be important enough that it would necessarily cause a reasonable investor to change his investment decision") (quoting *SEC v. Meltzer,* 440 F. Supp. 2d 179, 190 (E.D.N.Y. 2006)).

Under this standard, the Defendants' false statements and omissions were clearly material. Almost all of the Defendants' misrepresentations and omissions concerned the use of investors' funds. Instead of investing the investors' funds as stated in the offering documents and PPMs, Davison and Rybicki in many cases misappropriated investors' funds to fund their lavish lifestyles. Clearly, any reasonable investor would want to know that a Defendant was not using his or her money in the way the Defendant promised – to invest in a specific type of investment – but instead for the Defendant's own financial gain. *U.S. v. Lochmiller*, 521 Fed. Appx. 687, 691-92 (10th Cir. April 15, 2013) (upholding conspiracy to commit securities fraud conviction because, among other things, Defendant made material misrepresentations when he told investors he would use money for low-income housing but instead used it for personal gain); *SEC v. Smart*, 678 F.3d 850, 857 (10th Cir. 2012) (that defendants were not using money as represented would be material to a reasonable investor).

In addition, EquiAlt, Davison, and Rybicki created an illusion that EquiAlt's Funds were profitable, when in fact the Funds' financial condition has been disastrous all along.

See Merchant Capital, 483 F.3d at 768 (optimistic statement about business prospects materially misleading if it "fails to include past performance information that would be useful . . . in assessing those statements."); *SEC v. Coplan*, 13-62127-CIV, 2014 WL 695393, at *4 (S.D. Fla. Feb. 24, 2014) (omissions of how revenue was generated was material because "a reasonable investor considering whether to invest would have wanted to know that [the investment manager] used investors' funds to pay earlier investors their purported returns.").

c. Scienter

Courts have defined scienter as a state of mind embracing intent to deceive, manipulate or defraud. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). The Commission may establish scienter for violations of Sections 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act by "a showing of knowing misconduct or severe recklessness." *Monterosso*, 756 F.3d at 1335 (quoting *Carriba Air, Inc.*, 681 F.2d at 1324).

Here, Defendants obtained millions of dollars of money or property by means of these misrepresentations and omissions. Davison and Rybicki, and the entities they controlled, all acted with scienter. Davison and Rybicki knew, or were reckless in not knowing, that EquiAlt was making misrepresentations and omissions to investors. Davison knew, or was reckless in not knowing, that EquiAlt was using investor funds to make Ponzi-like payments. As the individuals who misappropriated investor funds and orchestrated this scheme, it is axiomatic that Davison and Rybicki knew, or were reckless in not knowing, they were not investing the funds in accordance with the representations EquiAlt made to investors. Davison and Rybicki's scienter can also be imputed to EquiAlt.

In re Sunbeam Sec. Litig., 89 F. Supp. 2d 1326, 1340 (S.D. Fla. 1999) (the scienter of corporate officers is properly imputed to the corporation). Therefore, EquiAlt also acted with the requisite scienter.

d. The "In Connection With" Requirement

Because Defendants made their misrepresentations and omissions and participated in a fraudulent scheme in connection with in the offer, purchase, and sale of their Funds, the "in connection with" requirement of Section 10(b) and Rule 10b-5 is met. *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (courts should interpret the "in connection with" requirement broadly to effectuate the remedial purpose of the federal securities laws); *SEC v. Merkin,* 2012 WL 5245561 *8 (S.D. Fla. Oct. 3, 2012) (the "in connection with" requirement is satisfied if the SEC shows that the material misrepresentations were relayed to the public in a way that a reasonable investor would rely on them).

