

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

CASE NO. 8:20-CV-325-T-35AEP

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;
et al.;

Relief Defendants.

_____ /

RECEIVER'S NOTICE OF FILING

Comes now, Burton W. Wiand as Receiver (the “**Receiver**”), by and through his undersigned counsel, provides notice to this Court of the filing of a purported class action lawsuit related to this matter in the Middle District of Florida and assigned to the Honorable William F. Jung (the “**Rubinstein Court**”). On February 26, 2020, investor plaintiffs filed *Rubinstein, et al. v. EquiAlt LLC et al.*, Case No. 8:20-cv-448-T-02TGW (“the **Class Action**”).

On February 28, 2020, the Receiver made the Class Action plaintiffs and the Rubinstein Court aware of the injunctive provisions of this Court's Orders by filing a Notice of Filing ("**Notice of Filing**") of the Temporary Restraining Order and Asset Freeze [Doc. 10] and Order Appointing Receiver [Doc.11]. *See* Exhibit 1. In the Notice of Filing, the Receiver requested that the Rubinstein Court stay the Class Action to comply with this Court's Orders. The Class Action plaintiffs filed a response arguing that a stay of the Class Action was unnecessary. *See* Exhibit 2. On April 10, 2020, the Class Action plaintiffs dismissed the defendants explicitly named in this case as defendants in the Class Action. The remaining defendants in the Class Action are primarily sales agents who allegedly sold unregistered EquiAlt securities to the class action investor plaintiffs.

The Receiver recently filed a reply to the Class Action plaintiffs' response. *See* Exhibit 3. In this Reply, the Receiver set forth the reasons why the Class Action should be stayed during the course of this Court's action.

Respectfully submitted,

s/Katherine C. Donlon

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WIAND GUERRA KING P.A.

5505 West Gray Street

Tampa, FL 33609

Tel: (813) 347-5100

Fax: (813) 347-5198

Attorneys for the Receiver, Burton W. Wiand

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 26, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send notification of electronic filing to all counsel of record.

s/Katherine C. Donlon

Katherine C. Donlon, FBN 0066941

EXHIBIT 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STEVEN J. RUBINSTEIN, et al.

Plaintiffs,

Case No.: 8:20-cv-00448-WFJ-TGW

v.

EQUIALT, LLC, et al.

Defendants.

NOTICE OF FILING

COMES NOW Receiver Burton W. Wiand and gives notice to the Court of the filing of *Securities and Exchange Commission v. Brian Davison, et al.*, Case No.: 8:20-cv-00325-MSS-AEP, pending in the Middle District of Florida (“SEC Action”). Defendants EquiAlt, LLC, EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC are named as a Corporate Defendants in the SEC Action.¹ The Court in the SEC Action has entered a Temporary Restraining Order, Asset Freeze and Other Injunctive Relief (Exhibit 1) and an Order granting the SEC’s Motion for Appointment of Receiver (“Receivership Order”) (Exhibit 2). Mr. Wiand has been appointed the Receiver over all the Corporate Defendants and the Relief Defendants (“Receivership Entities”) in the SEC Action.

Pursuant to these Orders, the Receiver is charged with marshaling and preserving the assets of the Receivership Entities. Paragraph 17 of the Receivership Order provides that “all persons ... are enjoined ... from prosecuting any actions or proceeding which involve the Receiver or which affect the property of the Corporate Defendants and Relief Defendants.”

¹ Defendants Brian Davison and Barry Rybicki are also named as Defendants in the SEC Action.

WHEREFORE, the Receiver requests that the Court stay this case pending further notice of the Receiver.

Dated: February 28, 2020.

Respectfully submitted,

WIAND GUERRA KING P.A.

/s/ Katherine C. Donlon

Katherine C. Donlon (FBN: 0066941)

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Jared J. Perez (FBN: 0085192)

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5505 West Gray Street

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Telephone: (813) 347-5100

Counsel for Receiver Burton W. Wiand

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 28, 2020, I electronically filed the foregoing with the Clerk of this Court by using the CM/ECF system which will send notification of electronic filing to all counsel of record.

/s/ Katherine C. Donlon

Katherine C. Donlon (FBN: 0066941)

EXHIBIT 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

Case No: 8:20-cv-00325-T-35AEP

BRIAN DAVISON, BARRY M. RYBICKI,
EQUIALT LLC, EQUIALT FUND, LLC,
EQUIALT FUND II, LLC, EQUIALT
FUND III, LLC, EA SIP, LLC,

Defendants,

**FILED *EX PARTE*
AND UNDER SEAL**

128 E. DAVIS BLVD, LLC, 310 78TH
AVE, LLC, 551 3D AVE S, LLC, 604
WEST AZEELE, LLC, BLUE WATERS
TI, LLC, 2101 W. CYPRESS, LLC, 2112
W. KENNEDY BLVD, LLC, BNAZ, LLC,
BR SUPPORT SERVICES, LLC, CAPRI
HAVEN, LLC, EANY, LLC, BUNGALOWS
TI, LLC, EQUIALT 519 3RD AVE S., LLC,
MCDONALD REVOCABLE LIVING
TRUST, 5123 E. BROADWAY AVE, LLC,
SILVER SANDS TI, LLC, TB OLDEST
HOUSE EST. 1842, LLC,

Relief Defendants.

**SEALED ORDER GRANTING EMERGENCY *EX PARTE* MOTION FOR TEMPORARY
RESTRAINING ORDER, ASSET FREEZE, AND OTHER INJUNCTIVE RELIEF**

THIS CAUSE comes before the Court upon the Plaintiff, Securities and Exchange Commission's Emergency Ex Parte Motion for Temporary Restraining Order, Asset Freeze, and Other Injunctive Relief, (Dkt. 4), which seeks the following orders with respect to Defendants, Brian Davison, Barry M. Rybicki, EquiAt LLC, EquiAlt Fund, LLC, EquiAlt

Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC (collectively, “Defendants”), and Relief Defendants 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, Bugalows TI LLC, Capri Haven, LLC, EA NY, LLC, EquiAlt 519 3rd Ave S., LLC, McDonald Revocable Living Trust, Silver Sands TI, LLC, and TB Oldest House Est. 1842, LLC (collectively, “Relief Defendants”):

1. a Temporary Restraining Order;
2. an Order to Show Cause Why a Preliminary Injunction Should Not be Granted;
3. an Order Freezing the Assets of Defendants and Relief Defendant;
4. an Order Requiring Sworn Accountings;
5. an Order Prohibiting Destruction of Documents; and
6. an Order Expediting Discovery.

The Court has considered the Commission’s Complaint, its Emergency Motion for a Temporary Restraining Order and Other Relief and Memorandum of Law in Support, and the declarations and exhibits filed in support of that motion. The Court finds the Commission has made a sufficient and proper showing in support of the relief granted herein by: (i) presenting a *prima facie* case of securities laws violations by Defendants; and (ii) showing a reasonable likelihood Defendants will harm the investing public by continuing to violate the federal securities laws unless they are immediately restrained. The Court also finds good cause to believe that unless immediately restrained and enjoined by Order of this Court, Defendants and Relief Defendants will continue to

dissipate, conceal or transfer from the jurisdiction of this Court assets which could be subject to an Order of Disgorgement.

Accordingly, the motion is **GRANTED**, and the Court hereby orders as follows:

I.

SHOW CAUSE HEARING

IT IS HEREBY ORDERED that Defendants **shall** appear for a **SHOW CAUSE HEARING** on **Thursday, February 27, 2020, at 1:30 p.m.**, in the Sam Gibbons United States Courthouse, Courtroom 7A, 801 North Florida Ave., Tampa, FL 33602, before the Honorable Mary S. Scriven. Defendants shall be prepared to show cause, if any, why a Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure should not be granted against them, as requested by the Commission. The Court has set aside **two (2) hours** for this hearing.

II.

TEMPORARY RESTRAINING ORDER

IT IS FURTHER ORDERED that, pending determination of the Commission's request for a Preliminary Injunction, Defendants Brian Davison, Barry M. Rybicki, EquiAlt LLC, EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, LLC and EA SIP, LLC, and their respective directors, officers, agents, servants, employees, attorneys, representatives and those persons in active concert or participation with them, and each of them, are hereby restrained and enjoined from violating:

Section 17(a)(1) of the Securities Act of 1933

A. Directly or indirectly, by use of any means or instruments of transportation or communication in interstate commerce, or by the use of the mails, in the offer or sale of

securities, knowingly or recklessly employing devices, schemes or artifices to defraud, in violation of Section 17(a)(1) of the Securities Act, 15 U.S.C. 77q(a)(1);

Section 17(a)(2) & (3) of the Securities Act of 1933

B. Directly or indirectly, by use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, in the offer or sale of securities, (i) obtaining money or property by means of untrue statements of material facts or omissions to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading; or (ii) engaging in acts, practices and courses of business which have operated and will operate as a fraud or deceit upon purchasers and prospective purchasers of such securities, in violation of Sections 17(a)(2) & (3) of the Securities Act, 15 U.S.C. §§ 77(q)(a)(2) & (3); and

Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5

C. Directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any securities, knowingly or recklessly: (i) employing devices, schemes or artifices to defraud; (ii) making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (iii) engaging in acts, practices and courses of business which have operated, are now operating or will operate as a fraud upon the purchasers of such securities in violation of Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, thereunder.

Section 15(a)(1) of the Exchange Act

IT IS FURTHER ORDERED AND ADJUDGED that Brian Davison, Barry Rybicki, and EquiAlt, LLC their respective directors, officers, agents, servants, employees, attorneys, representatives and those persons in active concert or participation with them, and each of them, are hereby restrained and enjoined from violating Section 15(a)(1) of the Exchange Act, 15 U.S.C. § 78o(a)(1), by to making use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security.

Section 5 of the Securities Act

IT IS FURTHER ORDERED AND ADJUDGED that Defendants, their respective directors, officers, agents, servants, employees, attorneys, representatives and those persons in active concert or participation with them, and each of them, are hereby restrained and enjoined from violating Section 5 of the Securities Act, 15 U.S.C. § 77e, by, directly or indirectly, in the absence of any applicable exemption:

- (a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;
- (b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or

- (c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed with the Commission as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act, 15 U.S.C. § 77h.

Section 20(a) of the Exchange Act – Control Person Liability

IT IS FURTHER ORDERED AND ADJUDGED that Brian Davison, and Barry Rybicki, their agents, servants, employees, attorneys, representatives, and those persons in active concert or participation with them, and each of them, are hereby restrained and enjoined from violating Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a).

Aiding and Abetting Violations of Section 15(a) of the Exchange Act

IT IS FURTHER ORDERED that Brian Davison, Barry Rybicki, and EquiAlt and their directors, officers, agents, employees, attorneys, representatives, and those persons in active concert or participation with them, and each of them, are hereby restrained and enjoined from aiding and abetting violations Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a).

III.

ASSET FREEZE

IT IS FURTHER ORDERED that, pending determination of the Commission's request for a Preliminary Injunction:

A. Defendants and Relief Defendants and their respective directors, officers, agents, servants, employees, attorneys, depositories, banks, and those persons in active concert or participation with any one or more of them, and each of them, who receive notice of this order by personal service, mail, email, facsimile transmission or otherwise, be and hereby are, restrained from, directly or indirectly, transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of, or withdrawing any assets or property, including but not limited to cash, free credit balances, fully paid for securities, personal property, real property, and/or property pledged or hypothecated as collateral for loans, or charging upon or drawing from any lines of credit, owned by, controlled by, or in the possession of, whether jointly or singly, and wherever located:

1. BRIAN DAVISON,
2. BARRY M. RYBICKI,
3. EQUALT LLC,
4. EQUALT FUND, LLC,
5. EQUALT FUND II, LLC,
6. EQUALT FUND III, LLC,
7. EA SIP, LLC,
8. 128 E. DAVIS BLVD, LLC,
9. 310 78TH AVE, LLC,
10. 551 3D AVE S, LLC,
11. 604 WEST AZEELE, LLC,
12. 2101 W. CYPRESS, LLC,

13. 2112 W. KENNEDY BLVD, LLC,
14. 5123 E. BROADWAY AVE, LLC,
15. BLUE WATERS TI, LLC,
16. BNAZ, LLC,
17. BR SUPPORT SERVICES, LLC,
18. BUNGALOWS TI LLC,
19. CAPRI HAVEN, LLC,
20. EA NY, LLC,
21. EQUIALT 519 3RD AVE S., LLC,
22. MCDONALD REVOCABLE LIVING TRUST,
23. SILVER SANDS TI, LLC,
24. TB OLDEST HOUSE EST. 1842, LLC,

B. Any financial or brokerage institution or other person or entity holding any such funds or other assets, in the name, for the benefit or under the control of Defendants and Relief Defendants or indirectly, held jointly or singly, and wherever located, and which receives actual notice of this order by personal service, mail, email, facsimile, or otherwise, shall hold and retain within its control and prohibit the withdrawal, removal, transfer, disposition, pledge, encumbrance, assignment, set off, sale, liquidation, dissipation, concealment, or other disposal of any such funds or other assets, including, but not limited to, the following presently known bank accounts:

Financial Institution	Name of Account	Account Number
Bank of America	Equalt Fund LLC	898090093190
Bank of America	Equalt Fund LLC	898090093200

Bank of America	Equialt Fund II LLC	898090093284
Bank of America	Equialt Fund II LLC	898090093297
Bank of America	EA SIP LLC	898090093213
Bank of America	Equialt LLC	898090093310
Bank of America	Equialt LLC	898090093323
Bank of America	Equialt Capital Advisors	229052064150
Bank of America	Blue Waters TI LLC	898090093187
Bank of America	TB Oldest House	898090093226
Bank of America	Silver Sands TI LLC	898090093336
Bank of America	Bungalows TI LLC	898090093307
Comerica Bank	Barry Rybicki	8002807306
Comerica Bank	Barry Rybicki	8002807314
JP Morgan Chase	5123 E Broadway AVE LLC	368330277
JP Morgan Chase	Brian Davison	453028545
JP Morgan Chase	BR Support Services	686369906

C. 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. The Individual Defendants and their family members shall also, pursuant to agreement with the Commission and the Receiver, be allowed access to reasonable forms of personal transportation. Any agreement on these matters shall be submitted to the Court.

IV.

SWORN ACCOUNTINGS

IT IS FURTHER ORDERED that within seven calendar days of the issuance of this Order, Defendants Brian Davison, Barry Rybicki and EquiAlt, LLC shall:

- (a) make a sworn accounting to this Court and the Commission of all funds,

whether in the form of compensation, commissions, income (including payments for assets, shares or property of any kind), and other benefits (including the provision of services of a personal or mixed business and personal nature) received, directly or indirectly, by EquiAlt LLC, EquiAlt Fund, LLC EquiAlt Fund II, LLC, EquiAlt Fund III, LLC and EA SIP, LLC;

(b) make a sworn accounting to this Court and the Commission of all assets, funds, or other properties, whether real or personal, held by EquiAlt LLC, EquiAlt Fund, LLC EquiAlt Fund II, LLC, EquiAlt Fund III, LLC and EA SIP, LLC, jointly or individually, or for its direct or indirect beneficial interest, or over which it maintains control, wherever situated, stating the location, value, and disposition of each such asset, fund, and other property; and

(c) provide to the Court and the Commission a sworn identification of all accounts (including, but not limited to, bank accounts, savings accounts, securities accounts and deposits of any kind and wherever situated) in which EquiAlt LLC, EquiAlt Fund, LLC EquiAlt Fund II, LLC, EquiAlt Fund III, LLC and EA SIP, LLC (whether solely or jointly), directly or indirectly (including through a corporation, partnership, relative, friend or nominee), either has an interest or over which it has the power or right to exercise control.

V.

