UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CIVIL ACTION NO. 8:20-CV-325-T-35AEP

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

BRIAN DAVISON,
BARRY M. RYBICKI,
EQUIALT LLC,
EQUIALT FUND, LLC,
EQUIALT FUND II, LLC,
EQUIALT FUND II, 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 WATRS TI, LLC
BNAZ, LLC
BR SUPPORT SERVERCES, 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.
_____/

INVESTOR PLAINTIFFS' NOTICE OF SPECIAL APPEARANCE AND MOTION FOR CONFIRMATION OF UNIMPEDED RIGHT TO PROSECUTE INVESTOR CLAIMS

Undersigned counsel enters a Special Notice of Appearance solely for the purpose of filing this Motion for Confirmation of Unimpeded Right to Prosecute Investor Claims.

To preserve their claims against potential statute of limitation defenses and to prosecute those claims, Richard and Phyllis Gleinn, John and Maria Celli, Eva Meier, Georgia Murphy, Steven J. Rubinstein and Tracey F. Rubinstein, as trustees for The Rubinstein Family Living Trust Dated 6/25/2010 and Bertram D. Greenberg, as trustee for the Greenberg Family Trust (collectively referred to as "Investor Plaintiffs"), yesterday filed an action in this Court against Paul Wassgren, DLA Piper LLP (US), and Fox Rothschild LLP ("the Lawyer Defendants"), styled *Richard Gleinn, et. al. v. Paul Wasgren, et. al.*, Case No. 8:20-cv-01677-VMC-CPT (the "Investor Class Action").

Because the Receiver appointed in the above-captioned SEC enforcement action ("the SEC Action") has taken the position that the Investor Plaintiffs are foreclosed from protecting their independent interests by *the ex parte* orders entered by this Court at the inception of the Receivership, the Investor Plaintiffs respectfully move the Court for an order confirming that, under the Eleventh Circuit's holding in *Isaiah v. JPMorgan Chase Bank, N.A.*, 960 F.3d 1296, 1306 (11th Cir. 2020) and prior Eleventh Circuit precedent, the Investor Plaintiffs' claims against the Lawyer Defendants (a) do not belong to and cannot be asserted by the Receiver, and (b) may be prosecuted by the Investor Plaintiffs in the Investor Class Action notwithstanding the Receiver's plans to prosecute elsewhere EquiAlt's own, distinct claims against the Lawyer Defendants.

Specifically, the Receiver contends that the Sealed Order Granting Plaintiff's Emergency *Ex Parte* Motion for Appointment of Receiver and Memorandum of Law [ECF No. 11] (the "Receivership Order") and the Sealed Order Granting Emergency *Ex Parte* Motion for Temporary Restraining Order, Asset Freeze and Other Injunctive Relief [ECF No. 10] (the "TRO") supposedly

preclude the Investor Plaintiffs' action against the Lawyer Defendants. As shown below, however, neither Order even purports to do so. Nor, as also shown below, could the Court under *Isaiah* enter an order foreclosing the Investor Plaintiffs' assertion of their own claims against the Lawyer Defendants. The Investor Plaintiffs' motion is therefore well-taken, and should be granted.

INTRODUCTION

There currently are two actions in this district arising from the Ponzi scheme allegedly orchestrated by the former managers of EquiAlt and the financial collapse of the investment funds previously sponsored and operated by EquiAlt: (1) the SEC Action; and (2) the Investor Action.

A. The SEC Action

The SEC Action was commenced in this Court on February 11, 2020 by the Securities and Exchange Commission ("SEC") against Equialt LLC and Defendants Brian Davison and Barry M. Rybicki (the "Corporate Defendants"), alleging that they "have conducted a Ponzi scheme raising more than $170 million from over 1,100 investors nationwide, many of them elderly through fraudulent unregistered securities offerings." Compl. [ECF No. 1], ¶ 1. The SEC named as additional Defendants a number of EquiAlt investment funds ("the EquiAlt Funds") and related entities ("the Relief Defendants"), and moved for the appointment of a receiver to administer EquiAlt's assets and liabilities. The SEC has alleged that at all relevant times, Corporate Defendants Davison and Rybicki exercised control over the business operations of EquiAlt and the EquiAlt Funds. *Id.*, ¶¶ 4, 37. The SEC further alleges that the EquiAlt Funds "have been operated as a Ponzi scheme almost since their inception." *Id.*, ¶ 42.

