

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

SECURITIES AND EXCHANGE
COMMISSION,

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

Plaintiff,

v.

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

Defendants, and

128 E. DAVIS BLVD, LLC;
310 78TH AVE, LLC; et al.;

Relief Defendants.

**RECEIVER'S OPPOSITION TO DAVISON'S MOTION TO MODIFY ORDER ON
MOTION TO APPOINT RECEIVER AND APPLICATION TO CLARIFY SCOPE OF
RECEIVERSHIP**

Comes now, the Receiver Burton Wiand, and files this Opposition to Defendant Brian Davison's Motion to Modify Order on Motion to Appoint Receiver and Application to Clarify Scope of Receivership [Doc. 81]. Contemporaneous with this filing, the Receiver is filing a Motion to Expand the Scope of Receivership to Include QOZ and REIT Entities [Doc. 90]. Rather than restate the reasons for that request here, the Receiver refers the Court to that motion. However, in light of the allegations made in Mr. Davison's instant motion, the Receiver wanted to provide a backdrop of the Receiver's efforts to work with Mr. Davison on this issue since early March.

Procedural Background

On February 11, 2020, the Securities and Exchange Commission filed this action naming Brian Davison (“Davison”); Barry Rybicki (“Rybicki”); EquiAlt LLC; EquiAlt Fund, LLC; EquiAlt Fund II, LLC; EquiAlt Fund III, LLC; EA SIP, LLC (“collectively “EquiAlt defendants”) (collectively, the “defendants”) as defendants and 128 E. Davis Blvd, LLC; 310 78th Ave, LLC; 551 3rd 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 (collectively, the “relief defendants”) as relief defendants. The Court appointed Burton W. Wiand as Receiver over the corporate defendants and the relief defendants. [Doc. 11] As Mr. Davison states in his motion, the SEC did not name the entities related to the REIT or Qualified Opportunity Fund as either defendants or relief defendants in the case and thus the Receiver had no authority or control over those entities.

In addition to appointing a receiver over certain entities, the Court also entered a Temporary Restraining Order, Asset Freeze and Other Injunctive Relief. [Doc. 10] The Order states “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, . . . 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” and then listed specific bank accounts, many of which were held at Bank of America. In addition to the specific accounts listed, Bank of America froze twelve other

accounts associated with EquiAlt or Mr. Davison, eleven of which are for entities that are the subject of this motion. The Receiver had no communications with Bank of America regarding which accounts should be or were frozen. At no time did the Receiver encourage Bank of America to restrict the accounts. In the Receiver's view the freezing of accounts was a result of the Court's Temporary Restraining Order and the application of that order was something to be discussed with the SEC.

Davison Was Prevented From Managing These Entities by the Court

Davison argues that he was prevented from exercising any authority over the QOZ and REIT. If Davison believes that the Court's earlier Order precluded him from managing these entities, then his proper recourse would be to seek clarification from the Court and the SEC, not the Receiver.

The Receiver Worked with Defendant Davison for Months To Work Toward a Resolution on This Issue

Within a couple of weeks of his appointment, it became apparent to the Receiver that there were issues related to the REIT and QOZ that needed to be managed – maintenance, utilities, and tenant issues, just to name a few. In his first conversation with current local counsel for Davison, the Receiver personally raised this problem with counsel and advised that it should be resolved. In early March, undersigned counsel was in communication with Davison's counsel about how to navigate these issues. On March 9th, Receiver's counsel sent a draft motion to unfreeze the REIT and QOZ bank accounts to Davison's counsel. This motion proposed that the Receiver would, after consultation with Mr. Davison, direct payments for ordinary course expenses from the REIT and QOZ bank accounts. The parties were ready to file the motion but counsel for Bank of America threatened to close the accounts. Bank of America had previously refused to hold accounts for the

receiver and now indicated that the Bank did not want accounts wherein Mr. Davison was a signatory.

The parties discussed other options including finding another bank that might hold the accounts. It was at this time that the Receiver suggested EquiAlt could advance certain funds to pay expenses related to the REIT such as overdue utility bills that would then be repaid by the REIT once the accounts were unfrozen. Davison's counsel agreed to that arrangement. The Receiver and his counsel met in person with Davison's counsel on Friday March 13th to discuss these issues and other matters.