RECORDS PRESERVATION

IT IS FURTHER ORDERED that, pending determination of the Commission's request for a Preliminary Injunction, Defendants and Relief Defendants, their directors, officers, agents, servants, employees, attorneys, depositories, banks, and those persons in active concert or participation with any one or more of them, and each of them, be and

they hereby are restrained and enjoined from, directly or indirectly, destroying, mutilating, concealing, altering, disposing of, or otherwise rendering illegible in any manner, any of the books, records, documents, correspondence, brochures, manuals, papers, ledgers, accounts, statements, obligations, files and other property of or pertaining to Defendants wherever located and in whatever form, electronic or otherwise, until further Order of this Court.

VI.

EXPEDITED DISCOVERY

IT IS FURTHER ORDERED that:


(a) Immediately upon entry of this Order, and while the Commission's request for a Preliminary Injunction is pending, the parties may take depositions upon oral examination of Barry Rybicki subject to three days' notice. Should Rybicki fail to appear for a properly noticed deposition, he may be prohibited from introducing evidence at the hearing on the Commission's request for a preliminary injunction;

VII.

RETENTION OF JURISDICTION

IT IS HEREBY FURTHER ORDERED that this Court shall retain jurisdiction over this matter and Defendants and Relief Defendants in order to implement and carry out the terms of all Orders and Decrees that may be entered and/or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court, and will order other relief that this Court deems appropriate under the circumstances.

DONE and **ORDERED** in Tampa, Florida, this 14th day of February, 2020.



MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:

PLAINTIFF'S COUNSEL ONLY

EXHIBIT 2

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

Case No: 8:20-cv-00325-T-35AEP

BRIAN DAVISON, BARRY M. RYBICKI,
EQUIALT LLC, EQUIALT FUND, LLC,
EQUIALT FUND II, LLC, EQUIALT
FUND III, LLC, EA SIP, LLC,

Defendants,

**FILED EX PARTE
AND UNDER SEAL**

128 E. DAVIS BLVD, LLC, 310 78TH
AVE, LLC, 551 3D AVE S, LLC, 604
WEST AZEELE, LLC, BLUE WATERS
TI, LLC, 2101 W. CYPRESS, LLC, 2112
W. KENNEDY BLVD, LLC, BNAZ, LLC,
BR SUPPORT SERVICES, LLC, CAPRI
HAVEN, LLC, EANY, LLC, BUNGALOWS
TI, LLC, EQUIALT 519 3RD AVE S., LLC,
MCDONALD REVOCABLE LIVING
TRUST, 5123 E. BROADWAY AVE, LLC,
SILVER SANDS TI, LLC, TB OLDEST
HOUSE EST. 1842, LLC,

Relief Defendants.

**SEALED ORDER GRANTING PLAINTIFF'S EMERGENCY EX PARTE MOTION FOR
APPOINTMENT OF RECEIVER AND MEMORANDUM OF LAW**

WHEREAS, Plaintiff Securities and Exchange Commission has filed an Emergency Motion for the appointment of a Receiver over Defendants EquiAlt LLC, EquiAlt Fund, LLC EquiAlt Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC (collectively the "Corporate Defendants"), (Dkt. 6), and all of the Relief Defendants in this action with full and exclusive power, duty and authority to: administer and manage the business affairs, funds, assets,

choses in action and any other property of the Corporate Defendants and Relief Defendants; marshal and safeguard all of the assets of the Corporate Defendants and Relief Defendants and take whatever actions are necessary for the protection of investors;

WHEREAS, the Court has found Plaintiff Securities and Exchange Commission has made a sufficient and proper showing of the relief requested by evidence demonstrating a *prima facie* case of violations of the federal securities laws by the Defendants.

WHEREAS this Court has subject matter jurisdiction over this action and personal jurisdiction over the Defendants, and venue properly lies in this district.

WHEREAS, the Commission has submitted the credentials of a candidate to be appointed as Receiver of all of the assets, properties, books and records, and other items of the Corporate Defendants and the Relief Defendants and the Commission has advised the Court that this candidate is prepared to assume this responsibility if so ordered by the Court.

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that Burton Wiand, Esq. is hereby appointed the Receiver over the Corporate Defendants and Relief Defendants, each of their subsidiaries, successors and assigns, and is hereby authorized, empowered, and directed to:

1. Take immediate possession of all property, assets and estates of every kind of the Corporate Defendants and Relief Defendants whatsoever and wheresoever located, including but not limited to all offices maintained by the Corporate Defendants and Relief Defendants, rights of action, books, papers, data processing records, evidences of debt, bank accounts, savings accounts, certificates of deposit, stocks, bonds, debentures and other securities, mortgages, furniture, fixtures, office supplies and equipment, and all real property of the Corporate Defendants and

Relief Defendants, wherever situated, and to administer such assets as is required in order to comply with the directions contained in this Order, and to hold all other assets pending further order of this Court;

2. Investigate the manner in which the affairs of the Corporate Defendants and Relief Defendants were conducted and institute such actions and legal proceedings, for the benefit and on behalf of the Corporate Defendants and Relief Defendants and their investors and other creditors as the Receiver deems necessary against those individuals, corporations, partnerships, associations and/or unincorporated organizations which the Receiver may claim have wrongfully, illegally or otherwise improperly misappropriated or transferred money or other proceeds directly or indirectly traceable from investors in EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC, their officers, directors, employees, affiliates, subsidiaries, or any persons acting in concert or participation with them, or against any transfers of money or other proceeds directly or indirectly traceable from investors in EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC; provided such actions may include, but not be limited to, seeking imposition of constructive trusts, disgorgement of profits, recovery and/or avoidance of fraudulent transfers, rescission and restitution, the collection of debts, and such orders from this Court as may be necessary to enforce this Order;
3. Initially recover, control and possess liquid assets, known real estate, LLC assets and high-end personal assets purchased with funds traceable from investor proceeds, and trusts if the Receiver deems appropriate. The Receiver is specifically authorized to retain for the purposes of the receivership, forensic accountants (Yip and Associates), information technology consultants and counsel

specializing in information technology research (Adam Sharp, E-Hounds, Inc. and Robert Stines of Freeborn & Peters LLP), RWJ Group, LLC, and investigators, and counsel in Phoenix, Arizona to assist in the service of the Order and securing of records and assets. The Receiver shall advise and seek the consent of the Court with respect to the institution of claims relating to vendors, professionals, investors, or financial institutions, or other litigation of a complex and significant nature that may involve commitment of significant assets or the incurrence of significant costs or expenses to the receivership;

4. Present to this Court a report reflecting the existence and value of the assets of the Corporate Defendants and Relief Defendants and of the extent of liabilities, both those claimed to exist by others and those the Receiver believes to be legal obligations of the Corporate Defendants and Relief Defendants;
5. Appoint one or more special agents, employ legal counsel, actuaries, accountants, clerks, consultants and assistants as the Receiver deems necessary and to fix and pay their reasonable compensation and reasonable expenses, as well as all reasonable expenses of taking possession of the assets and business of the Corporate Defendants and Relief Defendants and exercising the power granted by this Order, subject to prior approval by this Court;
6. Engage persons in the Receiver's discretion to assist the Receiver in carrying out the Receiver's duties and responsibilities, including, but not limited to, the United States Marshal's Service, accountants, or a private security firm;
7. Defend, compromise or settle legal actions, including the instant proceeding, in which the Corporate Defendants, the Relief Defendants, or the Receiver are a party, commenced either prior to or subsequent to this Order, without authorization of this

Court up to a total amount of \$50,000 for each claim; except, however, in actions where the Corporate Defendants or Relief Defendants are nominal parties, where the action does not effect a claim against or adversely affect the assets of Corporate Defendants or Relief Defendants, the Receiver may file appropriate pleadings at the Receiver's discretion. The Receiver may waive any attorney-client or other privilege held by the Corporate Defendants or Relief Defendants;

8. Assume control of, and be named as authorized signatory for, all accounts at any bank, brokerage firm or financial institution which has possession, custody or control of any assets or funds, wherever situated, of the Corporate Defendants or Relief Defendants and, upon, order of this Court, of any of their subsidiaries or affiliates, provided that the Receiver deems it necessary;
9. Make or authorize such payments and disbursements from the funds and assets taken into control, or thereafter received by the Receiver, and incur, or authorize the incurrence of, such expenses and make, or authorize the making of, such agreements as may be reasonable, necessary, and advisable in discharging the Receiver's duties;
10. Have access to and review all mail of Corporate Defendants or Relief Defendants (except for mail that appears to be purely personal or in any respect attorney-client privileged communication to or from the individual Defendants) received at any office or address of Corporate Defendants or Relief Defendants.

IT IS FURTHER ORDERED AND ADJUDGED that, in connection with the appointment of the Receiver provided for above:

11. The Corporate Defendants or Relief Defendants and all of their directors, officers, agents, employees, attorneys, attorneys-in-fact, shareholders, and other persons

who are in custody, possession, or control of any assets, books, records, or other property of the Defendants and Relief Defendants shall deliver forthwith upon demand such property, money, books and records to the Receiver, and shall forthwith grant to the Receiver authorization to be a signatory as to all accounts at banks, brokerage firms or financial institutions which have possession, custody or control of any assets or funds in the name of or for the benefit of the Corporate Defendants and Relief Defendants;

12. The Receiver is authorized to open a bank account or accounts in the name of the Receivership to carry out the business of the Receivership and the Receivership Estate;

13. All banks, brokerage firms, financial institutions, and other business entities which have possession, custody or control of any assets, funds or accounts in the name of, or for the benefit of the Corporate Defendants and Relief Defendants shall cooperate expeditiously in the granting of control and authorization as a necessary signatory as to said assets and accounts to the Receiver;

14. Unless authorized by the Receiver, the Corporate Defendants and Relief Defendants and their principals shall take no action, nor purport to take any action, in the name of or on behalf of the Corporate Defendants and Relief Defendants;

15. The Corporate Defendants and Relief Defendants, their principals, and their respective officers, agents, employees, attorneys, and attorneys-in-fact, shall cooperate with and assist the Receiver. The Corporate Defendants and Relief Defendants and their principals and respective officers, agents, employees, attorneys, and attorneys-in-fact shall take no action, directly or indirectly, to hinder, obstruct, or otherwise interfere with the Receiver in the conduct of the Receiver's

duties or to interfere in any manner, directly or indirectly, with the custody, possession, management, or control by the Receiver of the funds, assets, premises, and choses in action described above;

16. The Receiver, and any counsel whom the Receiver may select, are entitled to reasonable compensation from the assets now held by or in the possession or control of or which may be received by the Corporate Defendants and Relief Defendants; said amount or amounts of compensation shall be commensurate with their duties and obligations under the circumstances, subject to approval of the Court. The Receiver is specifically authorized to retain Wiand Guerra King P.A. as attorneys for the Receiver;

17. During the period of this receivership, all persons, including creditors, banks, investors, or others, with actual notice of this Order, are enjoined from filing a petition for relief under the United States Bankruptcy Code without prior permission from this Court, or from in any way disturbing the assets or proceeds of the receivership or from prosecuting any actions or proceedings which involve the Receiver or which affect the property of the Corporate Defendants and Relief Defendants;

18. The Receiver is fully authorized to proceed with any filing the Receiver may deem appropriate under the Bankruptcy Code as to the Corporate Defendants and Relief Defendants;

19. Title to all property, real or personal, all contracts, rights of action and all books and records of the Corporate Defendants and Relief Defendants and their principals, wherever located within or without this state, is vested by operation of law in the Receiver;

20. Upon request by the Receiver, any company providing telephone services to the Corporate Defendants or Relief Defendants shall provide a reference of calls from any number presently assigned to the Defendants and Relief Defendants to any such number designated by the Receiver or perform any other changes necessary to the conduct of the receivership;
21. Any entity furnishing water, electric, telephone, sewage, garbage or trash removal services to the Corporate Defendants or Relief Defendants shall maintain such service and transfer any such accounts to the Receiver unless instructed to the contrary by the Receiver. The Receiver shall pay the invoices from the aforementioned utilities for services provided to the Corporate Defendants and Relief Defendants in the ordinary course of their business;
22. The United States Postal Service is directed to provide any information requested by the Receiver regarding the Corporate Defendants or Relief Defendants as directed by the Receiver;
23. No bank, savings and loan association, other financial institution, or any other person or entity shall exercise any form of set-off, alleged set-off, lien, or any form of self-help whatsoever, or refuse to transfer any funds or assets to the Receiver's control without the permission of this Court;
24. No bond shall be required in connection with the appointment of the Receiver. Except for an act of gross negligence or greater, the Receiver shall not be liable for any loss or damage incurred by the Corporate Defendants or Relief Defendants, or by the Receiver's officers, agents or employees, or any other person, by reason of any act performed or omitted to be performed by the Receiver in connection with the discharge of the Receiver's duties and responsibilities;

25. Service of this Order shall be sufficient if made upon the Corporate Defendants or Relief Defendants and their principals by facsimile or overnight courier;

26. In the event the Receiver discovers that funds of persons who have invested in EquiAlt Fund, LLC EquiAlt Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC have been transferred to other persons or entities, the Receiver shall apply to this Court for an Order giving the Receiver possession of such funds or assets acquired with such funds and, if the Receiver deems it advisable, extending this receivership over any person or entity holding such investor funds or assets;

27. This Court shall retain jurisdiction of this matter for all purposes;

28. Within thirty (30) days after the end of each calendar quarter, the Receiver shall file and serve a full report and accounting of each Receivership Estate (the "Quarterly Status Report"), reflecting (to the best of the Receiver's knowledge as of the period covered by the report) the existence, value, and location of all Receivership Property, and of the extent of liabilities, both those claimed to exist by others and those the Receiver believes to be legal obligations of the Receivership Estates;

29. The Quarterly Status Report shall contain the following:

- A. A summary of the operations of the Receiver;
- B. The amount of cash on hand, the amount and nature of accrued administrative expenses, and the amount of unencumbered funds in the estate;
- C. A schedule of all the Receiver's receipts and disbursements (attached as Exhibit A to the Quarterly Status Report), with one column for the quarterly period covered and a second column for the entire duration of the receivership;
- D. A description of all known Receivership Property, including approximate or actual valuations, anticipated or proposed

dispositions, and reasons for retaining assets where no disposition is intended;

- E. A description of liquidated and unliquidated claims held by the Receivership Estate, including the need for forensic and/or investigatory resources; approximate valuations of claims; and anticipated or proposed methods of enforcing such claims (including likelihood of success in: (i) reducing the claims to judgment; and, (ii) collecting such judgments);
- F. The status of Creditor Claims Proceedings, after such proceedings have been commenced; and,
- G. The Receiver's recommendations for a continuation or discontinuation of the receivership and the reasons for the recommendations.

30. Subject to Paragraphs 31 - 37 immediately below, the Receiver need not obtain Court approval prior to the disbursement of Receivership Funds for expenses in the ordinary course of the administration and operation of the receivership. Further, prior Court approval is not required for payments of applicable federal, state or local taxes;

31. Subject to Paragraph 32 immediately below, the Receiver is authorized to solicit persons and entities ("Retained Personnel") to assist him in carrying out the duties and responsibilities described in this Order. Except as otherwise provided herein, the Receiver shall not engage any Retained Personnel without first obtaining an Order of the Court authorizing such engagement;

32. The Receiver and Retained Personnel are entitled to reasonable compensation and expense reimbursement from the Receivership Estates as described in the "Billing Instructions for Receivers in Civil Actions Commenced by the U.S. Securities and Exchange Commission" (the "Billing Instructions") agreed to by the Receiver. Such compensation shall require the prior approval of the Court;

33. Within forty-five (45) days after the end of each calendar quarter, the Receiver and

Retained Personnel shall apply to the Court for compensation and expense reimbursement from the Receivership Estates (the “Quarterly Fee Applications”). At least thirty (30) days prior to filing each Quarterly Fee Application with the Court, the Receiver will serve upon counsel for the SEC a complete copy of the proposed Application, together with all exhibits and relevant billing information in a format to be provided by SEC staff;

34. All Quarterly Fee Applications will be interim and will be subject to cost benefit and final reviews at the close of the receivership. At the close of the receivership, the Receiver will file a final fee application, describing in detail the costs and benefits associated with all litigation and other actions pursued by the Receiver during the course of the receivership;

35. Quarterly Fee Applications may be subject to a holdback in the amount of 20% of the amount of fees and expenses for each application filed with the Court. The total amounts held back during the course of the receivership will be paid out at the discretion of the Court as part of the final fee application submitted at the close of the receivership;

36. Each Quarterly Fee Application shall:

- A. Comply with the terms of the Billing Instructions agreed to by the Receiver; and,
- B. Contain representations (in addition to the Certification required by the Billing Instructions) that: (i) the fees and expenses included therein were incurred in the best interests of the Receivership Estate; and, (ii) with the exception of the Billing Instructions, the Receiver has not entered into any agreement, written or oral, express or implied, with any person or entity concerning the amount of compensation paid or to be paid from the Receivership Estate, or any sharing thereof.


