

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
CASE NO. 8:20-cv-325-T-35AEP

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.

**DEFENDANT BARRY M. RYBICKI'S MOTION TO MODIFY ASSET FREEZE TO
PERMIT ACCESS TO FUNDS FOR LEGAL DEFENSE COSTS
(EXPEDITED RELIEF REQUESTED)**

Defendant, Barry M. Rybicki ("Rybicki"), by and through his undersigned counsel, hereby files this Motion to Modify Asset Freeze to Permit Access to Funds for Legal Defense Costs. Due

to the time sensitive nature of these issues, Rybicki requests, if possible, that the Court expedite its consideration of this Motion.

1. On February 14, 2020, the Court entered an Order Granting Emergency *Ex Parte* Motion for Temporary Restraining Order, Asset Freeze and Other Injunctive Relief (ECF No. 10). The Order provides that “The Commission and any Receiver appointed by this Court shall provide the Individual Defendants access to reasonable amounts of their personal assets for necessary living expenses and legal fees.” (Order at 9).

2. For some time prior to the filing of this action and the entry of the Asset Freeze, Rybicki had been represented by the law firm Sidley Austin, LLP (“Sidley”) relating to the Commission’s investigation into EquiAlt. Sidley has done a significant amount of work in support of Mr. Rybicki’s defense.

3. Beginning well before the Commission’s emergency filings on February 14, Sidley performed extensive fact-development and legal research on the potential unregistered broker-dealer issue that it understood the Commission to be investigating at the time. This included meeting with Mr. Rybicki in Arizona and reviewing numerous subscription agreements, private placement memos, and other relevant documents to gain an understanding of EquiAlt’s business, Mr. Rybicki’s role in it, and the facts pertinent to the registration issue. Sidley also engaged in significant work to respond to the SEC’s pending subpoena to Mr. Rybicki’s company, BR Support Services, including inquires and reviews to determine what documents Mr. Rybicki or his company possessed that were responsive to the subpoena, and what responsive documents were in the possession of EquiAlt. In furtherance of this effort, Sidley also arranged to image Mr. Rybicki’s computers and devices. Finally, during this phase Sidley also began preparing Mr. Rybicki for his testimony before the Commission, which the SEC had also requested.

4. As a condition of its engagement in this case, Sidley received a retainer of \$50,000 as an advancement of fees for Mr. Rybicki's legal defense. Sidley received the retainer prior to the SEC's filing on February 14, 2020, but the full amount of the retainer had been earned by that point.

5. When the SEC filed its Complaint and the Court granted the SEC's request for a TRO, Sidley immediately undertook a number of steps on an urgent basis given the SEC's extensive allegations and actions and the need to prepare on an emergency basis for the Preliminary Injunction Hearing. Among other things, this included: (a) negotiating with the agents of the Receiver (who arrived at Mr. Rybicki's house on February 14) regarding the copying of his devices and those of other individuals employed by BR Support Services; (b) assisting Mr. Rybicki to prepare a financial accounting for himself and BR Support Services; (c) assisting Mr. Rybicki to determine his family's monthly expenses in order to request the release of such funds from the SEC pursuant to the Court's Order; (d) preparing for the Preliminary Injunction hearing, including by conducting extensive research and investigation into the facts underlying the SEC's core allegation of a Ponzi scheme, and by drafting responses to the motions and allegations in the Complaint; and (e) preparing Mr. Rybicki for his testimony, which the SEC obtained authorization to request on an expedited basis.

6. Of course, this extensive and urgent expenditure of resources was a direct and predictable result of the SEC's emergency action. Notably, the SEC could have avoided much of this expense had it indicated in any way to Mr. Rybicki concerns about how EquiAlt was being operated. Had it done so, it would have learned that EquiAlt had ceased marketing to new investors, had undertaken extensive, voluntary forensic work to analyze the Funds' books and records, and had undertaken to obtain appraisals – all in an effort to engage the SEC in a dialogue about its concerns. Instead, the SEC chose this path.