4. <u>Davison and Rybicki are Liable as a Control Persons</u>

Section 20(a) of the Exchange Act makes a person "who, directly or indirectly, controls any person liable under any provision of [the act] or of any rule or regulation thereunder ... liable jointly and severally with ... such controlled person." 15 U.S.C. § 78t(a). A Defendant is liable as a control person under Section 20(a), where "(1) the defendant had the power to control the general affairs of the primary violator, and (2) the defendant had the power to control the specific corporate policy that resulted in the primary violation." *Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 723 (11th Cir. 2008);

Brown v. Enstar Group, Inc., 84 F.3d 393, 396 (11th Cir. 1996). "The plaintiff must also establish that the controlled person violated the securities laws." *Brown*, 84 F.3d at 396–97. A controlling person is liable if he "acted recklessly in failing to do what he could have done to prevent the violation." *Id.*

Here, it is clear that Davison and Rybicki had the power to and did exercise control over the operations of the EquiAlt and the Funds. Davison, the CEO and owner, controlled the Funds' offerings, the bank accounts, and the accounting on behalf of these entities. Davison also signed checks paying investors' interest payments using investor proceeds or directed others to do so. Rybicki, the Managing Director and principal, signed subscription agreements with investors on behalf of the Funds, was in charge of the marketing materials, and the offering documents including the PPMs.

5. EquiAlt, Davison and Rybicki Aided and Abetted Violations of Section 15(a)(1) of the Exchange Act

Section 15(a)(1) of the Exchange Act makes it unlawful for a broker or dealer to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security unless such broker or dealer is registered with the Commission, or in the case of a natural person, is associated with a registered broker-dealer or is eligible for an exemption or safe harbor. It is not necessary to prove scienter to establish a violation of Section 15(a)(1). *SEC v. United Monetary Servs.*, Inc., [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,284 at 96,302 (S.D. Fla. May 18, 1990).

Section 3(a)(4)(A) of the Exchange Act defines "broker" as "any person engaged in the business of effecting transactions in securities for the accounts of others." The terms "engaged in the business" and "effecting transactions" are not defined by statute; however,

the courts and the Commission have considered a number of factors to determine whether a person is a broker. A person may be found to be acting as a broker if he participates with a "certain regularity of participation" in securities transactions "at key points in the chain of distribution." *Mass. Fin. Serv., Inc. v. Sec. Inv. Prot. Corp.*, 411 F. Supp. 411, 415 (D. Mass. 1976), *aff'd* 545 F.2d 754 (1st Cir. 1976), *cert. denied*, 431 U.S. 904 (1977).

Among the activities that demonstrate acting as a broker are (1) solicitation of investors to purchase securities; (2) receipt of transaction-based compensation; (3) involvement in negotiations between the issuer and the investor; (4) provision of advice or valuations as to the merits of the investment; (5) active rather than passive location of investors; (6) whether the individual or entity was an employee of the issuer; and (7) whether the individual or entity was selling, or had previously sold, the securities of other issuers. *SEC v. Pension Trust Corp.*, 2010 WL 3894082, at *21 (S.D. Fla. Sept. 30, 2010) (citations omitted). The factors listed above are not exclusive, and not all of them, or any particular number of them, must be satisfied for a person to be a broker. *SEC v. Benger*, 697 F. Supp. 2d 932, 945 (N.D. Ill. 2010).

With respect to aiding and abetting, Exchange Act Section 20(e) provides that "any person that knowingly or recklessly provides substantial assistance to another person in violation of provision of" that act "shall be deemed to be in violation of such provision." To establish aiding and abetting, the Commission must show: (1) a primary violation; (2) the aider and abettor provided "substantial assistance" to the violator; and (3) the aider and abettor acted with scienter. *SEC v. BIH Corp.*, 2011 WL 3862530, *6 (M.D. Fla. Aug. 31, 2011). The scienter requirement can be satisfied by extreme recklessness, which can be

shown by "red flags," "suspicious events creating reasons for doubt," or "a danger . . . so obvious that the actor must have been aware of" the danger of violations. *SEC v. K.W. Brown & Co.*, 555 F.Supp.2d 1275, 1307 (S.D. Fla. 2008).

Here, there are primary violations of Section 15(a) by the sales agents who solicited investments in the Funds, provided investors with PPMs and sales offering materials, provided advice on the merits of the investment, and received transaction-based compensation in the form of commissions. They have never been registered with the Commission as broker-dealers or associated with a registered broker-dealer. EquiAlt controlled all of the communications, including all of the misrepresentations and omissions to investors. Davison and Rybicki also authorized and paid commissions to the external sales agents, and Davison, Rybicki and EquiAlt knew (or were extremely reckless in not knowing) that the sales agents were not registered. Thus, there is more than sufficient evidence to find that EquiAlt, Davison, and Rybicki aided and abetted the sales agents' primary violations of Section 15(a) of the Exchange Act.