The SEC Action asserts claims against the Defendants under the Federal Securities Act for unlawfully selling unregistered securities and for committing securities fraud. *See* 15 U.S.C. §§ 77e(a) and (c) and §§ 77q(a)(1), (2) and (3). The SEC also asserts claims against the Defendants for violating the anti-fraud provisions of the Exchange Act and Rule 10b-5 promulgated

thereunder, control person liability and aiding and abetting the foregoing securities laws. *See* 15 U.S.C. §78j(b) and 17 C.F.R. § 240.10b-5(a), (b) and (c).

On February 14, 2020, the Court entered the Receivership Order appointing the Receiver and directing the Receiver to investigate and institute legal proceedings "for the benefit and on behalf of the Corporate Defendants and Relief Defendants and their investors and other creditors," and enjoining "actions or proceedings which involve the Receiver or which affect the property of the Corporate Defendants and Relief Defendants." ECF No. 11, ¶¶ 2, 17. On the same date, the Court entered the TRO restraining the Corporate Defendants and those in active participation with them from violating the federal securities laws and freezing their assets. ECF No. 10.

The Receiver has to date a status report describing his efforts to marshall the assets and liquidate the claims of the Corporate Defendants and the Relief Defendants. ECF No. 84. In this context, the Court recently entered an order authorizing the Receiver to engage special counsel to prosecute EquiAlt's claims against two of the Lawyer Defendants, Paul Wassgren and DLA Piper ("the Company Claims"). [ECF No. 127]. The Receiver has not sought, nor has the Court granted, authority to bring claims against Fox Rothschild, the law firm where Wassgren practiced from 2011 until 2017. During this critical period while Wassgren was a partner at Fox Rothschild, he prepared the organizational documents forming EquiAlt, drafted Private Placement Memorandums containing the critical misrepresentations and omissions used to solicit investors, provided securities advice to EquiAlt and directed the preparation and filing of false Form D statements with the SEC and orchestrated the use of unlicensed agents to sell the EquiAlt securities to investors, all in violation of the applicable securities laws.

B. The Investor Class Action

The Investor Plaintiffs, and the class members they seek to represent, are Florida,

California, Arizona, and Colorado residents who purchased securities styled as "debentures" issued by the EquiAlt Funds (the "EquiAlt Securities"). The Investor Plaintiffs contend that the Lawyer Defendants violated State securities, consumer protection, and common law by providing material assistance in the unlawful and fraudulent sale of the unregistered EquiAlt Securities. Investor Plaintiffs accordingly assert independent, non-derivative claims against the Lawyer Defendants under the pertinent State laws for: (1) violations of the registration and anti-fraud provisions of various states' securities and consumer protection laws; and (2) aiding and abetting breaches of fiduciary duty, fraud and negligent misrepresentation (collectively, "the Investor Claims"). [Investor Class Action, ECF No. 1]. Because the Investor Claims against the Lawyer Defendants arise out of the same unlawful sale of the EquiAlt Securities at issue in the SEC Action, in accordance with Local Rule 1.04(d) the Investor Plaintiffs have filed Notice of Pendency of Other Actions designating the Investor Class Action as a case related to this SEC Action. [Investor Class Action, ECF No. 5.][1]

C. Proposed Coordination of Efforts

In short, the Investor Plaintiffs are in the Investor Class Action asserting the Investor Claims against the Lawyer Defendants; the Receiver, on the other hand, has announced his intention to bring a separate suit asserting the Company Claims against the Lawyer Defendants.

Although distinct and independently actionable, the Investor Claims have many decided advantages over the Company Claims. By way of example only, unlike the Company Claims the Investor Claims are not susceptible to potential equitable defenses like *in pari delcito*[2] and several

[1] Pursuant to 15 U.S.C. § 78u(g) and the SEC's request, the Investor Plaintiffs have not sought to consolidate the Investor Class Action with the SEC Action.

[2] *See e.g. Freeman v. Dean Witter Reynolds, Inc.*, 865 So.2d 543, 551 (*in pari delicto* may be asserted against receiver seeking to allege tort claims against third parties where entity was sham corporation created as centerpiece of Ponzi scheme); *Fed. Deposit Ins. Corp. v. O'Melveny &*

of them provide for strict liability and an objective statutory measure damages (i.e,. full resecssion or rescissionary damages)[3] rather than requiring a highly debatable "deepening insolvency" analysis and proof.[4]

Moreover, undersigned counsel have substantial experience representing investors in class actions seeking redress for victims of Ponzi schemes like EquiAlt and have successfully secured recoveries against national law firms totaling hundreds of millions of dollars. *See* Joint Decl. of Class Counsel ("Joint Decl.")], ¶¶ 4–15. In most of those cases, class counsel have worked closely and cooperatively with receivers and bankruptcy trustees to maximize the recoveries on behalf of the Ponzi scheme victims and have coordinated the class action proceedings with parallel actions brought by receivers or trustees standing in the shoes of the entities used to perpetrate the Ponzi schemes. *Id.*