7. In order to fund all of these activities for the benefit of Mr. Rybicki's defense, and also to cover other funds beyond the initial \$50,000 retainer that had already been earned prior to the Asset Freeze, Sidley requested that an additional amount of \$100,000 be unfrozen to cover Mr. Rybicki's legal fees through February 27, 2020, pursuant to the Court's Order granting Mr. Rybicki access to reasonable attorney's fees. The Commission and the Receiver agreed to allow the amount of \$75,000 to be unfrozen for these purposes. Just two days prior to the Preliminary Injunction Hearing, after substantial effort in preparation for that hearing, the parties agreed to continue the hearing; and on February 26, 2020, the Court ordered that the hearing would be continued until May 13, 2020 (ECF No. 29).

8. On February 28, 2020, Plaintiff filed its Notice of Filing and Request for Entry of Proposed Agreed Order Extending and Modifying Asset Freeze (ECF No. 30), and the Court entered the Agreed Order Extending and Modifying Asset Freeze (ECF No. 31), authorizing the release of funds for reasonable living expenses and legal fees in the amount of \$75,000. Nevertheless, as described above, because Sidley had been engaged in extensive work on Mr. Rybicki's behalf since well before this Action was filed, and between the time this Action was filed and the date of the Order allowing the release of \$75,000, that entire amount (and more) had already been earned by the time the order was entered.

9. At the same time that the SEC and the Receiver agreed to unfreeze this initial amount, it made clear to Sidley that they did not intend to continue paying the hourly rates of the Washington, D.C. and New York attorneys that were working on this case. In response, Mr. Rybicki and his attorneys formulated a plan to significantly lower defense costs going forward. Undersigned local counsel, Mark Levy, would assume an expanded role in the litigation defense, and a sole practitioner, David R. Chase, like Stephen Cohen a former SEC enforcement attorney, would join the defense in order to address the securities enforcement issues. The hourly rates of

Mr. Levy (\$475) and Mr. Chase (\$550) are significantly lower than the rates of the Sidley attorneys. In addition, Stephen Cohen of Sidley agreed to stay on the defense for a reasonable period of time in order to manage the transition and ensure that the new attorneys had the full benefit of the work that Sidley had already performed. Significantly, Mr. Cohen **agreed to do so without expecting collection of any further fees.**

10. Both Mr. Chase's firm and Mr. Levy's firm each request to be paid a \$45,000 retainer in order to step into these new roles. A significant amount of work, however, is still required to be done going forward to adequately represent Rybicki's interests in this case, including but not limited to: (1) reviewing and analyzing the Commission's voluminous investigative file, which is believed to consume a hard drive with 500 GB of memory and which defense counsel just recently received from the Commission; (2) preparation for, and the taking of depositions; (3) responding to the Complaint and the filing and defense of material motions; (4) coordination of logistical issues with the Receiver; (5) preparation for trial; and to the extent appropriate, (6) engaging in settlement discussions with both the Commission and Receiver. Moreover, Rybicki was just named in a class action complaint in the Middle District of Florida (Case No. 20-cv-00448-WFJ-TGW) arising out of the same subject matter as the Commission's allegations and, unless and until it is stayed by the Receiver, this class action will cause Rybicki to unnecessarily have to expend even more of his already limited funds, in addition to what is being requested here. In undertaking all of this work, current counsel, Mr. Chase and Mr. Levy, will certainly utilize all of the work product, research, and fact-development completed by Sidley. Nevertheless, given that new counsel must still learn the case themselves and the scope of the work that remains to be done, the legal fees sought by Rybicki's counsel is eminently reasonable.

11. Rybicki has been forced to bring this Motion because at this time the Commission and the Receiver have refused to authorize the unfreezing of any additional funds for legal fees,

despite the Court's Order requiring that they do so. If Rybicki is not allowed access to his reasonable legal fees at this critical stage in the proceedings, his ability to defend himself will be severely compromised and his due process rights violated.

WHEREFORE, Defendant, Barry M. Rybicki, respectfully requests that this Court grant his motion and enter an order unfreezing \$90,000 of Rybicki's funds to pay for his legal fees, and awarding such further relief it deems just and proper.

LOCAL RULE 3.01(g) CERTIFICATE

Pursuant to Local Rule 3.01(g), counsel for Defendant Barry M. Rybicki has conferred with counsel for Plaintiff, Alise Johnson, who advised that both the Commission and the Receiver opposed the requested relief.

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2020, I electronically filed the foregoing Motion with the Clerk of the Court using CM/ECF, which will send a notice of such filing to all counsel of record as indicated on the attached Service List.

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