37. At the close of the Receivership, the Receiver shall submit a Final Accounting, in

a format to be provided by SEC staff, as well as the Receiver's final application for compensation and expense reimbursement;

38. On the request of the Commission, the Receiver shall provide the Commission with any documentation that the Commission deems necessary to meet its reporting requirements, that is mandated by statute or Congress, or that is otherwise necessary to further the Commission's mission.

39. The Receiver has a continuing duty to ensure that there are no conflicts of interest between the Receiver, his Retained Personnel, and the Receivership Estate.

DONE and **ORDERED** in Tampa, Florida, this 14th day of February, 2020.



MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
PLAINTIFF'S COUNSEL ONLY
US MARSHAL'S SERVICE

EXHIBIT 2

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STEVEN J. RUBINSTEIN, et al.,

Case No.: 8:20-cv-00448-WFJ-TGW

Plaintiffs,

v.

EQUIALT, LLC, et al.,

Defendants.

PLAINTIFFS' RESPONSE TO RECEIVER'S NOTICE OF FILING

In accordance with the Court's Endorsed Order [ECF No. 27], Plaintiffs Steven J. Rubenstein *et al.* (collectively, "Investor Plaintiffs"), respectfully respond to the Notice of Filing filed by Receiver Burton W. Wiand (the "Receiver") on February 28, 2020 [ECF No. 26] (the "Stay Request"), in which the Receiver "requests that the Court stay this case pending further notice of the Receiver." ECF No. 26 at 2.

The Court appointed the Receiver on February 14, 2020 at the request of the SEC in *Securities and Exchange Commission v. Brian Davidson, et. al.*, Case No.: 8:20-cv-00325-MSS-AEP, currently pending in the Middle District of Florida (the "SEC Action") before the Hon. Mary Scriven. Investor Plaintiffs have filed Notice of Pendency of Other Actions [ECF No. 30] designating the above-captioned action ("this Action") as a related case to the SEC Action. This Action is the only Complaint (class action or individual) that has been filed on behalf of the many hundreds of investors that lost over \$140 million from this Ponzi scheme.

For the reasons set forth below, Investor Plaintiffs have always ***unequivocally agreed*** to a stay of their claims against all of the defendants named in the SEC Action SEC Defendants, as per Order entered in the SEC Action. As made clear in their initial Complaint in this Action, Investor Plaintiffs named those Defendants only to preserve their claims from potential statute of limitations defenses and with the express agreement to abide by any order of the Court enjoining such claims during the pendency of the receivership. *See* ECF No. 1 at 2 n.1. The footnote in the Complaint made perfectly clear that any order staying such claims would immediately be recognized and

adhered to by Plaintiffs' counsel. Immediately upon having Paragraph 17 of the Receivership Order brought to their attention, Investor Plaintiffs agreed to stay all such claims and have not even served the defendants named in the SEC Action.

Despite Investor Plaintiffs' agreement to stay their claims specifically against the Defendants named in the SEC Action, however, the Receiver has asked this Court to stay this Action against *all* Defendants, including any and all third-party sales agents and investment advisory firms who are *not named* in the SEC Action (and most likely *could not be named* in the SEC Action) and against whom Investor Plaintiffs already assert a variety of state law causes of action. Investor Plaintiffs respectfully oppose any stay of their claims against these potentially liable Defendants because: (1) the Receiver has not met the strict requirements for issuance of such a stay; (2) Investor Plaintiffs' claims against such third-parties are not otherwise encompassed by Paragraph 17 of the Receivership Order entered in the SEC Action; and (3) pursuing such claims in this Action will not diminish or affect any assets of the Receivership or prejudice any claims held by the Receiver, because those claims belong exclusively to Investor Plaintiffs. In fact, because the Receiver lacks standing to pursue the investor claims,¹ Investor Plaintiffs' pursuit of their claims against liable third-parties will provide the best possible recovery for all of the damaged investors in this case. Investor Plaintiffs respectfully request the Court enter an order staying this Action against the SEC Defendants, but allowing the case to proceed against the remaining Defendants.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Investor Plaintiffs are residents of Arizona and California² who purchased unregistered debenture securities issued by EquiAlt, LLC ("EquiAlt"). Investor Plaintiffs commenced this putative class action on February 26, 2020, alleging that EquiAlt operated as a Ponzi scheme and asserting state statutory and common law claims for securities fraud, for the offer and sale of unregistered securities, and for the sale of securities by unregistered and unauthorized sales agents

¹ See, e.g., *In re Burton Wiand Receivership Cases Pending in the Tampa Division of the Middle District of Florida*, Nos. 8:05-cv-1856-T-27MSS et al., 2008 WL 818504 (M.D. Fla. Mar. 26, 2008) (explaining that a receiver lacks standing to pursue claims that could only be brought by the investors).

² Plaintiffs intend to join a Florida investor (as well as other investors that have contacted undersigned counsel) as an additional Plaintiff in this Action but have refrained from amending the existing Complaint in deference to resolution of the Receiver's pending stay motion.

(collectively, the “Investor Claims”).

In their Class Action Complaint, Investor Plaintiffs alleged claims against three different groups of Defendants:

- A. EquiAlt, EquiAlt Fund LLC, EquiAlt Fund II LLC, EquiAlt III LLC and EA SIP, LLC (described in the SEC Action as the “Corporate Defendants”);
- B. Brian Davison (the Chief Executive Officer of EquiAlt), Barry Rybicki (the Managing Director of EquiAlt) and Tony Kelly (the CFO of EquiAlt) (Davison and Rybicki are described in the SEC Action as the “Relief Defendants”); and
- C. Numerous sales agents and investment advisory firms that sold the unregistered debenture securities issued by EquiAlt (the “Sales Agent Defendants”).

ECF No. 1 at 7–9.

At the time Investor Plaintiffs filed their Complaint, they were aware of the SEC Action pending in the Middle District of Florida and of the related injunction issued by the Court in that SEC Action; however, that injunction did not appear to preclude the assertion of the Investor Plaintiffs’ claims against the Corporate Defendants or the Relief Defendants and Plaintiffs were not able to reach the appointed Receiver to discuss this matter. Nevertheless, Investor Plaintiffs certainly intended to comply with the Court’s injunction should it be construed otherwise, expressly stating in the Complaint:

Upon careful review of the injunction entered by the Honorable Court in the SEC Action, that order does not appear to bar any person from proceeding against EquiAlt, the Funds, or the EquiAlt Principals. *See SEC v. Davison, et al.*, No. 8:20-cv-00325-MSS-AEP (M.D. Fla.), at ECF No. 10 (the “SEC Action”). Should that Court enter an order enjoining any such claims during the pendency of the receivership, Plaintiffs will certainly abide by that Court’s rulings and proceed solely against the other parties named herein.

ECF No. 1 at 2 n.1.

Investor Plaintiffs were, however, at the time unaware that the Court in the SEC Action had also entered a separate “Receivership Order,” containing the following provision:

During the period of this receivership, all persons, including creditors, banks, investors, or others, with actual notice of this Order, are enjoined from filing a petition for relief under the United States Bankruptcy Code without prior permission from this Court, or from in any way disturbing the assets or proceeds of the receivership or ***from prosecuting any actions or proceedings which involve the Receiver or which affect the property of the Corporate Defendants and Relief Defendants.***

Receivership Order, ¶ 17 (emphasis added).

On February 27, 2020—after Investor Plaintiffs filed their Complaint—the Receiver returned Plaintiffs call and provided Investor Plaintiffs’ counsel with a copy of the Receivership Order and indicated his belief that Paragraph 17 of the order operates to stay this Action. Investor Plaintiffs’ counsel immediately assured the Receiver that Investor Plaintiffs would readily stipulate to stay all proceedings against the Corporate Defendants and Relief Defendants. Investor Plaintiffs’ counsel explained that filing this Action had been necessary to toll the statutes of limitations applicable to the Investor Plaintiffs’ claims against the Defendants (some of which are very short), and that to protect the interests of the investors it is imperative to assert and preserve claims against additional sales agents and other parties who potentially aided and abetted the alleged Ponzi scheme. Investor Plaintiffs’ counsel proposed to work cooperatively with the Receiver with respect to the continued prosecution of the Investor Plaintiffs’ claims against the Sales Agent Defendants as they have done in many very successful, prior Ponzi schemes in Florida and throughout the country which best helped all of the injured victims. Finally, Investor Plaintiffs’ counsel invited further discussions with the Receiver to fashion an acceptable and mutually advantageous arrangement to advance all of the stakeholders’ respective interests.

The following day, however, the Receiver filed the Stay Request, requesting the Court to stay the Investor Plaintiffs’ action in its *entirety* based on the Receivership Order. While our formal response follows, Investor Plaintiffs’ counsel intend and desire to continue discussions with the Receiver for the purpose of resolving the issues implicated by the Stay Request in a mutually acceptable manner and coordinating this Action with the SEC Action. Investor Plaintiffs’ goal is to offer the best help to all of the investors, the real victims of the EquiAlt Ponzi scheme.

II. ARGUMENT

A. Investor Plaintiffs Are Agreeable to a Voluntary Stay of All Claims against the Corporate Defendants and the Relief Defendants.

Consistent with their assurances in the Complaint, Investor Plaintiffs readily and voluntarily agree to a stay of all claims alleged against the Corporate Defendants and the Relief Defendants in the SEC Action. Investor Plaintiffs view their interests and those of the Receiver as completely aligned in the efforts to preserve and protect the property of the Corporate Defendants and the Relief Defendants.

B. Investor Plaintiffs' Claims against Unnamed Third-Parties Should Not Be Stayed.

It is another thing, however, to stay the prosecution of the Investor Plaintiffs' claims anyone else, including against parties who are neither Corporate Defendants nor Relief Defendants, as the Receiver asks. ECF No. 26 at 2 ("WHEREFORE, the Receiver requests that the Court stay *this case* pending further notice of the Receiver."). The Receiver offers no explanation why the prosecution of the Investor Plaintiffs' claims against the Sales Agent Defendants (or other potentially liable participants in the offer and sale of unregistered securities) should be foreclosed. Implicit in the Receiver's request, however, is a suggestion that pursuit of the Investor Plaintiffs' claims in this Action would somehow compete with the pursuit of the SEC's claims in the SEC Action. As shown below, this Action and the SEC Action are not in competition because they involve different claims alleged against different defendants. But even if they were, the Court should not in its discretion stay one action in favor of another. There is no law nor logic to support such an extreme result.

"Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936); *I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1552 n.13 (11th Cir. 1986) (citing *Landis*); *Galdames v. N & D Inv. Corp.*, No. 08-20472-CIV, 2009 WL 691932, at *1 (S.D. Fla. Mar. 29, 2010) (stating such motions are "disfavored and granted only in exceptional circumstances") (internal quotation marks and citation omitted). To obtain a stay, therefore, the party seeking it "must make out *a clear case of hardship or inequity* in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis*, 299 U.S. at 255 (emphasis added); *accord I.A. Durbin*, 793 F.2d at 1552 n.13 ("a discretionary stay is justified only if, based on a balancing of the parties' interests, there is a clear inequity to the suppliant who is required to defend while another action remains unresolved") (citing *Landis*); *Brady v. Ally Fin., Inc.*, No. 3:17-cv-638-J-39JRK, 2017 WL 10651307, at *1 (M.D. Fla. Nov. 21, 2017) (quoting *Landis*). The party seeking a stay bears the burden of demonstrating its necessity. *Brady*, 2017 WL 10651307, at *1 (citing *Clinton v. Jones*, 520 U.S. 681, 708 (1997)).

Here, the Receiver identifies no prejudice, let alone "hardship or inequity," in allowing Investor Plaintiffs to pursue their claims against the Sales Agent Defendants. Conversely, preventing the Investor Defendants from proceeding will prejudice the Investor Plaintiffs on two

fronts. First, as always there is the risk that relevant evidence will be more difficult to obtain with the passage of time. *Garmendiz v. Capio Partners, LLC*, No: 8:17-cv-00987-EAK-AAS, 2017 WL 3208621, at *2 (M.D. Fla. July 26, 2017) (stating in denying stay, “the risk of evidence being lost or destroyed and the potential for witnesses’ memories to fade further demonstrates the potential for prejudice to the Plaintiff”). Second, and more importantly here, a stay will preclude Investor Plaintiffs from amending the Complaint to add timely claims against other defendants, including causes of action for the sale of unregistered securities with limitations periods as short as one year. The Investor Plaintiffs should not be forced to sit on their hands while the limitations deadlines pass.

C. The Receiver Order Does Not Enjoin Investor Plaintiffs’ Claims Against the Sales Agent Defendants

The Receiver asks the Court to stay this case in its entirety without providing any legal authority, argument or factual basis for such a sweeping prohibition of continued litigation against Defendants who are not parties to the SEC Action. The Receiver’s Stay Request is presumably based on Paragraph 17 of the Receivership Order, which he simply quotes. ECF No. 26 at 1. Paragraph 17, however, contains only the prototypical language prohibiting litigation diminishing or affecting the receivership assets in orders that are routinely entered by courts presiding over receivership proceedings. *See SEC v. An-Car Oil Co.*, 604 F.2d 114, 117 (1st Cir. 1979) (entering TRO enjoining “all creditors from commencing, prosecuting, continuing, or enforcing suit against (the entities put into receivership)”); *Lankenau v. Coggeshall & Hicks*, 350 F.2d 61, 62 (2d Cir. 1965) (staying “all persons . . . from commencing or continuing any suits against the defendant herein or his property other than suits to enforce liens”); *Jordan v. Indep. Energy Corp.*, 446 F. Supp. 516, 520 (N.D. Tex. 1978) (staying “all persons, firms or corporations from ‘commencing, prosecuting, continuing or enforcing any suit or proceeding . . . interfering with any property owned by or in the possession of defendant’”).

Thus, by its own terms, the Receiver Order enjoins only prosecution of “actions or *proceedings which involve the Receiver* or which *affect the property of the Corporate Defendants and Relief Defendants.*” Receivership Order, ¶ 17. Investor Plaintiffs have already agreed to stay prosecution of their claims against the Corporate Defendants and Relief Defendants and will stipulate to an order doing just that. But extending Paragraph 17 to continued litigation of Investor Plaintiffs’ claims against the Sales Agent Defendants in no way “involve[s] the Receiver,” nor does such litigation “affect the property of the Corporate Defendants and Relief Defendants.” *Id.*

First, Investor Plaintiffs' claims against the Sales Agent Defendants do not "involve" the Receiver. Investor Plaintiffs have asserted no claims against the Receiver. The Receiver is not a party to this Action. Investor Plaintiffs have agreed to stay all claims against the Corporate Defendants and the Relief Defendants, who are the only Defendants in the SEC Action. And the SEC and the Receiver have alleged no claims against any of the Sales Agent Defendants. Thus, there is no remaining overlap whatsoever between this Action and the SEC Action.