Accordingly, the Investor Plaintiffs have repeatedly offered to work cooperatively with the Receiver in a mutual effort to benefit both the vicitimized investors and the Receivership. Joint Decl., ¶¶ 15–22. The Receiver, however, has declined these overtures and, instead, taken the position that the TRO and Receivership Order bar the prosecution of ***any and all*** claims by the Investor Plaintiffs against ***any parties*** that relate ***in any way*** to EquiAlt -- including the Investor

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Meyers, 61 F.3d 17, 19 (9th Cir. 1995) (addressing *in pari delicto* doctrine, "it does not necessarily follow that equitable defenses can never be asserted against … a receiver; we hold only that the bank's inequitable conduct is not imputed to [a receiver]."

[3] *See e.g.* Cal. Corp. Code § 25503; A.R.S. § 44-2001(A); and C.R.S. § 11-51-604.

[4] *See, e.g. In re Southwest Florida Heart Group, P.A.* 346 B.R. 897,898 (Bankr. M.D.Fla. 2006) (deepening insolvency is measure of damages but not independent claim); *Smith v. Arthur Anderson LLP*, 421 F.3d 989 (9th Cir. 2005) ("We need not make any general pronouncements on the deepening insolvency theory, not least because it is difficult to grasp exactly what the theory entails…we do not opine whether the occurrence of additional debt that cannot be repaid, in and of itself, constitutes a corporate injury remediable by a trustee"); J. Brighton, "Deepening the Blows Against Deepening Insolvency?" 24 Am. Bankr. Inst. J. (September, 2006).

Claims against the Lawyer Defendants that the Receiver does not own, has no standing to bring and has not sought authority to bring. *Id.*

In particular, on July 9, 2020, counsel for the Receiver sent an email to counsel for the Investor Plaintiffs stating that "[i]t has come to the Receiver's attention that your firm is considering filing claims against the law firms that provided counsel to EquiAlt" and incorrectly asserting that "these are the Receiver's claims to bring." Joint Decl., Ex. B. Counsel for the Receiver concluded the email threatening that that "these are the Receiver's claims and will [sic] take necessary action to protect them." *Id.*

Counsel for the Investor Plainitffs responded to the Receiver on July 20, 2020, advising that: (1) the Investor Plaintiffs would soon file a class action complaint in this Court asserting claims that belong exclusively to the investors; (2) the Receiver does not hold or have standing to bring those claims; (3) the TRO and Receiverhip Order do not preclude the Investor Plaintiffs from prosecuting the investor-owned claims; and (4) the Receiver is improperly acting to prejudice the investors by attempting to preclude the Investor Plaintiffs from initiating and prosecuting the investor claims that will become time-barred if this class action were not filed. Joint Decl., Ex. C. The Investor Plaintiffs once again urged the Receiver to proceed in a cooperative rather than antagonistic fashion. *Id.*

Absent such cooperation from the Receiver, Investor Plaintiffs now bring this motion out of an abundance of caution to confirm their authority to assert the Investor Claims, unimpeded by the the TRO, the Receivership Order, or any other order the Receiver may seek in the SEC Action to thwart the Investor Class Action. Joint Decl. ¶ 22. Given the Receiver's contention that the Receivership Order and TRO supposedly preclude the Investor Plaintiffs' prosecution of the Investor Claims, there is no question that the Investor Plaintiffs have standing to mount their

challenge to the overbreadth of the Receiver's interpretation of this Court's orders. *McKusick v. City of Melbourne, Fla.,* 96 F.3d 478, 481 (11th Cir. 1996).

LEGAL ARGUMENT

A. Nothing in the TRO Precludes the Investor Plaintiffs' Prosecution of the Investor Claims against the Lawyer Defendants.

In the TRO, the Court enjoins the Corporate Defendants and the Relief Defendants, and those acting in concert with them, from violating the federal securities laws, and from transferring, setting off, receiving, seeling, pledging, assigning, liquidating or otherwise disposing of their assets ("the Asset Freeze."). TRO, at 3–9. Nothing in the TRO is directed at the Investor Plaintiffs, let alone purports to preclude the assertion of the Investor Claims against the Lawyer Defendants by the Investor Plaintiffs. Joint Decl., ¶ 23.