On March 17th, Davison's counsel provided a revised draft of the motion. This draft, for the first time included the QOZ, allowed for more management on the part of Mr. Davison and specifically stated that Mr. Davison would have access to and authority over EquiAlt personnel, subject to the Receiver's approval, to manage the REIT and QOZ.¹ On March 20th, Receiver's counsel notified Davison's counsel that they had been unable to find another bank to handle the accounts, that the Receiver would not allow Mr. Davison access to EquiAlt employees, and there needed to be a different plan. Given the situation that this case presents, the Receiver was not comfortable with allowing Davison management authority over assets or Bank accounts and certainly not over his prior employees who now worked for the Receiver. Receiver's counsel emailed Davison's counsel on March 23rd listing certain utilities and maintenance issues that needed urgent attention and seeking Davison's counsel's confirmation to the earlier arrangement of advancing costs. In response, Davison's counsel wanted to continue to argue about the substance of the working draft (based on inaccurate facts) rather than confirm their agreement to the urgent

¹ The Receiver had previously instructed EquiAlt employees not to have further contact with Mr. Davison.

expense reimbursements. Finally, after several email exchanges and a telephone call, Davison's counsel agreed to the reimbursement arrangement for those expenses. At that point, the Receiver had advanced approximately \$14,256.20 to cover REIT expenses.

The Receiver did not hear from Davison's counsel again on this issue until Mr. Fischer became involved in the case on March 31st. At that time, the Receiver, through counsel, notified Davison's counsel that the Receiver would not be advancing any further expenses and would be referring all REIT and QOZ issues to Mr. Davison or someone of his choosing.

On April 1st, counsel had a conference call and counsel for both sides continued to restate their positions. On April 6th, the Receiver clarified that the Receiver would allow Mr. Davison access to REIT and QOZ documents but that the remaining EquiAlt employees were fully employed handling the issues for the Receivership Entities and could not be loaned to him for his management of those entities. Further, the Receiver did not agree to Mr. Davison's access to the bank accounts without some independent monitoring. In this response, the Receiver also noted that he had not decided as to whether or not to seek to expand the Receivership to include the REIT and QOZ. This was not a threat as suggested by Mr. Davison in his motion but rather a statement that the Receiver, in the course of his duties to the Court, had not made a decision on this issue. The Receiver wanted counsel to be aware of that fact as evidence was being uncovered about Davison's conduct and the REIT and QOZ that raised concerns that these two funds should be combined with the other Receivership Funds and not left under Davison's control.

In fact, the Receiver and his team, in the midst of the COVID-19 crisis, were continuing their investigation and beginning to assemble the Receiver's First Quarterly Status Report. On April 21st, Davison's counsel submitted their own proposed order on the REIT/QOZ issues. After

review and continued investigation, counsel for the Receiver notified Davison's counsel on April 30th that the Receiver would not consent to the proposed motion.

After the filing of the motion, on May 12th, undersigned counsel reached out to Davison's counsel to work toward paying certain REIT expenses with REIT rents that had been inexplicably deposited into EquiAlt's account by management software AppFolio. Davison's counsel agreed to the arrangement and \$27,390.01 in expenses were paid on May 18th. This arrangement is merely a band-aid for a much bigger problem which is the management of the QOZ and REIT by someone independent of Davison who could manage the entities and have access to the funds related to these entities.

Receiver's Recommendation to Expand Receivership

As stated in the Receiver's Motion to Expand the Receivership [Doc. 90], filed contemporaneously with this opposition, and the Receiver's First Quarterly Status Report, it is the Receiver's opinion and recommendation to this Court that the REIT and QOZ, and the entities that support them, should be folded into the Receivership. Rather than restate the reasons for that opinion here, the Receiver refers the Court to that filing. But in summary, funds from Receivership Entities were moved to fund in large part the REIT and QOZ both through investor monies and the payment of expenses and personnel. The creation of these entities was another plan by the individual defendants to perpetuate their efforts to raise money from public investors.

From a logistical perspective, the Receiver will be able to manage the REIT and QOZ issues from the EquiAlt office. EquiAlt employees, who now work for the Receiver, coupled with the Receiver's team, have thorough knowledge of the operations and issues relating to the QOZ and the REIT. Also, the Receiver is in possession of the accounting and historical records for these funds. Having the QOZ and REIT folded into the Receivership would be the most efficient method

not only to protect the assets of those companies for the benefit of the investors but also to resolve claims between the Receivership Funds and the QOZ and REIT. Finally, the Receiver is best situated to meet the needs of the tenants of those properties in the most efficient and expeditious manner.

CONCLUSION

Based on the foregoing, the Receiver respectfully requests that the Court deny Defendant Davison's Motion to Modify the Receivership Order and to grant the Receiver's Motion to Expand the Receivership to Include the REIT and QOZ Entities.

Respectfully submitted,

s/Katherine C. Donlon

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 19, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

s/Katherine C. Donlon

Katherine C. Donlon, FBN 0066941