Furthermore, Investor Plaintiffs have taken no steps requiring Receiver participation in any fashion in this Action. While Investor Plaintiffs have reached out to the Receiver to share information of mutual interest, any information Investor Plaintiffs desire to obtain from the Receiver will be sought on a consensual basis first, and no discovery will be directed to the Receiver absent permission from the Court presiding over the SEC Action in which the Receiver Order was entered.

Second, no aspect of the continuing litigation against the Sales Agent Defendants "affect[s] the property of the Corporate Defendants and Relief Defendants." Because they have agreed to stay all claims asserted against the defendants in the SEC Action, the Investor Plaintiffs will be prosecuting no claims against the Corporate Defendants or the Relief Defendants, will be taking no actions that would burden those parties or the receivership with additional fees or costs and will not be seeking any monetary claims that would reduce, diminish or deplete the receivership assets. Nor will Investor Plaintiffs be seeking any injunctive or equitable relief impacting those assets or the administration of the receivership. In short, prosecution of the Investor Plaintiffs' claims against parties other than the SEC defendants having no financial entanglement with the SEC defendants can and will have no effect on the property or assets of the Corporate Defendants or the Relief Defendants.

D. Investor Plaintiffs' Claims Against the Sales Agents Cannot Be Stayed or Enjoined Because those Claims Belong to the Investors, Not the Receiver

Finally, the claims asserted by the Investor Plaintiffs in this Action against the Sales Agent Defendants by definition do not compete with the Receiver's efforts, because the Receiver has no standing to assert those investor claims. In *In re Burton Wiand*, 2008 WL 818504, the court explained:

By contrast to the enforcement power of the SEC, it is well-established that a court-appointed receiver has no greater rights or powers than the corporation in receivership and "can only make a claim which the corporation could have made." *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (citing *Caplin v.*

Marine Midland Grace Trust Co., 406 U.S. 416, 429, 92 S.Ct. 1678, 32 L.Ed.2d 195 (1972)); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995). Therefore, ***it has been repeatedly held that a receiver lacks standing to pursue claims that could only be brought by the investors.*** See e.g., *Freeman v. First Union Nat'l*, 329 F.3d 1231, 1235 (11th Cir. 2003) (receiver is not authorized to bring claim for negligence); *Fleming*, 922 F.2d at 25 (receiver is not authorized to bring claims against corporation for violations of the commodity exchange act); *Liberte Capital Group, LLC v. Capwill*, 248 F. App'x 650, 656 (6th Cir. 2007) (receiver is not authorized to bring investor's claims for mandatory arbitration against brokers).

2008 WL 818504, at *5 (emphasis added). See also *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 627 (6th Cir. 2003) (“although the stated objective of a receivership may be to preserve the estate for the benefit of creditors, that does not equate to a grant of authority to pursue claims belonging to the creditors”); *Obermaier v. Arnett*, No. 2:02CV111FTM29DNF, 2002 WL 31654535, at *3–4 (M.D. Fla. Nov. 20, 2002) (noting that “[t]he Receiver lacks standing to assert claims on behalf of the defrauded investors and has standing to assert claims on behalf of the receivership entities”) (quoting *Knauer v. Jonathon Roberts Fin. Group, Inc.*, No. IP 01-1168-C-K/T, 2002 WL 31431484 (S.D. Ind. 2002)); *Scholes v. Schroeder*, 744 F. Supp. 1419, 1422–23 (N.D. Ill. 1990) (“Fraud on *investors* that damages those *investors* is for those *investors* to pursue – not the receiver.”) (emphasis added).

The Receiver does not and cannot assert that he has standing to assert the Investor Plaintiffs' claims against the Sales Agent Defendants. Lacking any such standing, the Receiver may not properly enjoin the Investor Plaintiffs from litigating their own independent Investor Claims against third parties (nor as explained above, does the Receiver Order purport to do so). See e.g. *SEC v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830, 841–42 (5th Cir. 2019) (“an equity receiver may sue *only to redress injuries to the entity in receivership*” and accordingly “[t]he prohibition on enjoining unrelated, third-party claims without the third parties' consent . . . is a maxim of law not abrogated by the district court's equitable power”).

In re Wiand, Nos. 8:05-cv-1856-T-27MSS, et al., 2007 WL 963162 (M.D. Fla. Jan. 12, 2007), is instructive. There, the court entered an order with language strikingly similar to the order entered in this case, permitting the receiver to institute actions and legal proceedings

for the benefit and on behalf of the Receivership Entities and their investors and other creditors against individuals or entities which the Receiver claims have wrongfully or improperly received funds or other proceeds directly or indirectly traceable from investors in the Receivership Entities, including but not limited to actions seeking constructive trusts; disgorgement of profits; recovery and avoidance of fraudulent transfers under Florida Statute § 726.101, et seq., or

otherwise.

2007 WL 963162, at *5. *Compare* Receivership Order, ¶ 2. The *Wiand* court found that such language “could only have permitted the Receiver to pursue claims he was authorized to pursue under the United States Constitution and the applicable federal and state statutes” and “did not purport to confer standing on the Receiver which would be contrary to constitutional and statutory law.” *Id.* at *6. Indeed, the receiver conceded that under the language of the order he did “not have authority to redress injuries on behalf of the investors, who are actual or potential creditors of the Receivership Entities” and that he was “not standing in the shoes of the defrauded investors.” *Id.* at *8. As in *In re Wiand*, this Court should conclude that the Receivership Order does not provide the Receiver with standing to pursue the Investor Plaintiffs’ claims and, therefore, it provides no basis to stay claims against persons not named in the SEC Action.

III. CONCLUSION

For the foregoing reasons, the Receiver’s bid to stay this Action in its entirety is not well-taken and should be denied. Investor Plaintiffs respectfully request that the Court enter an order staying this Action against the Corporate Defendants and Relief Defendants but permitting claims against parties not named in the SEC Action, such as the Sales Agents, to proceed.

Respectfully submitted this 5th day of March 2020.

By: /s/ Adam M. Moskowitz

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 5th, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send notification of electronic filing to all counsel of record.

By: /s/ Adam M. Moskowitz
Adam M. Moskowitz

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

STEVEN J. RUBINSTEIN, et al.,

Case No.: 8:20-cv-00448-WFJ-TGW

Plaintiffs,

v.

EQUIALT, LLC, et al.,

Defendants.

**[PROPOSED] ORDER GRANTING IN PART AND DENYING IN PART
RECEIVER'S NOTICE OF FILING AND REQUEST FOR STAY**

This matter comes to the Court on the Receiver's Notice of Filing, ECF No. 26, which seeks a stay of this case in its entirety based on an Order Granting the SEC's Motion for Appointment of a Receiver ("Receivership Order") entered in *Securities and Exchange Commission v. Brian Davison, et al.*, No. 8:20-cv-00325-MSS-AEP, pending in the Middle District of Florida (the "SEC Action"). *See* ECF No. 26-2. The SEC Action includes two groups of defendants: the "Corporate Defendants," including Defendants EquiAlt, LLC, EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC; and the "Relief Defendants," including Brian Davison and Barry Rybicki (together, the "Receivership Entities"). Mr. Burton W. Wiand has been appointed the Receiver over all the Receivership Entities in the SEC Action. In response to the Receiver's request for a stay, Plaintiffs agree that the case should be stayed against the Receivership Entities, but that this action should proceed as to those Defendants who are not named in the SEC Action, such as the sales agents and investment advisors.

The Court, having reviewed the Receiver's Notice of Filing and the Plaintiffs' response thereto, hereby orders a stay of this action filed against the Receivership Entities named in SEC Action. Accordingly, the Court grants a stay of this action, but only as to Defendants EquiAlt,

LLC, EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC, Barry Davison and Barry Rybicki. The Court denies the Receiver's request for a stay against the remaining Defendants not included in the SEC Action because (1) the Receiver has not met the strict requirements for issuance of such a stay; (2) Plaintiffs' claims against such third-parties are not otherwise encompassed by Paragraph 17 of the Receivership Order entered in the SEC Action; and (3) pursuing such claims in this Action will not diminish or affect any assets of the Receivership or prejudice any claims held by the Receiver, because those claims belong exclusively to Investor Plaintiffs. This case may therefore proceed against the remaining Defendants.

DONE AND ORDERED at Tampa, Florida on March __, 2020.

William F. Jung
United States District Judge

Copies Furnished:
Counsel of Record

EXHIBIT 3

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STEVEN J. RUBINSTEIN, et al.

Case No: 8:20-cv-448-T-02TGW

Plaintiffs,

v.

EQUIALT, LLC, et al.

Defendants.

RECEIVER'S REPLY TO PLAINTIFFS' RESPONSE TO NOTICE OF FILING

On March 6, 2020, the Court ordered that Burton W. Wiand, as receiver for numerous entities¹ (the “**Receiver**”), file a reply to Plaintiffs’ Response to the Receiver’s Notice of Filing. (Docs. 26, 31, and 33.) Since that time, counsel for the Receiver has communicated with counsel for Investor Plaintiffs’ regarding how a stay could be crafted in this case to be consistent with and to avoid violating the injunction against competing litigation (the “**Injunction**”) issued by the Honorable Mary S. Scriven in *Securities and Exchange Commission v. Brian Davison, et al.*, Case No.: 8:20-CV-325-T-35AEP (the “**Receivership Court**” and the “**SEC Action**,” respectively).

The parties ultimately were unable to agree on terms within the parameters of well-established receivership law. As such, the Receiver submits this Reply and urges the Court to

¹ Mr. Wiand was appointed as Receiver over 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 (collectively, the “**Receivership**,” “**Receivership Estate**,” or “**Receivership Entities**”).

require the Investor Plaintiffs to abide by the Receivership Court’s injunction. This will avoid piecemeal litigation, the possibility of inconsistent outcomes, and most importantly, the usurpation of the Receivership Court’s authority to issue injunctions for the protection of the Receivership Estate and its complete jurisdiction and control over Receivership assets, including commissions fraudulently transferred to sales agents and held in constructive trust for the benefit of the Receivership Estate².

BACKGROUND

The SEC Action was filed on February 11, 2020 and alleges that Brian Davison and Barry Rybicki used various EquiAlt Funds, EquiAlt LLC, and related Receivership Entities (“**EquiAlt**”)

² See *In re Christou*, 2010 WL 4008191, *3 (Bankr. N.D. Ga. 2010) (“Any transfers made during the course of a Ponzi scheme are presumptively made with intent to defraud.”); *Quilling v. Schonsky*, 247 Fed. App’x 583, 586 (5th Cir. 2007) (“[T]ransfers made from a Ponzi scheme are presumptively made with intent to defraud”); *Warfield v. Byron*, 436 F.3d 551, 558 (same); *SEC v. Harris*, 2010 WL 3719318, *1 (N.D. Tex. 2010) (same). Because the sales commissions are fraudulent transfers, they are held in constructive trust for the benefit of the Receivership Estate. *In re Fin. Fed. Title & Trust, Inc.*, 347 F.3d 880, 891 (11th Cir. 2003) (affirming imposition of constructive trust over homestead property purchased with Ponzi scheme proceeds) (“The doctrine of constructive trusts is a recognized tool of equity designed in certain situations to right a wrong committed and to prevent unjust enrichment of one person at the expense of another either as a result of fraud, undue influence, abuse of confidence or mistake in the transaction.”). Courts have applied this rationale to sales commissions earned from a Ponzi scheme. See *Warfield v. Byron*, 436 F.3d 551, 558 (2006) (Affirming receiver’s motion for summary judgment to recover commissions from salespeople in a Ponzi scheme as fraudulent transfers and rejecting the argument that the salespeople provided services of reasonably equivalent value in good faith) (“It takes cheek to contend that in exchange for the payments he received [for recruiting new victim investors], the . . . Ponzi scheme benefited from his efforts to extend the fraud by securing new investments.”); *In re Ramirez Rodriguez*, 209 B.R. at 434 (stating that “as a matter of law, the Defendant gave no value to the debtors [Ponzi scheme operators] for the commissions attributable to investments made by others pursuant to the verbal agreement with [the debtors]”); see also *Randy v. Edison Worldwide Capital (In re Randy)*, 189 B.R. 425, 438–39 (Bankr.N.D. Ill.1995) (as illegal services premised on illegal contracts, broker services provided in furtherance of a Ponzi scheme do not provide reasonably equivalent value); *Dicello v. Jenkins (In re Int’l Loan Network, Inc.)*, 160 B.R. 1, 16 (Bankr.D.D.C.1993) (investors who talked up Ponzi scheme, even if they had a contract, conferred no value since enforcing an illegal contract exacerbates harm to defrauded creditors).

to perpetrate a massive real estate Ponzi scheme that raised over \$170 million from over 1,100 victim investors across the country. To accomplish this fraud, EquiAlt relied on the efforts of numerous unregistered sales agents who secured funds from victim investors and reaped exorbitant, improper sales commissions by selling them unregistered securities, primarily debentures. On February 14, 2020, the Receivership Court entered a temporary restraining order and asset freeze (“**TRO**”) and an order appointing Mr. Wiand as Receiver over EquiAlt (“**Order Appointing Receiver**” and, collectively with the TRO, the “**Orders**”). *See* Exhibits 1 and 2, the Orders. A preliminary injunction hearing was scheduled for February 27, 2020, but the parties jointly moved to extend time, and the Receivership Court continued the preliminary injunction hearing until May 13, 2020. Due to the COVID-19 pandemic, on March 19, 2020, the Receivership Court issued an order continuing all hearings and civil jury trials for cases scheduled to begin on or before May 29, 2020 and staying all associated deadlines. On May 20, 2020, the Receivership Court rescheduled the Show Cause hearing for June 16, 2020. Until that time, the Receiver is continuing to operate under the Orders.

On February 26, 2020, just twelve days after the SEC Action was filed and the Receiver was appointed, the Investor Plaintiffs filed a class action complaint that named as defendants EquiAlt and other Receivership Entities. The Receiver orally advised Investor Plaintiffs’ counsel that their filing was inconsistent with the Orders issued by the Receivership Court and forwarded the Order Appointing Receiver to Investor Plaintiff’s counsel. The Receiver submitted a Notice of Filing (Doc. 26) and notified Investor Plaintiffs’ counsel that filing suit against EquiAlt or in any way disturbing the assets of the Receivership Estate was a violation of the Orders, and Investor Plaintiffs withdrew their complaint.

On April 8, 2020, the Investor Plaintiffs filed an amended complaint (Doc. 51), which removed those defendants who are parties to the SEC Action and added additional defendants who allegedly acted as sales agents for EquiAlt. The Receiver has informed Investor Plaintiffs' counsel again that filing suit against Receivership Entities and pursuing Receivership assets is an ongoing violation of the Orders. Investor Plaintiffs have refused to withdraw their amended complaint (the "Class Action").

RECEIVERSHIP ORDERS

The Investor Plaintiffs were correct to withdraw the original class action pursuant to the Orders. In the present case, the Injunction against litigation provided in the Orders also applies to claims against sales agents and all other targets of the Class Action (specifically paragraphs 2 and 17 of the Order Appointing Receiver) *because the Class Action affects the Receiver and is targeting assets of the Receivership Estate*. Paragraph 17 of the Order Appointing Receiver reads as follows:

During the period of this receivership, all persons, including creditors, banks, investors, or others, with actual notice of this Order, are enjoined from filing a petition for relief under the United States Bankruptcy Code **without prior permission from this Court, or from in any way disturbing the assets or proceeds of the receivership or from prosecuting any actions or proceedings which involve the Receiver or which affect the property of the Corporate Defendants and Relief Defendants**

(Order Appointing Receiver p.7 at ¶17) (emphasis added).