B. An *Ex Parte* Temporary Restraining Order is Necessary

Based on the facts and law set forth above, the Commission has met its burden of showing: (1) there is *prima facie* evidence the Defendants are violating the securities laws; and (2) there is a reasonable likelihood they will continue to violate the law unless the Court immediately issues an *ex parte* temporary restraining order against Defendants. As our accompanying Certification Under Rule 65 as to why we are not providing the Defendants notice explains in more detail, we have grave concerns the Defendants will dissipate investor assets if we do. They have already misappropriated millions for personal use, and misused

millions more of the money they have raised from investors. Given that Defendants continue to raise money from new investors and the ongoing fraud both Davison and Rybicki are committing, we ask the Court to enter the attached proposed order granting this temporary restraining order and entering the asset freeze without notice to the Defendants to prevent them from further pilfering investor funds. The Commission will immediately serve the Defendants with the pleadings and orders, and the attached proposed order asks the Court to set a show cause hearing at which time the Defendants can appear and argue why the Court should not enter a preliminary injunction and further extend the asset freeze.

C. An *Ex Parte* Freeze of Assets Is Necessary

A district court may exercise its full range of equitable powers, including an asset freeze, to preserve sufficient funds for the payment of a disgorgement award. *FTC v. United States Oil & Gas Corp.*, 748 F.2d 1431, 1433-34 (11th Cir. 1984); *see also Levi Strauss & Co. v. Sunrise Int'l Trading Co.*, 51 F.3d 982, 987 (11th Cir. 1995). Freezing assets is a well-accepted equitable remedy employed to "preserve the status quo" and is proper in actions arising under the federal securities laws. *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734-35 (11th Cir. 2005). Thus, it is well recognized that an asset freeze is sometimes necessary to ensure a future disgorgement order will not be rendered meaningless. *SEC v. Lauer*, 478 Fed. Appx. 550, 554 (11th Cir. 2012) ("The district court may freeze assets in order to preserve funds while a party seeks an equitable remedy such as disgorgement."); *CFTC v. Levy*, 541 F.3d 1102, 1114 (11th Cir. 2005) ("[A] district court may freeze a defendant's assets to ensure the adequacy of a disgorgement remedy"). The Court need only find some basis for inferring a violation of the federal securities laws to

impose an asset freeze. *Unifund SAL*, 910 F.2d 1028, 1041-42 (2d Cir. 1990).

The Commission's "burden for showing the amount of assets subject to disgorgement (and, therefore available for freeze) is light: a reasonable approximation of a defendant's ill-gotten gains" is all that is required. "Exactitude is not a requirement . . . ." *ETS Payphones*, 408 F.3d at 735 (citation and quotation omitted); *FTC v. IAB Marketing Associates, LP,* 746 F.3d 1228, 1234 (11th Cir. 2014). The Commission's burden to demonstrate the potential for dissipation of funds is even lighter. *FTC v. IAB Marketing Associates, LP,* 972 F. Supp. 2d 1307, 1313 n.3 (S.D. Fla. 2013) ("There does not need to be evidence that assets will likely be dissipated in order to impose an asset freeze") (citing *ETS Payphones*, 408 F.3d at 734, and *SEC v. Lauer*, 445 F. Supp. 2d 1362, 1367-70 (S.D. Fla. 2006)); *SEC v. Gonzalez de Castilla*, 145 F. Supp. 2d 402, 415 (S.D.N.Y. 2001) ("the SEC must demonstrate only . . . a concern that defendants will dissipate their assets . . . .").

The Court's power to freeze assets extends to Relief Defendants. *CFTC v. Walsh*, 618 F.3d 218, 225 (2nd Cir. 2010); *CFTC v. International Berkshire Group Holdings, Inc.*, 2006 WL 3716390 at *10 (S.D. Fla. Nov. 3, 2006). A Relief Defendant is a party not charged with wrongdoing who nevertheless "possesses illegally obtained profits but has no legitimate claim to them." *Huff*, 758 F. Supp. 2d at 1362. To obtain a freeze over a Relief Defendant's assets, the Commission "most demonstrate only that [it] is likely ultimately to succeed in disgorging the frozen funds." *Walsh*, 618 F.3d at 225.[5]

[5] *See also SEC v. Cavanagh*, 155 F.3d 129, 136 (2nd Cir. 1998) (federal courts may order equitable relief against a person who is not accused of wrongdoing in a securities enforcement action); *SEC v. Posner*, 16 F.3d 520, 521-22 (2nd Cir. 1994) (courts have "broad equitable power in securities cases to fashion appropriate ancillary remedies necessary to grant full relief").