In addition to violating the plain language of the Injunction, the Class Action significantly interferes with the of the duties of the Receiver pursuant to paragraph 2 of the Order Appointing Receiver, which tasks the Receiver to:

Investigate the manner in which the affairs of the Corporate Defendants and Relief Defendants were conducted and institute such actions and legal proceedings, **for the benefit and on behalf of** the Corporate Defendants and Relief Defendants and **their investors and other creditors** as the Receiver deems necessary **against those**

individuals, corporations, partnerships, associations and/or unincorporated organizations which the Receiver may claim have wrongfully, illegally or otherwise improperly misappropriated or transferred money or other proceeds directly or indirectly traceable from investors in EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC, their officers, directors, employees, affiliates, subsidiaries, or any persons acting in concert or participation with them, **or against any transfers of money or other proceeds directly or indirectly traceable from investors** in EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC; provided **such actions may include, but not be limited to, seeking imposition of constructive trusts, disgorgement of profits, recovery and/or avoidance of fraudulent transfers, rescission and restitution**, the collection of debts, and such orders from this Court as may be necessary to enforce this Order

(Order Appointing Receiver p. 3 at ¶2) (emphasis added). The Receiver undoubtedly has various potential claims against the defendants in the purported Class Action including, fraudulent transfer claims, unjust enrichment claims, aiding and abetting claims, *etc.* The Class Action impacts all of those claims.

CLAIMS AGAINST TONY KELLY

The Class Action also targets an individual employee of EquiAlt, Tony Kelly. Prior to the appointment of the Receiver, Tony Kelly was an employee of EquiAlt and responsible for certain real estate operations. The Receiver has continued Tony Kelly's employment. The Injunction applies to him as an employee of EquiAlt and might also trigger possible indemnification obligations of EquiAlt, thereby impacting Receivership property.

ARGUMENT

I. The Receivership Court May Enjoin Competing Proceedings and this Court Should Enforce the Injunction

The Receivership Court's power to stay the Class Action is derived from (1) the All Writs Act (28 U.S.C. § 1651) and (2) the inherent powers of an equity court to fashion relief. *See generally SEC v. Credit Bancorp, Ltd.*, 93 F. Supp. 2d 475 (S.D.N.Y. 2000).

The All Writs Act empowers United States District Courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). Under the All Writs Act, “a federal court may enjoin actions in other jurisdictions that would undermine its ability to reach and resolve the merits of the dispute before it.” *Credit Bancorp, Ltd.*, 93 F. Supp. 2d at 476 (internal quotation marks omitted). Injunctive relief for both state and federal court proceedings falls within the scope of the All Writs Act. *See Wright v. Linkus Enterprises, Inc.*, 259 F.R.D. 468, 477 (E.D. Cal. 2009); *Newby v. Enron Corp.*, 302 F.3d 295, 301 (5th Cir. 2002).

The Receivership Court also has broad inherent powers to supervise an equity receivership and determine the appropriate action to be taken in the administration of the receivership. *See, e.g., SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010); *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989); *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986). The Receivership Court’s broad discretion derives from the inherent powers of an equity court to fashion relief. *See Vescor Capital Corp.*, 599 F.3d at 1193-94 (concluding stay of all actions related to property held within receivership estate was well within the district court’s broad equitable powers to fashion relief). The purpose of establishing a receivership is “to protect the estate property and ultimately return that property to the proper parties in interest,” and a receiver is vested with the duty and authority to marshal and preserve assets to effectuate an orderly, efficient, and equitable administration. *Credit Bancorp, Ltd.*, 93 F. Supp. 2d at 476-77; *see also* 28 U.S.C. § 754 (noting a receiver “appointed in any civil action or proceeding involving property ... shall ... be vested with complete jurisdiction and control of all such property with the right to take possession thereof”). As such, a district court presiding over an equity receivership in an SEC enforcement action has the power to stay

“competing actions.” *Credit Bancorp, Ltd.*, 93 F. Supp. 2d at 477. The Class Action is a competing action because it affects the Receiver, attempts to disturb assets or proceeds of the Receivership, and targets assets of the Receivership Estate – *i.e.*, the commissions received by the unregistered sales agents who allegedly sold unregistered EquiAlt securities to the victim investors.

Courts have expressly recognized the need in receivership proceedings to stay competing actions in securities fraud cases. *See Credit Bancorp, Ltd.*, 93 F. Supp. 2d at 477 (observing “where a court has appointed a receiver and obtained jurisdiction over the receivership estate, as here, the power to stay competing actions falls within the court’s inherent power to prevent interference with the administration of that estate” and “[t]he power of a receivership court to prevent the commencement, prosecution, continuation, or enforcement of such [competing] actions has been recognized specifically in the context of securities fraud cases”); *see also Eller Industries, Inc. v. Indian Motorcycle Mfg., Inc.*, 929 F. Supp. 369, 373 (D. Colo. 1995) (“Federal Courts have the power, if necessary, to take control over an entity and impose a receivership free from interference in other court proceedings.”); *Oppenheimer v. San Antonio Land & Irrigation Co.*, 246 F. 934, 935 (5th Cir. 1917) (noting district court has “complete jurisdiction and control” over receivership property, and thus “was not in error in restraining proceedings in another court involving the same subject-matter”). Indeed, the absence of such authority would render the receivership process meaningless because non-parties could deplete the receivership estate or prevent it from recovering assets simply by filing competing actions. *See Credit Bancorp, Ltd.*, 93 F. Supp. 2d at 477; *see also Foshee v. Forethought Fed. Sav. Bank*, 2010 WL 3239272, *10 (W.D. Tenn. 2010) (theorizing that allowing plaintiffs to proceed with a separate federal action would serve to circumvent receiver’s exclusive control over receivership property).

In receivership proceedings, courts are generally disinclined to allow non-parties to attempt to recover a larger portion of what they might be owed by means of instituting ancillary proceedings. *See Pittsford Capital Income Partners, LLC*, 2007 WL 61096 at *2 (“[G]ranteeing the relief requested by the Judgment Creditors would defeat this fundamental purpose because only a handful of victims would receive close to full compensation while the pro rata shares available to the hundreds of other victims would be significantly diminished.”); *see also Foshee*, 2010 WL 3239272, at *10 (granting receiver’s motion to stay federal court proceeding due to possibility of conflicting claims to assets in dispute); *SEC v. Universal Financial*, 760 F.2d 1034, 1038 (9th Cir. 1985) (refusing to lift receivership stay to allow investors to litigate claims due to concerns of diminution of possible receivership estate); *Credit Bancorp, Ltd.*, 93 F. Supp. 2d at 476 (concluding that allowing non-party to continue prosecuting action would thwart court’s ability to orderly and equitably administer estate). Investor Plaintiffs’ piecemeal, litigation efforts would directly and substantially interfere with, and thus subvert, this Receivership. *See, e.g., Schauss v. Metals Depository Corp.*, 757 F.2d 649, 654 (5th Cir. 1985) (noting that injunction orders are necessary to “prevent piecemeal resolution of issues that call for a uniform result”). Each creditor and investor in the present case will be afforded due process during the distribution phase of the Receivership, which will include the sales agents’ commissions that the Receiver anticipates recovering through litigation.

Allowing investors to recover those funds outside the Receivership would complicate the equitable distribution process and lead to unequal recoveries at the expense of other Receivership creditors when instead, similarly situated investors should be treated equally. *Elliott*, 953 F.2d at 1569 (citations omitted). Equity does not permit a preference among creditors who are victims of a Ponzi scheme, “equality is equity.” *Id.* at 1570 (internal quotation marks omitted).

II. The Commissions are Receivership Assets

The Receiver has the duty to investigate and pursue claims against entities who have “wrongfully, illegally or otherwise improperly misappropriated or transferred money or other proceeds directly or indirectly traceable from investors ... such actions may include, but not be limited to, seeking imposition of constructive trusts, disgorgement of profits, recovery and/or avoidance of fraudulent transfers.” (Order Appointing Receiver p. 3 at ¶12). The plain language of the Order Appointing Receiver makes it clear that the commissions earned by the sales agents are directly within the purview of the Receivership Estate and competing claims for those same funds must be enjoined. Specifically, the sales agents hold the fraudulently transferred funds in constructive trust for the Receiver’s benefit, pending their remission to the Receivership Estate. *See Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-51 (2000) (“Whenever the legal title to property is obtained through means or under circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired . . . and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder. . . .”); *In re Fin. Fed. Title & Trust, Inc.*, 347 F.3d 880 (11th Cir. 2003) (imposing constructive trust on property purchased with Ponzi scheme proceeds).

Additionally, the Receiver’s preliminary investigation has uncovered financial records indicating that the sales agents received compensation for selling unregistered EquiAlt securities to victim investors. A typical sales agent commission fee disbursement occurred in the following manner:

- A sales agent secured funds from a victim investor;
- those funds were transferred to an EquiAlt entity;

- EquiAlt transferred illegal sales commissions (as high as 12%) to an entity managed by Barry Rybicki (primarily BR Support Services, LLC); and
- Barry Rybicki facilitated the transfer of the illegal commissions (typically 6%) to individual agents who made the sale and retained the remaining funds for himself.

The same general structure applies to almost all sales agent defendants in the Class Action, and all of these transactions are recoverable as fraudulent transfers. Furthermore, a limited number of agents received commissions directly from EquiAlt. Sales agents received additional improper commissions when they convinced victim investors to roll over their investments into a new EquiAlt fund or renew their debentures when they reached maturity instead of withdrawing their money. More than \$25 million was transferred from Receivership Entities to BR Support Services, LLC as improper sales commissions and related fraudulent expenses. The argument that these commissions were somehow bilked from the victim investors by the sales agents without the direct involvement of Receivership Entities is false.

Given the scope of the Orders and the preliminary findings of the Receiver's investigation, the Receiver has claims against the sales agents to recover the commissions as fraudulent transfers under the Florida Uniform Fraudulent Transfer Act (Fla. Stat. § 726.105) ("FUFTA") among other causes of action. Transfers made from a Ponzi scheme are presumed to be fraudulent. *See Wiand v. Lee*, 753 F.3d 1194, 1201 (11th Cir. 2014) ("[U]nder FUFTA's actual fraud provision, proof that a transfer was made in furtherance of a Ponzi scheme establishes actual intent to defraud under §726.105(1)(a) without the need to consider the badges of fraud."); *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 531 B.R. 439 (Bankr. S.D.N.Y. 2015) ("Once it is determined that a Ponzi scheme exists, all transfers made in furtherance of that Ponzi scheme are presumed to have been made with fraudulent intent.").

Courts have acknowledged that disgorgement of sales commissions related to selling unregistered securities is proper and that a receiver is an appropriate party to receive the disgorged

commissions. *See Cobalt MultiFamily Investors I, LLC v. Lisa Arden*, 2010 WL 3791040, *3 (S.D.N.Y. Sept. 9, 2010) (“The salespeople are plainly not entitled to retain such commission payments, and the receiver appears to be a proper person to pursue those funds on behalf of the [receivership] estate, which in turn will presumably be held responsible for the ultimate reimbursement of the shareholders”), *adopted* 2010 WL 3790915 (S.D.N.Y. Sept. 28, 2010); *see also Hays v. Adam*, 512 F. Supp. 2d 1330, 1343 (N.D. Ga. 2007) (“[if] a receiver can recover Ponzi scheme profits from investors who have done nothing wrong, he would also be entitled to recover Ponzi scheme profits held by sales agents like the defendants, who illegally sold unregistered securities, and without whose efforts the scheme could not have occurred”). Sales agents who procured funds for a Ponzi scheme did not receive the commissions in exchange for providing services of reasonably equivalent value. *See, e.g., Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006); *Wiand v. Lee*, 753 F.3d at 1201- 02.

Given the plain language of the Orders and substantial precedent finding that sales agents’ commissions related to securities fraud and Ponzi schemes are recoverable by receivers, this Court should also find that the commissions sought by the Class Action are Receivership assets and are thus protected from competing litigation by the Injunction.

III. The Stay Applies to Parties Not Named in the SEC Action

The Investor Plaintiffs argue that the Injunction does not apply to the targets of the Class Action because they are not named in the SEC Action or Orders. However, the Injunction also applies to the individual sales agents and other defendants who are not named in the SEC Action, especially in this instance where the Class Action is seeking to recover Receivership assets. Courts can issue a stay on competing litigation in SEC enforcement actions and “such a stay *can be made effective against persons not parties to the SEC action* who have notice of the stay.” *SEC v.*

Wencke, 622 F.2d 1363, 1371 (9th Cir. 1980) (emphasis added). The operative factor in determining the scope of the Injunction in this instance is the target of the Class Action. The Class Action is targeting EquiAlt commissions earned by the sales agents, which are Receivership assets because the commissions were transferred from a Ponzi scheme, and are therefore fraudulent and are held in constructive trust for the Receivership pending return through anticipated litigation. It does not matter what claim the Investor Plaintiffs are bringing, or who has standing to bring that particular claim. The only relevant consideration is that the Class Action targets Receivership assets.

The Investor Plaintiffs argue that the sales agents are separate and apart from EquiAlt, when in fact, this alleged Ponzi scheme could not have survived without an ever-growing supply of new investors recruited by the sales agents. This structure is essential to the operation of a classic Ponzi scheme. *See, e.g., Wiand v. Lee*, 753 F.3d at 1201 (“A Ponzi scheme uses the principal investments of newer investors, who are promised large returns, to pay older investors what appear to be high returns, but which are in reality a return of their own principal or that of other investors.”). As was the case in *Hays v. Adam*, 512 F. Supp. 2d 1330 (N.D. Ga. 2007), the EquiAlt sales agents received commissions and bonus payments for their role in the scheme and “[t]he Ponzi scheme was dependent upon the sales agents’ efforts in soliciting investors.” *Hays*, 512 F. Supp. 2d at 1333-34. The alleged actions of the sales agents in this case were essential to perpetrate the Ponzi scheme and thus inseparable from the EquiAlt fraud as a whole. The Injunction applies to the sales agents and conduct alleged in the Class Action because their illegal activity was inextricably intertwined with the EquiAlt Ponzi scheme, directly pertains to the subject of the Receiver’s investigative duties in the Orders, and targets Receivership assets for recovery.

IV. Investor Plaintiffs Have Not Obtained Leave of Court to File the Class Action

The court that appoints a receiver has the discretion to resolve all matters relating to the receivership or allow some matters to be litigated in another jurisdiction. *See Barton v. Barbour*, 104 U.S. 126 (1881); *Porter v. Sabin*, 149 U.S. 473, 13 S.Ct. 1008, 37 L.Ed. 815 (1893); *Gasser v. Infanti Intern., Inc.*, 2004 WL 1243114 (E.D.N.Y. Apr. 21, 2004) (“It is well established that when a federal court appoints a receiver to administer the assets of an entity, the [c]ourt obtains jurisdiction over the property and over claimants to the property.”); *Eller Indus., Inc.* 929 F. Supp. 369 at 371 (citations omitted) (“[The receivership court] has exclusive jurisdiction over the assets and administration of the [r]eceivership imposed on [the receivership estate]. Equitable actions against the estate may be authorized only by [the receivership court].”); *In re VistaCare Group, LLC*, 678 F.3d 218 (3d Cir. 2012) (“Absent such permission, no other court would have jurisdiction to hear the suit.”). The receivership court retains jurisdiction to resolve all matters related to the administration of the receivership in order to protect its duty to distribute the receivership assets to creditors equitably and according to their respective priorities. *In re VistaCare Group, LLC*, 678 F.3d at 226 (citing *Barton*, 104 U.S. at 136).

If any ambiguity exists regarding the scope of the Orders, it should be resolved by the Receivership Court, which issued them. While the Class Action was filed in the Middle District of Florida, “[r]ather than enter the metaphysical argument about whether the District of [Florida] is one court or several ... [s]ound judicial management requires that the equities and priorities among claimants to receivership assets normally be determined in the receivership proceeding— in this case the proceeding before [the receivership court].” *Smith v. American Industrial Research Corp.*, 665 F.2d 397, 399 (1st Cir. 1981).

Pursuant to the Orders, the Investor Plaintiffs must petition the Receivership Court for leave before filing the Class Action. As of the date of this filing, the Investor Plaintiffs have made

no such motion.³ The Class Action should be stayed because the Investor Plaintiffs have failed to comply with the sound policy and procedural requirements in the Orders by failing to obtain leave of the Receivership Court prior to filing a lawsuit that directly affects the Receivership Estate.

V. The Receiver Has Standing to Bring Claims Against the Sales Agents

The Investor Plaintiff's argue extensively that the Receiver lacks standing to bring claims against the sales agents and other targets of the Class Action, this assertion is simply wrong. *See Hays v. Adam*, 512 F. Supp. 2d 1330 (N.D. Ga. 2007) (holding the receiver had standing to bring alleged state-law claims for unjust enrichment against sales agents for the sale of unregistered securities in a Ponzi scheme); *see also Cobalt Multifamily Investors I, LLC v. Arden*, 857 F. Supp. 2d 349 (S.D.N.Y. 2011) (receiver able to seek disgorgement from sales agents in a scheme to defraud investors)⁴. As in *Hays*, the victim investors in the present case are potentially tort creditors of the Receivership, and the Receiver has standing to seek the reimbursement of unjust

³ Should the Investor Plaintiffs file a motion to lift the stay, the motion should be denied pursuant to the applicable framework for evaluating such a request. *See SEC v. Wencke*, 742 F.2d 1230, 1231 (9th Cir. 1984) (in determining whether to lift a blanket stay in a receivership, the court balances the interests of the receiver and the moving party and applies a three-factor test: "(1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is made; and (3) the merit of the moving party's underlying claim."); *SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010) ("And, in a case involving a Ponzi scheme, the interests of the [r]eceiver are very broad and include not only protection of the receivership *res*, but also protection of defrauded investors and considerations of judicial economy. This is a corollary of the district court's power to enter a blanket stay. This power is broader than the court's authority to grant or deny injunctive relief under Fed. R. Civ. P. 65.") (citations omitted).

⁴ In the present case, the appropriate regulatory authorities have already brought the SEC Action, which seeks disgorgement and other remedies against the Receivership Defendants. It not unlikely that state or federal enforcement agencies will also pursue the sales agents and seek disgorgement, restitution, and other remedies with respect to their alleged securities violations. Should recoveries be made from those actions, the Receiver anticipates that those funds shall be deposited in the Receivership Estate and subsequently disbursed to Receivership creditors.

enrichment obtained by sales agents for the benefit of the Receivership Estate. *See Warfield v. Alaniz*, 453 F.Supp.2d 1118, 1127 (D. Ariz. 2006) (receiver had standing to act on behalf of defrauded investors and imposition of constructive trust over commissions earned on sales of instruments would not violate procedural due process).

Courts in Middle District of Florida have enjoined other actions brought by victim investors because they competed with the receivership. For example, in the SEC enforcement action styled *Securities and Exchange Commission v. Arthur Nadel* (“the **Nadel Ponzi Scheme**” or “the **Nadel Action**”), upon motion by the receiver, the Honorable Richard A. Lazzara enjoined a state court case styled *Paolino v. Neil V. Moody and Christopher D. Moody*, Case No. 2009-ca-001876 (Cir. Ct. 12th Judicial Cir., Sarasota County, Fla.) (the “**Nadel Receivership Court**” and the “**Paolino Proceeding**,” respectively). *See SEC v. Nadel*, 8:09-CV-87-T-26TBM, 2009 WL 2868642 (M.D. Fla. Sept. 3, 2009). *See* attached Exhibit 3 (“**Order Enjoining Paolino Proceeding**”). The Paolino Proceeding was brought by a victim investor of the Nadel Ponzi Scheme named Louis D. Paolino, Jr. (“**Paolino**”) against individual orchestrators of the Nadel Ponzi Scheme in their capacity as officers and managers of corporations that became receivership entities in the Nadel Action (the “**Moodys**”). The Moodys received ill-gotten gains from the Nadel Ponzi Scheme in the form of “performance allocations” or “management fees” and used those funds to purchase jewelry and invest in a jewelry store known as Queen’s Wreath Jewels, Inc. (“**Queen’s Wreath**”), which subsequently purchased additional jewelry with those funds. Just like the sales agents and their commissions in the present case, the Moodys were not named defendants in the Nadel Action and Paolino argued that the Moodys and the jewelry are

[T]herefore not subject to the claims in the [Nadel Action] complaint. In that same vein, Paolino argues that the investors will have no recourse against the Moodys in [the Nadel Action], but must seek relief against them for breach of fiduciary duty and similar claims in the [Paolino Proceeding]. Finally, Paolino asserts that the jewelry is owned by Queen's Wreath, not the Moodys, and Queen's Wreath does not owe money to the Moodys and therefore the receiver in these proceedings may not seek property that does not belong to the Moodys.

(Order Enjoining Paolino Proceeding at p. 3.)

In rejecting these arguments, the Nadel Receivership Court enjoined the Paolino Proceeding in part because, Paolino's position "[I]gnores the fact that the money used to purchase the jewelry by Queen's Wreath initially came from proceeds obtained through the Moodys from the investors." *Id.* The Nadel Receivership Court reasoned, "Because the investors seek to recoup that money in the [Paolino Proceeding], such action prevents the receiver in [the Nadel Action] from marshaling the funds and property obtained through the fraudulent scheme." *Id.* at p. 3-4. Despite the fact that the jewelry and Queen's Wreath were not explicitly named as receivership assets or entities in the Nadel Action, "The receiver in [the Nadel Action] obtained constructive possession of all of the property that constitutes proceeds of the fraudulent scheme [when he was appointed]." *Id.* at p. 7. Like the jewelry in the Nadel Action and Paolino Proceeding, the sales commissions in the EquiAlt Receivership are Receivership assets because they originated as "proceeds ultimately supplied by the defrauded investors as part of the scheme." *Id.*

In explaining the basis for the injunction, the Nadel Receivership Court recognized, "The realistic threat to this Court's already established jurisdiction over the receivership estate lies in the windfall that would go to a single investor, Paolino, at the expense of all the other defrauded investors waiting in line. The very purpose of the receivership here is to marshal the assets taken and used from the fraudulent scheme and distribute what can be obtained to the various investors."

Id.

In the present matter, this Court should enforce the Receivership Court's Injunction with respect to the Class Action to allow the Receiver to accomplish his duties pursuant to the Orders.

CONCLUSION

WHEREFORE, The Receiver respectfully submits that the Injunction pursuant to the Orders prohibits the prosecution of the Class Action by the Investor Plaintiffs and absent leave by Judge Scriven to amend or lift the Receivership Court's Orders, continuation of this matter is an ongoing and direct violation of the Orders.

Dated: May 22, 2020

Respectfully submitted,

WIAND GUERRA KING P.A.

/s/ Katherine C. Donlon

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Tampa, FL 33609

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Attorneys for Receiver Burton W. Wiand

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 22nd, 2020, I electronically filed the foregoing with the Clerk of this Court by using the CM/ECF system which will send notification of electronic filing to all counsel of record.

/s/ Katherine C. Donlon

Katherine C. Donlon

EXHIBIT 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

Case No: 8:20-cv-00325-T-35AEP

BRIAN DAVISON, BARRY M. RYBICKI,
EQUIALT LLC, EQUIALT FUND, LLC,
EQUIALT FUND II, LLC, EQUIALT
FUND III, LLC, EA SIP, LLC,

Defendants,

**FILED EX PARTE
AND UNDER SEAL**

128 E. DAVIS BLVD, LLC, 310 78TH
AVE, LLC, 551 3D AVE S, LLC, 604
WEST AZEELE, LLC, BLUE WATERS
TI, LLC, 2101 W. CYPRESS, LLC, 2112
W. KENNEDY BLVD, LLC, BNAZ, LLC,
BR SUPPORT SERVICES, LLC, CAPRI
HAVEN, LLC, EANY, LLC, BUNGALOWS
TI, LLC, EQUIALT 519 3RD AVE S., LLC,
MCDONALD REVOCABLE LIVING
TRUST, 5123 E. BROADWAY AVE, LLC,
SILVER SANDS TI, LLC, TB OLDEST
HOUSE EST. 1842, LLC,

Relief Defendants.

**SEALED ORDER GRANTING EMERGENCY EX PARTE MOTION FOR TEMPORARY
RESTRAINING ORDER, ASSET FREEZE, AND OTHER INJUNCTIVE RELIEF**

THIS CAUSE comes before the Court upon the Plaintiff, Securities and Exchange Commission's Emergency Ex Parte Motion for Temporary Restraining Order, Asset Freeze, and Other Injunctive Relief, (Dkt. 4), which seeks the following orders with respect to Defendants, Brian Davison, Barry M. Rybicki, EquiAt LLC, EquiAlt Fund, LLC, EquiAlt

Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC (collectively, “Defendants”), and Relief Defendants 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, Bugalows TI LLC, Capri Haven, LLC, EA NY, LLC, EquiAlt 519 3rd Ave S., LLC, McDonald Revocable Living Trust, Silver Sands TI, LLC, and TB Oldest House Est. 1842, LLC (collectively, “Relief Defendants”):

1. a Temporary Restraining Order;
2. an Order to Show Cause Why a Preliminary Injunction Should Not be Granted;
3. an Order Freezing the Assets of Defendants and Relief Defendant;
4. an Order Requiring Sworn Accountings;
5. an Order Prohibiting Destruction of Documents; and
6. an Order Expediting Discovery.

The Court has considered the Commission’s Complaint, its Emergency Motion for a Temporary Restraining Order and Other Relief and Memorandum of Law in Support, and the declarations and exhibits filed in support of that motion. The Court finds the Commission has made a sufficient and proper showing in support of the relief granted herein by: (i) presenting a *prima facie* case of securities laws violations by Defendants; and (ii) showing a reasonable likelihood Defendants will harm the investing public by continuing to violate the federal securities laws unless they are immediately restrained. The Court also finds good cause to believe that unless immediately restrained and enjoined by Order of this Court, Defendants and Relief Defendants will continue to

dissipate, conceal or transfer from the jurisdiction of this Court assets which could be subject to an Order of Disgorgement.

Accordingly, the motion is **GRANTED**, and the Court hereby orders as follows:

I.

SHOW CAUSE HEARING

IT IS HEREBY ORDERED that Defendants **shall** appear for a **SHOW CAUSE HEARING** on **Thursday, February 27, 2020, at 1:30 p.m.**, in the Sam Gibbons United States Courthouse, Courtroom 7A, 801 North Florida Ave., Tampa, FL 33602, before the Honorable Mary S. Scriven. Defendants shall be prepared to show cause, if any, why a Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure should not be granted against them, as requested by the Commission. The Court has set aside **two (2) hours** for this hearing.

II.

TEMPORARY RESTRAINING ORDER

IT IS FURTHER ORDERED that, pending determination of the Commission's request for a Preliminary Injunction, Defendants Brian Davison, Barry M. Rybicki, EquiAlt LLC, EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, LLC and EA SIP, LLC, and their respective directors, officers, agents, servants, employees, attorneys, representatives and those persons in active concert or participation with them, and each of them, are hereby restrained and enjoined from violating:

Section 17(a)(1) of the Securities Act of 1933

A. Directly or indirectly, by use of any means or instruments of transportation or communication in interstate commerce, or by the use of the mails, in the offer or sale of

securities, knowingly or recklessly employing devices, schemes or artifices to defraud, in violation of Section 17(a)(1) of the Securities Act, 15 U.S.C. 77q(a)(1);

Section 17(a)(2) & (3) of the Securities Act of 1933

B. Directly or indirectly, by use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, in the offer or sale of securities, (i) obtaining money or property by means of untrue statements of material facts or omissions to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading; or (ii) engaging in acts, practices and courses of business which have operated and will operate as a fraud or deceit upon purchasers and prospective purchasers of such securities, in violation of Sections 17(a)(2) & (3) of the Securities Act, 15 U.S.C. §§ 77(q)(a)(2) & (3); and

Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5

C. Directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any securities, knowingly or recklessly: (i) employing devices, schemes or artifices to defraud; (ii) making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (iii) engaging in acts, practices and courses of business which have operated, are now operating or will operate as a fraud upon the purchasers of such securities in violation of Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, thereunder.

Section 15(a)(1) of the Exchange Act

IT IS FURTHER ORDERED AND ADJUDGED that Brian Davison, Barry Rybicki, and EquiAlt, LLC their respective directors, officers, agents, servants, employees, attorneys, representatives and those persons in active concert or participation with them, and each of them, are hereby restrained and enjoined from violating Section 15(a)(1) of the Exchange Act, 15 U.S.C. § 78o(a)(1), by to making use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security.

Section 5 of the Securities Act

IT IS FURTHER ORDERED AND ADJUDGED that Defendants, their respective directors, officers, agents, servants, employees, attorneys, representatives and those persons in active concert or participation with them, and each of them, are hereby restrained and enjoined from violating Section 5 of the Securities Act, 15 U.S.C. § 77e, by, directly or indirectly, in the absence of any applicable exemption:

- (a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;
- (b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or

- (c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed with the Commission as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act, 15 U.S.C. § 77h.

Section 20(a) of the Exchange Act – Control Person Liability

IT IS FURTHER ORDERED AND ADJUDGED that Brian Davison, and Barry Rybicki, their agents, servants, employees, attorneys, representatives, and those persons in active concert or participation with them, and each of them, are hereby restrained and enjoined from violating Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a).

Aiding and Abetting Violations of Section 15(a) of the Exchange Act

IT IS FURTHER ORDERED that Brian Davison, Barry Rybicki, and EquiAlt and their directors, officers, agents, employees, attorneys, representatives, and those persons in active concert or participation with them, and each of them, are hereby restrained and enjoined from aiding and abetting violations Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a).

III.

ASSET FREEZE

IT IS FURTHER ORDERED that, pending determination of the Commission's request for a Preliminary Injunction:

A. Defendants and Relief Defendants and their respective directors, officers, agents, servants, employees, attorneys, depositories, banks, and those persons in active concert or participation with any one or more of them, and each of them, who receive notice of this order by personal service, mail, email, facsimile transmission or otherwise, be and hereby are, restrained from, directly or indirectly, transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of, or withdrawing any assets or property, including but not limited to cash, free credit balances, fully paid for securities, personal property, real property, and/or property pledged or hypothecated as collateral for loans, or charging upon or drawing from any lines of credit, owned by, controlled by, or in the possession of, whether jointly or singly, and wherever located:

1. BRIAN DAVISON,
2. BARRY M. RYBICKI,
3. EQUIALT LLC,
4. EQUIALT FUND, LLC,
5. EQUIALT FUND II, LLC,
6. EQUIALT FUND III, LLC,
7. EA SIP, LLC,
8. 128 E. DAVIS BLVD, LLC,
9. 310 78TH AVE, LLC,
10. 551 3D AVE S, LLC,
11. 604 WEST AZEELE, LLC,
12. 2101 W. CYPRESS, LLC,

13. 2112 W. KENNEDY BLVD, LLC,
14. 5123 E. BROADWAY AVE, LLC,
15. BLUE WATERS TI, LLC,
16. BNAZ, LLC,
17. BR SUPPORT SERVICES, LLC,
18. BUNGALOWS TI LLC,
19. CAPRI HAVEN, LLC,
20. EA NY, LLC,
21. EQUIALT 519 3RD AVE S., LLC,
22. MCDONALD REVOCABLE LIVING TRUST,
23. SILVER SANDS TI, LLC,
24. TB OLDEST HOUSE EST. 1842, LLC,

B. Any financial or brokerage institution or other person or entity holding any such funds or other assets, in the name, for the benefit or under the control of Defendants and Relief Defendants or indirectly, held jointly or singly, and wherever located, and which receives actual notice of this order by personal service, mail, email, facsimile, or otherwise, shall hold and retain within its control and prohibit the withdrawal, removal, transfer, disposition, pledge, encumbrance, assignment, set off, sale, liquidation, dissipation, concealment, or other disposal of any such funds or other assets, including, but not limited to, the following presently known bank accounts:

Financial Institution	Name of Account	Account Number
Bank of America	Equalt Fund LLC	898090093190
Bank of America	Equalt Fund LLC	898090093200

Bank of America	Equialt Fund II LLC	898090093284
Bank of America	Equialt Fund II LLC	898090093297
Bank of America	EA SIP LLC	898090093213
Bank of America	Equialt LLC	898090093310
Bank of America	Equialt LLC	898090093323
Bank of America	Equialt Capital Advisors	229052064150
Bank of America	Blue Waters TI LLC	898090093187
Bank of America	TB Oldest House	898090093226
Bank of America	Silver Sands TI LLC	898090093336
Bank of America	Bungalows TI LLC	898090093307
Comerica Bank	Barry Rybicki	8002807306
Comerica Bank	Barry Rybicki	8002807314
JP Morgan Chase	5123 E Broadway AVE LLC	368330277
JP Morgan Chase	Brian Davison	453028545
JP Morgan Chase	BR Support Services	686369906

C. 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. The Individual Defendants and their family members shall also, pursuant to agreement with the Commission and the Receiver, be allowed access to reasonable forms of personal transportation. Any agreement on these matters shall be submitted to the Court.