As discussed in above, the Court has the power to enter an asset freeze against Defendants and Relief Defendants as an equitable remedy to preserve the status quo and preserve funds for disgorgement that will compensate defrauded investors. The evidence demonstrates that Defendants violated the federal securities laws, that Defendants received investor funds as a result of these violations, and that Davison and Rybicki transferred investor funds that they and EquiAlt obtained through their violations to themselves and to the Relief Defendants.

Moreover, there is ample evidence that Davison and Rybicki may continue to dissipate investor funds if all of these assets are not frozen. As demonstrated above, both directed millions in payments to themselves despite the precarious financial position of the Funds. Accordingly, for the reasons set forth above, the Court should enter an asset freeze against Defendants and all of the Relief Defendants in the form of the Order accompanying this memorandum. The Court should further set a hearing within 14 days ordering Defendants and the Relief Defendants to show cause why the asset freeze and other emergency relief in the accompanying order should not be extended for the pendency of the litigation.

C. A Sworn Accounting

The Commission seeks disgorgement orders against Defendants and the Relief Defendants. To this end, sworn accountings by EquiAlt, Davison, Rybicki and the Relief Defendants are necessary to enable the Commission and the Court to more precisely determine the amounts the Defendants have received, spent, and misappropriated in

furtherance of the fraud, and to better identify the amount of any unjust enrichment and the assets available for disgorgement. *SEC v. Lybrand*, 2000 WL 913894 at *12 (S.D.N.Y. July 6, 2000). The Commission asks the Court to order sworn accountings be received within 7 days.

D. An Order Prohibiting The Destruction Of Records

The Commission also seeks an Order prohibiting the destruction of records against Defendants and all the Relief Defendants to prevent the altering or destruction of evidence before this Court can hear and adjudicate the Commission's claims. Such an Order is also necessary to ensure that whatever equitable relief that might be appropriate is not compromised. *SEC v. Shiner*, 268 F. Supp. 2d 1333, 1345-46 (S.D. Fla. 2003). Consequently we ask the Court to enter an order prohibiting the destruction of records pending the outcome of this case.

E. An Expedited Deposition Of Rybicki

Under the Federal Rules of Civil Procedure, the parties in a civil case may not ordinarily conduct discovery before they hold their Rule 16 scheduling conference and Rule 26(f) discovery meeting. However, because of the emergency nature of this action, Rybicki's failure to appear for testimony, and the imminent threat that he will dissipate assets, the Commission asks the Court to allow us to notice Rybicki for deposition immediately upon the signing of the Order accompanying this memorandum on three business days' notice.

As described throughout this memorandum, Rybicki has transferred investor funds to himself and BR Support Services. The Commission has sought documents from

Rybicki, and tried to schedule his investigative testimony through his former counsel for several months prior to bringing this lawsuit. Even after the Commission agreed to postpone the testimony so Rybicki could obtain new counsel, Rybicki and his new counsel failed to provide dates to take his testimony in a timely fashion, within the time the Commission requested. Nor has the Commission received the documents it requested from Rybicki's company. Thus, for the further preservation of investor funds, the Commission asks the Court to allow the Commission to set Rybicki's expedited testimony immediately, as set forth in the accompanying Order.

IX. CONCLUSION

For the foregoing reasons, the Court should grant the Commission's Motion for Temporary Restraining Order and Other Emergency Relief and issue the accompanying proposed Order.

Respectfully submitted,

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By: _____

Alise Johnson, Esq.
Senior Trial Counsel
Fla. Bar No. 0003270
Direct Dial: (305) 982-6385
Email: johnsonali@sec.gov

Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
801 Brickell Avenue, Suite 1950
Miami, Florida 33131
Telephone: (305) 982-6300
Facsimile: (305) 536-4154