IV.

SWORN ACCOUNTINGS

IT IS FURTHER ORDERED that within seven calendar days of the issuance of this Order, Defendants Brian Davison, Barry Rybicki and EquiAlt, LLC shall:

- (a) make a sworn accounting to this Court and the Commission of all funds,

whether in the form of compensation, commissions, income (including payments for assets, shares or property of any kind), and other benefits (including the provision of services of a personal or mixed business and personal nature) received, directly or indirectly, by EquiAlt LLC, EquiAlt Fund, LLC EquiAlt Fund II, LLC, EquiAlt Fund III, LLC and EA SIP, LLC;

(b) make a sworn accounting to this Court and the Commission of all assets, funds, or other properties, whether real or personal, held by EquiAlt LLC, EquiAlt Fund, LLC EquiAlt Fund II, LLC, EquiAlt Fund III, LLC and EA SIP, LLC, jointly or individually, or for its direct or indirect beneficial interest, or over which it maintains control, wherever situated, stating the location, value, and disposition of each such asset, fund, and other property; and

(c) provide to the Court and the Commission a sworn identification of all accounts (including, but not limited to, bank accounts, savings accounts, securities accounts and deposits of any kind and wherever situated) in which EquiAlt LLC, EquiAlt Fund, LLC EquiAlt Fund II, LLC, EquiAlt Fund III, LLC and EA SIP, LLC (whether solely or jointly), directly or indirectly (including through a corporation, partnership, relative, friend or nominee), either has an interest or over which it has the power or right to exercise control.

V.

RECORDS PRESERVATION

IT IS FURTHER ORDERED that, pending determination of the Commission's request for a Preliminary Injunction, Defendants and Relief Defendants, their directors, officers, agents, servants, employees, attorneys, depositories, banks, and those persons in active concert or participation with any one or more of them, and each of them, be and

they hereby are restrained and enjoined from, directly or indirectly, destroying, mutilating, concealing, altering, disposing of, or otherwise rendering illegible in any manner, any of the books, records, documents, correspondence, brochures, manuals, papers, ledgers, accounts, statements, obligations, files and other property of or pertaining to Defendants wherever located and in whatever form, electronic or otherwise, until further Order of this Court.

VI.

EXPEDITED DISCOVERY

IT IS FURTHER ORDERED that:

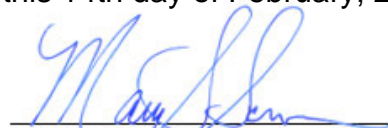
(a) Immediately upon entry of this Order, and while the Commission's request for a Preliminary Injunction is pending, the parties may take depositions upon oral examination of Barry Rybicki subject to three days' notice. Should Rybicki fail to appear for a properly noticed deposition, he may be prohibited from introducing evidence at the hearing on the Commission's request for a preliminary injunction;

VII.

RETENTION OF JURISDICTION

IT IS HEREBY FURTHER ORDERED that this Court shall retain jurisdiction over this matter and Defendants and Relief Defendants in order to implement and carry out the terms of all Orders and Decrees that may be entered and/or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court, and will order other relief that this Court deems appropriate under the circumstances.

DONE and **ORDERED** in Tampa, Florida, this 14th day of February, 2020.



MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
PLAINTIFF'S COUNSEL ONLY

EXHIBIT 2

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

Case No: 8:20-cv-00325-T-35AEP

BRIAN DAVISON, BARRY M. RYBICKI,
EQUIALT LLC, EQUIALT FUND, LLC,
EQUIALT FUND II, LLC, EQUIALT
FUND III, LLC, EA SIP, LLC,

Defendants,

**FILED EX PARTE
AND UNDER SEAL**

128 E. DAVIS BLVD, LLC, 310 78TH
AVE, LLC, 551 3D AVE S, LLC, 604
WEST AZEELE, LLC, BLUE WATERS
TI, LLC, 2101 W. CYPRESS, LLC, 2112
W. KENNEDY BLVD, LLC, BNAZ, LLC,
BR SUPPORT SERVICES, LLC, CAPRI
HAVEN, LLC, EANY, LLC, BUNGALOWS
TI, LLC, EQUIALT 519 3RD AVE S., LLC,
MCDONALD REVOCABLE LIVING
TRUST, 5123 E. BROADWAY AVE, LLC,
SILVER SANDS TI, LLC, TB OLDEST
HOUSE EST. 1842, LLC,

Relief Defendants.

**SEALED ORDER GRANTING PLAINTIFF'S EMERGENCY EX PARTE MOTION FOR
APPOINTMENT OF RECEIVER AND MEMORANDUM OF LAW**

WHEREAS, Plaintiff Securities and Exchange Commission has filed an Emergency Motion for the appointment of a Receiver over Defendants EquiAlt LLC, EquiAlt Fund, LLC EquiAlt Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC (collectively the "Corporate Defendants"), (Dkt. 6), and all of the Relief Defendants in this action with full and exclusive power, duty and authority to: administer and manage the business affairs, funds, assets,

choses in action and any other property of the Corporate Defendants and Relief Defendants; marshal and safeguard all of the assets of the Corporate Defendants and Relief Defendants and take whatever actions are necessary for the protection of investors;

WHEREAS, the Court has found Plaintiff Securities and Exchange Commission has made a sufficient and proper showing of the relief requested by evidence demonstrating a *prima facie* case of violations of the federal securities laws by the Defendants.

WHEREAS this Court has subject matter jurisdiction over this action and personal jurisdiction over the Defendants, and venue properly lies in this district.

WHEREAS, the Commission has submitted the credentials of a candidate to be appointed as Receiver of all of the assets, properties, books and records, and other items of the Corporate Defendants and the Relief Defendants and the Commission has advised the Court that this candidate is prepared to assume this responsibility if so ordered by the Court.

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that Burton Wiand, Esq. is hereby appointed the Receiver over the Corporate Defendants and Relief Defendants, each of their subsidiaries, successors and assigns, and is hereby authorized, empowered, and directed to:

1. Take immediate possession of all property, assets and estates of every kind of the Corporate Defendants and Relief Defendants whatsoever and wheresoever located, including but not limited to all offices maintained by the Corporate Defendants and Relief Defendants, rights of action, books, papers, data processing records, evidences of debt, bank accounts, savings accounts, certificates of deposit, stocks, bonds, debentures and other securities, mortgages, furniture, fixtures, office supplies and equipment, and all real property of the Corporate Defendants and

Relief Defendants, wherever situated, and to administer such assets as is required in order to comply with the directions contained in this Order, and to hold all other assets pending further order of this Court;

2. Investigate the manner in which the affairs of the Corporate Defendants and Relief Defendants were conducted and institute such actions and legal proceedings, for the benefit and on behalf of the Corporate Defendants and Relief Defendants and their investors and other creditors as the Receiver deems necessary against those individuals, corporations, partnerships, associations and/or unincorporated organizations which the Receiver may claim have wrongfully, illegally or otherwise improperly misappropriated or transferred money or other proceeds directly or indirectly traceable from investors in EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC, their officers, directors, employees, affiliates, subsidiaries, or any persons acting in concert or participation with them, or against any transfers of money or other proceeds directly or indirectly traceable from investors in EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC; provided such actions may include, but not be limited to, seeking imposition of constructive trusts, disgorgement of profits, recovery and/or avoidance of fraudulent transfers, rescission and restitution, the collection of debts, and such orders from this Court as may be necessary to enforce this Order;
3. Initially recover, control and possess liquid assets, known real estate, LLC assets and high-end personal assets purchased with funds traceable from investor proceeds, and trusts if the Receiver deems appropriate. The Receiver is specifically authorized to retain for the purposes of the receivership, forensic accountants (Yip and Associates), information technology consultants and counsel

specializing in information technology research (Adam Sharp, E-Hounds, Inc. and Robert Stines of Freeborn & Peters LLP), RWJ Group, LLC, and investigators, and counsel in Phoenix, Arizona to assist in the service of the Order and securing of records and assets. The Receiver shall advise and seek the consent of the Court with respect to the institution of claims relating to vendors, professionals, investors, or financial institutions, or other litigation of a complex and significant nature that may involve commitment of significant assets or the incurrence of significant costs or expenses to the receivership;

4. Present to this Court a report reflecting the existence and value of the assets of the Corporate Defendants and Relief Defendants and of the extent of liabilities, both those claimed to exist by others and those the Receiver believes to be legal obligations of the Corporate Defendants and Relief Defendants;
5. Appoint one or more special agents, employ legal counsel, actuaries, accountants, clerks, consultants and assistants as the Receiver deems necessary and to fix and pay their reasonable compensation and reasonable expenses, as well as all reasonable expenses of taking possession of the assets and business of the Corporate Defendants and Relief Defendants and exercising the power granted by this Order, subject to prior approval by this Court;
6. Engage persons in the Receiver's discretion to assist the Receiver in carrying out the Receiver's duties and responsibilities, including, but not limited to, the United States Marshal's Service, accountants, or a private security firm;
7. Defend, compromise or settle legal actions, including the instant proceeding, in which the Corporate Defendants, the Relief Defendants, or the Receiver are a party, commenced either prior to or subsequent to this Order, without authorization of this

Court up to a total amount of \$50,000 for each claim; except, however, in actions where the Corporate Defendants or Relief Defendants are nominal parties, where the action does not effect a claim against or adversely affect the assets of Corporate Defendants or Relief Defendants, the Receiver may file appropriate pleadings at the Receiver's discretion. The Receiver may waive any attorney-client or other privilege held by the Corporate Defendants or Relief Defendants;

8. Assume control of, and be named as authorized signatory for, all accounts at any bank, brokerage firm or financial institution which has possession, custody or control of any assets or funds, wherever situated, of the Corporate Defendants or Relief Defendants and, upon, order of this Court, of any of their subsidiaries or affiliates, provided that the Receiver deems it necessary;
9. Make or authorize such payments and disbursements from the funds and assets taken into control, or thereafter received by the Receiver, and incur, or authorize the incurrence of, such expenses and make, or authorize the making of, such agreements as may be reasonable, necessary, and advisable in discharging the Receiver's duties;
10. Have access to and review all mail of Corporate Defendants or Relief Defendants (except for mail that appears to be purely personal or in any respect attorney-client privileged communication to or from the individual Defendants) received at any office or address of Corporate Defendants or Relief Defendants.

IT IS FURTHER ORDERED AND ADJUDGED that, in connection with the appointment of the Receiver provided for above:

11. The Corporate Defendants or Relief Defendants and all of their directors, officers, agents, employees, attorneys, attorneys-in-fact, shareholders, and other persons

who are in custody, possession, or control of any assets, books, records, or other property of the Defendants and Relief Defendants shall deliver forthwith upon demand such property, money, books and records to the Receiver, and shall forthwith grant to the Receiver authorization to be a signatory as to all accounts at banks, brokerage firms or financial institutions which have possession, custody or control of any assets or funds in the name of or for the benefit of the Corporate Defendants and Relief Defendants;

12. The Receiver is authorized to open a bank account or accounts in the name of the Receivership to carry out the business of the Receivership and the Receivership Estate;

13. All banks, brokerage firms, financial institutions, and other business entities which have possession, custody or control of any assets, funds or accounts in the name of, or for the benefit of the Corporate Defendants and Relief Defendants shall cooperate expeditiously in the granting of control and authorization as a necessary signatory as to said assets and accounts to the Receiver;

14. Unless authorized by the Receiver, the Corporate Defendants and Relief Defendants and their principals shall take no action, nor purport to take any action, in the name of or on behalf of the Corporate Defendants and Relief Defendants;

15. The Corporate Defendants and Relief Defendants, their principals, and their respective officers, agents, employees, attorneys, and attorneys-in-fact, shall cooperate with and assist the Receiver. The Corporate Defendants and Relief Defendants and their principals and respective officers, agents, employees, attorneys, and attorneys-in-fact shall take no action, directly or indirectly, to hinder, obstruct, or otherwise interfere with the Receiver in the conduct of the Receiver's

duties or to interfere in any manner, directly or indirectly, with the custody, possession, management, or control by the Receiver of the funds, assets, premises, and choses in action described above;

16. The Receiver, and any counsel whom the Receiver may select, are entitled to reasonable compensation from the assets now held by or in the possession or control of or which may be received by the Corporate Defendants and Relief Defendants; said amount or amounts of compensation shall be commensurate with their duties and obligations under the circumstances, subject to approval of the Court. The Receiver is specifically authorized to retain Wiand Guerra King P.A. as attorneys for the Receiver;

17. During the period of this receivership, all persons, including creditors, banks, investors, or others, with actual notice of this Order, are enjoined from filing a petition for relief under the United States Bankruptcy Code without prior permission from this Court, or from in any way disturbing the assets or proceeds of the receivership or from prosecuting any actions or proceedings which involve the Receiver or which affect the property of the Corporate Defendants and Relief Defendants;

18. The Receiver is fully authorized to proceed with any filing the Receiver may deem appropriate under the Bankruptcy Code as to the Corporate Defendants and Relief Defendants;

19. Title to all property, real or personal, all contracts, rights of action and all books and records of the Corporate Defendants and Relief Defendants and their principals, wherever located within or without this state, is vested by operation of law in the Receiver;

20. Upon request by the Receiver, any company providing telephone services to the Corporate Defendants or Relief Defendants shall provide a reference of calls from any number presently assigned to the Defendants and Relief Defendants to any such number designated by the Receiver or perform any other changes necessary to the conduct of the receivership;
21. Any entity furnishing water, electric, telephone, sewage, garbage or trash removal services to the Corporate Defendants or Relief Defendants shall maintain such service and transfer any such accounts to the Receiver unless instructed to the contrary by the Receiver. The Receiver shall pay the invoices from the aforementioned utilities for services provided to the Corporate Defendants and Relief Defendants in the ordinary course of their business;
22. The United States Postal Service is directed to provide any information requested by the Receiver regarding the Corporate Defendants or Relief Defendants as directed by the Receiver;
23. No bank, savings and loan association, other financial institution, or any other person or entity shall exercise any form of set-off, alleged set-off, lien, or any form of self-help whatsoever, or refuse to transfer any funds or assets to the Receiver's control without the permission of this Court;
24. No bond shall be required in connection with the appointment of the Receiver. Except for an act of gross negligence or greater, the Receiver shall not be liable for any loss or damage incurred by the Corporate Defendants or Relief Defendants, or by the Receiver's officers, agents or employees, or any other person, by reason of any act performed or omitted to be performed by the Receiver in connection with the discharge of the Receiver's duties and responsibilities;

25. Service of this Order shall be sufficient if made upon the Corporate Defendants or Relief Defendants and their principals by facsimile or overnight courier;
26. In the event the Receiver discovers that funds of persons who have invested in EquiAlt Fund, LLC EquiAlt Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC have been transferred to other persons or entities, the Receiver shall apply to this Court for an Order giving the Receiver possession of such funds or assets acquired with such funds and, if the Receiver deems it advisable, extending this receivership over any person or entity holding such investor funds or assets;
27. This Court shall retain jurisdiction of this matter for all purposes;
28. Within thirty (30) days after the end of each calendar quarter, the Receiver shall file and serve a full report and accounting of each Receivership Estate (the "Quarterly Status Report"), reflecting (to the best of the Receiver's knowledge as of the period covered by the report) the existence, value, and location of all Receivership Property, and of the extent of liabilities, both those claimed to exist by others and those the Receiver believes to be legal obligations of the Receivership Estates;
29. The Quarterly Status Report shall contain the following:
- A. A summary of the operations of the Receiver;
 - B. The amount of cash on hand, the amount and nature of accrued administrative expenses, and the amount of unencumbered funds in the estate;
 - C. A schedule of all the Receiver's receipts and disbursements (attached as Exhibit A to the Quarterly Status Report), with one column for the quarterly period covered and a second column for the entire duration of the receivership;
 - D. A description of all known Receivership Property, including approximate or actual valuations, anticipated or proposed

dispositions, and reasons for retaining assets where no disposition is intended;

- E. A description of liquidated and unliquidated claims held by the Receivership Estate, including the need for forensic and/or investigatory resources; approximate valuations of claims; and anticipated or proposed methods of enforcing such claims (including likelihood of success in: (i) reducing the claims to judgment; and, (ii) collecting such judgments);
- F. The status of Creditor Claims Proceedings, after such proceedings have been commenced; and,
- G. The Receiver's recommendations for a continuation or discontinuation of the receivership and the reasons for the recommendations.

30. Subject to Paragraphs 31 - 37 immediately below, the Receiver need not obtain Court approval prior to the disbursement of Receivership Funds for expenses in the ordinary course of the administration and operation of the receivership. Further, prior Court approval is not required for payments of applicable federal, state or local taxes;

31. Subject to Paragraph 32 immediately below, the Receiver is authorized to solicit persons and entities ("Retained Personnel") to assist him in carrying out the duties and responsibilities described in this Order. Except as otherwise provided herein, the Receiver shall not engage any Retained Personnel without first obtaining an Order of the Court authorizing such engagement;

32. The Receiver and Retained Personnel are entitled to reasonable compensation and expense reimbursement from the Receivership Estates as described in the "Billing Instructions for Receivers in Civil Actions Commenced by the U.S. Securities and Exchange Commission" (the "Billing Instructions") agreed to by the Receiver. Such compensation shall require the prior approval of the Court;

33. Within forty-five (45) days after the end of each calendar quarter, the Receiver and

Retained Personnel shall apply to the Court for compensation and expense reimbursement from the Receivership Estates (the “Quarterly Fee Applications”). At least thirty (30) days prior to filing each Quarterly Fee Application with the Court, the Receiver will serve upon counsel for the SEC a complete copy of the proposed Application, together with all exhibits and relevant billing information in a format to be provided by SEC staff;

34. All Quarterly Fee Applications will be interim and will be subject to cost benefit and final reviews at the close of the receivership. At the close of the receivership, the Receiver will file a final fee application, describing in detail the costs and benefits associated with all litigation and other actions pursued by the Receiver during the course of the receivership;

35. Quarterly Fee Applications may be subject to a holdback in the amount of 20% of the amount of fees and expenses for each application filed with the Court. The total amounts held back during the course of the receivership will be paid out at the discretion of the Court as part of the final fee application submitted at the close of the receivership;

36. Each Quarterly Fee Application shall:

- A. Comply with the terms of the Billing Instructions agreed to by the Receiver; and,
- B. Contain representations (in addition to the Certification required by the Billing Instructions) that: (i) the fees and expenses included therein were incurred in the best interests of the Receivership Estate; and, (ii) with the exception of the Billing Instructions, the Receiver has not entered into any agreement, written or oral, express or implied, with any person or entity concerning the amount of compensation paid or to be paid from the Receivership Estate, or any sharing thereof.


37. At the close of the Receivership, the Receiver shall submit a Final Accounting, in

a format to be provided by SEC staff, as well as the Receiver's final application for compensation and expense reimbursement;

38. On the request of the Commission, the Receiver shall provide the Commission with any documentation that the Commission deems necessary to meet its reporting requirements, that is mandated by statute or Congress, or that is otherwise necessary to further the Commission's mission.

39. The Receiver has a continuing duty to ensure that there are no conflicts of interest between the Receiver, his Retained Personnel, and the Receivership Estate.

DONE and **ORDERED** in Tampa, Florida, this 14th day of February, 2020.



MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
PLAINTIFF'S COUNSEL ONLY
US MARSHAL'S SERVICE

EXHIBIT 3

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

CASE NO: 8:09-cv-87-T-26TBM

ARTHUR NADEL; SCOOP CAPITAL, LLC;
SCOOP MANAGEMENT, INC.,

Defendants,

SCOOP REAL ESTATE, L.P.; VALHALLA
INVESTMENT PARTNERS, L.P.; VALHALLA
MANAGEMENT, INC.; VICTORY IRA FUND, LTD.;
VIKING IRA FUND, LLC; VIKING FUND, LLC; and
VIKING MANAGEMENT,

Relief Defendants.

_____ /

ORDER

Before the Court is the Receiver's Motion to Enjoin State Court Proceedings and for Possession of Jewelry (Dkt. 177), Louis Paolino's Response (Dkt. 181), and the Receiver's Reply (Dkt. 188). After careful consideration of the motion, the record, and the applicable law, the Court concludes the state action must be enjoined.

PROCEDURAL POSTURE

The Securities and Exchange Commission (SEC), a federal agency, filed this action on January 21, 2009. (Dkt. 1). On that same day, this Court entered a preliminary injunction against the defendants and relief defendants, a temporary restraining order, and an order appointing a receiver. (Dkts. 7, 8 & 9). A notice of related, pending cases was

filed on February 2, 2009, which revealed only one action, the pending criminal proceedings in the Southern District of New York. (Dkt. 23). The receivership was first expanded on January 27, 2009, to include various entities. (Dkt. 17). The receivership has been expanded at least four more times. (Dkts. 44, 68, 79 & 153). Throughout the course of these proceedings, several entities have sought to intervene; however, none have been successful. (Dkts. 45 & 88). Also over the course of these proceedings, various defrauded investors have reached settlements with the receiver to avoid further litigation. (Dkts. 119, 126, 134, 136, 138, 143, 145, 150, & 187). It is against this backdrop that Paolino seeks to defeat the Receiver's motion to enjoin his state court proceedings which he instituted on February 4, 2009, and in which a receiver was appointed on February 10, 2009. At some point, the receiver in the state court case took possession of the jewelry at issue.

With respect to the previous interventions sought in this case, the first intervention was sought by General Electric Capital Corporation and VFS Financing, Inc., and was denied on February 11, 2009. (Dkts. 32 & 45). As secured creditors of an entity under the receiver's authority, Tradewind, LLC, they claimed the receivership in this action prohibited them from pursuing their contractual rights against Tradewind, LLC, and they sought possession of the aircraft in which they hold a security interest. After a careful review of the submissions, this Court held that intervention was unwarranted and would serve only to delay adjudication of the merits of this case. (Dkt. 45).

Subsequent to the first denial of third parties seeking intervention, this Court had occasion to rule again on a request for intervention which was made by the same attorney

who objects to the granting of the present motion. (Dkt. 82). Numerous individuals and concerns who had invested in entities and funds managed by Arthur Nadel sought to intervene for the purposes of preventing Defendant Nadel's attorney's fees in his criminal case from being paid from receivership assets. The Court denied intervention again for the same reason — intervention would interfere with the established receivership in this case. (Dkt. 88).

THE TWO ACTIONS

The crux of Paolino's argument is the timing of the respective receivers taking possession of the jewelry at issue—that the state court receiver physically took possession of the jewelry before the receiver in this case. Paolino contends that by the state appointed receiver taking possession of the jewelry first, this federal District Court cannot exercise its authority over that property. He also argues that this Court does not have jurisdiction over the jewelry because the Moodys are not parties to this action and are therefore not subject to the claims in the complaint. In that same vein, Paolino argues that the investors will have no recourse against the Moodys in this action, but must seek relief against them for breach of fiduciary duty and similar claims in the pending state court action. Finally, Paolino asserts that the jewelry is owned by Queen's Wreath, not the Moodys, and Queen's Wreath does not owe money to the Moodys and therefore the receiver in these proceedings may not seek property that does not belong to the Moodys. This last argument, however, ignores the fact that the money used to purchase the jewelry by Queen's Wreath initially came from proceeds obtained through the Moodys from the investors. Because the investors seek to recoup that money in the state court action, such

action prevents the receiver in this action from marshaling the funds and property obtained through the fraudulent scheme.

ANALYSIS

A district court, as a court sitting in equity, possesses the power to enjoin state court proceedings, and this power has been codified by Congress in the All-Writs Act, 28 U.S.C. § 1651. See Wesch v. Folsom, 6 F.3d 1465, 1470 (11th Cir. 1993). Employing this authority, generally, a federal court may enjoin a state court proceeding “to prevent a state court from so interfering with a federal court’s consideration or disposition of a case as to seriously impair the federal court’s flexibility and authority to decide the case.” Wesch, 6 F.3d at 1470 (quoting Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng’rs, 398 U.S. 281, 295, 90 S.Ct. 1739, 1747, 26 L.Ed.2d 234 (1970)). To maintain the intended relationship between federal and state courts, however, Congress enacted the Anti-Injunction Act, 28 U.S. C. § 2283. Wesch, 6 F.3d at 1470.

The Anti-Injunction Act provides that a federal court “may not grant an injunction to stay proceedings in a State court[.]” save for three exceptions. The exceptions exist to permit a federal court to stay or enjoin a state court proceeding and must be narrowly construed. Atlantic Coast Line, 398 U.S. at 286; In re Ford Motor Co., 471 F.3d 1233, 1250 (11th Cir. 2006) (listing Supreme Court opinions stressing strict, narrow construction of exceptions to Anti-Injunction Act). A state court proceeding may be enjoined in three circumstances: (1) when Congress has expressly authorized such injunction; (2) when it is necessary in aid of the federal court’s jurisdiction, and (3) when the federal court’s judgments must be protected or effectuated. 28 U.S.C. § 2283; Atlantic Coast Line, 398

U.S. at 288; Ford Motor, 471 F.3d at 1249; Burr & Forman v. Blair, 470 F.3d 1019, 1027-28 (11th Cir. 2006).¹

It has long been recognized by various courts that the Anti-Injunction Act does not apply when the United States is the party seeking an injunction, as is the SEC in this case. See Securities & Exchange Comm’n v. Wencke, 577 F.2d 619, 623 (9th Cir. 1978) (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 146, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971)). In Nash-Finch, the Supreme Court reasoned that the general language of section 2283 prohibiting federal courts from enjoining state courts was not meant to frustrate the interests of federal agencies and their business of federal regulation. Nash-Finch, 404 U.S. at 147. The Supreme Court articulated the purpose of the Act as “to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights.” Id. at 146.

Although independent research has not revealed a recent Eleventh Circuit case that squarely addresses the issue of the application of the Anti-Injunction Act when the United States is a party, a former Fifth Circuit case plainly holds that the Anti-Injunction Act is inapplicable when the United States is the federal plaintiff. United States v. Composite

¹ Under both the All Writs Act, 28 U.S.C. § 1651(a), and the Anti-Injunction Act, is the power to enjoin a state court action if the state court’s action threatens the district court’s jurisdiction. Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1099-1103, n. 16 (11th Cir. 2004).

State Bd. of Med. Exam'rs, 656 F.2d 131, 134 (5th Cir. 1981).² Supreme Court precedent and other courts relying on that authority support such a premise. See Arkansas v. Farm Credit Servs., 520 U.S. 821, 829, 117 S.Ct. 1776, 1781, 138 L.Ed.2d 34 (1997) (holding that the “restrictions of § 2283 are inapplicable in a suit brought by the National Government and citing Leiter Minerals, Inc. v. United States, 352 U.S. 220, 225-26, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957)); Mitchum v. Foster, 407 U.S. 225, 235-36, 92 S.Ct. 2151, 215-59, 32 L.Ed.2d 705 (1972) (holding that implied exception to Anti-Injunction Act “permits a federal injunction of state court proceedings when the plaintiff in the federal court is the United States itself, or a federal agency asserting ‘superior federal interests’”); Leiter Minerals, 352 U.S. at 225-26; Wencke, 577 F.2d at 623 (citing Leiter); United States v. Commonwealth of Puerto Rico, 144 F.Supp.2d 46, 53 n. 16 (D.P.R. 2001) (citing Leiter). Thus, this Court finds that the implied exception to the Anti-Injunction Act, when an agency of the federal government is proceeding for an injunction, applies in this case.³

Here, the SEC, as a federal agency, has secured an injunction and established a receivership to marshal the assets of the fraudulent scheme. Thus, while the receiver in

² In Bonner v. City of Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit decided prior to October 1, 1981.

³ See also Securities & Exchange Comm'n v. Credit Bancorp, Ltd., 93 F.Supp.2d 475 (S.D.N.Y. 2000) (holding that “where a court has appointed a receiver and obtained jurisdiction over the receivership of estate, as here, the power to stay competing actions falls within the court’s inherent power to prevent interference with the administration of that estate.”).

the state court action may have taken possession of the jewelry, the jewelry was purchased with proceeds ultimately supplied by the defrauded investors as part of the scheme. In other words, the SEC first enjoined the defendants and relief defendants and therefore, had already established the superiority of the federal interests in this case, regardless of the state receiver's later taking possession of some of the assets sought to be recovered in this action. The receiver in this case obtained constructive possession⁴ of all of the property that constitutes proceeds of the fraudulent scheme in January 2009, which was before the state court action was filed. The realistic threat to this Court's already established jurisdiction over the receivership estate lies in the windfall that would go to a single investor, Paolino, at the expense of all the other defrauded investors waiting in line. The very purpose of the receivership here is to marshal the assets taken and used from the fraudulent scheme and distribute what can be obtained to the various investors. Accordingly, this Court exercises its discretion to enjoin the state court proceeding.⁵

It is therefore **ORDERED AND ADJUDGED** as follows:

- (1) The Receiver's Motion to Enjoin State Court Proceedings and for Possession of Jewelry (Dkt. 177) is **GRANTED**. The state court

⁴ See Harkin v. Brundage, 276 U.S. 36, 43, 48 S.Ct. 268, 271 72 L.Ed. 457 (1928) (holding that court that obtains jurisdiction and constructive possession of property first is entitled to proceed without interference even though property may not be in actual possession of receiver).

⁵ Counsel for Plaintiff in this case would be well advised to cease his prosecution of the case he instituted on behalf of other allegedly defrauded investors in *Bell, et al. v. Moody, et al.*, Case number 2009 CA 014378 (Twelfth Judicial Circuit in and for Sarasota County, Florida). Otherwise, on motion of the Receiver, that action will likewise be enjoined upon a proper showing.

proceeding titled Paolino v. Moody, et al., Case No. 2009 CA 1876 NC, in the Twelfth Judicial Circuit in and for Sarasota County, Florida, is hereby enjoined.

- (2) The state court receiver is hereby directed to transfer the jewelry at issue to the receiver in this action, Burt Wiand, no later than 5:00 p.m., Wednesday, September 9, 2009.
- (3) The Clerk is directed to send a copy of this order to the Honorable Charles E. Williams, 200 Main Street, Room 108, Sarasota, Florida 34237.

DONE AND ORDERED at Tampa, Florida, on September 3, 2009.

s/Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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Counsel of Record