B. Nothing in the Receivership Order Precludes the Investor Plaintiffs' Prosecution of the Investor Plaintiffs' Claims against the Lawyer Defendants

In the Receivership Order, the Court appointed the Receiver and generally authorized him to take immediate possession of all property, assets and estates of every kind of the Corporate Defendants and the Relief Defendants. In its filings with the Court, however, the Receiver has asserted that the following paragraph of the Receivership Order forecloses the Investor Plaintiffs' prosecution of claims against third-parties such as the Lawyer Defendants:

> 17. During the period of this receivership, all persons, including creditors, banks, investors, or others, with actual notice of this Order, are enjoined … from in any way disturbing the assets or the proceeds of the receivership or from prosecuting any actions or proceedings which [a] involve the Receiver or [b] which affect the property of the Corporate Defendants and Relief Defendants.

Receivership Order, at 7.

The Investor Plaintiffs in the Investor Class Action assert no claims against the Receiver, the Corportae Defendants, or the Relief Defendants. Joint Decl., ¶ 24. Nor is the Receiver a

necessary party to the Investor Class Action; indeed, the Receiver has announced plans to retain its own counsel to assert the Company Claims against the Lawyer Defendants. *Id.*,¶ 21. The Investor Class Action thus does not "involve the Receiver."

Nor does the assertion of the Investor Class Claims against the Lawyer Defendants "affect the property of the Corporate Defendants and Relief Defendants." The assets of a receivership are comprised of "precisely" the rights, causes of action, and remedies "which ***the receivership entities*** possessed at the moment the Court created the receivership." *S.E.C. v. Pension Fund of Am. L.C.*, No. 05-20863-CIV-MOORE/GARBER, 2006 WL 8433996, at *9 (S.D. Fla. Sept. 11, 2006) (emphasis added); *see also S.E.C. v. Faulkner*, Civ. A. No. 3:16-CV-1735-D, 2020 WL 584614, at *3 (N.D. Tex. Feb. 6, 2020) ("The assets of a receivership estate include any causes of action belonging to the receivership entities."). A cause of action is treated as property of the receivership only if the receiver has standing to bring the claim. *See Faulkner*, 2020 WL 584614, at *3 (noting that "a claim is treated as a receivership asset only if the Receiver could have brought the claim directly"). Indeed, as this Court previously recognized in a similar case involving the Receiver, a receivership order can only permit a receiver to pursue claims that he is "authorized to pursue under the United States Constitution and the applicable federal and state statutes" and cannot confer standing on a receiver which would be "contrary to constitutional and statutory law." *In re Wiand*, Nos. 8:05-cv-1856-T-27MSS, et al., 2007 WL 963162, at *6 (M.D. Fla. Jan. 12, 2007).

As set forth in the TRO and the Receivership Order, assets of the Receivership include items such as cash, bank and savings accounts, certificates of deposit, securities, personal property, real property, mortgages, furniture, fixtures, office supplies and equipment owned by, controlled by, or in the possession of, the Corporate Defendants and Relief Defendants. *See* TRO at 2–3; Receivership Order at 7–8. None of these assets will be disturbed in any way by litigation of the

Investor Claims against the Lawyer Defendants. Investor Plaintiffs are prosecuting no claims against the Corporate Defendants or the Relief Defendants, are taking no actions that would burden those parties or the Receivership with additional fees or costs, and are seeking no monetary damages that would reduce, diminish or deplete the Receivership assets.[5] Nor are Investor Plaintiffs seeking any injunctive or equitable relief impacting those assets or the administration of the Receivership.

Moreover, unlike the Corporate Defendants and Relief Defendants, the Lawyer Defendants do not have a limited fund from which damages can be recovered on behalf of Investor Plaintiffs. The Lawyer Defendants are well-established law firms with significant resources, including insurance policies, to cover any damages that may be awarded to Investor Plaintiffs in the proposed California action. Indeed, DLA Piper (where Paul Wassgren currently serves as a Partner) is "a global law firm with lawyers located in more than 40 countries" and "more than 25 offices across the United States." Joint Decl., ¶ 25 (citing https://www.dlapiper.com/en/us/aboutus/ (last visited on 6/22/2020)). Fox Rothschild LLP (where Paul Wassgren was formerly a partner) similarly touts itself as "a 950-lawyer national law firm with 27 offices." *Id.* (citing https://www.foxrothschild.com/our-firm/ (last visited on 6/22/2020)). Thus, should the Receiver ultimately decide to pursue separate claims against the Lawyer Defendants on behalf of the Receivership entities, there undoubtedly will be ample resources from which to compensate the Receivership estate.

[5] Any contention by the Receiver that the Receivership may be subject to discovery requests or other requests for information is entirely speculative (as no such discovery has been propounded) and wholly undermined by the Receiver's asserted intention to initiate litigation asserting the Company Claims against certain of the Lawyer Defendants inevitably entailing discovery requiring production of comparable information. Furthermore, the Investor Plaintiffs have concurrently filed a Motion to Transfer the Investor Class Action to this Court as a related case under Local Rule 1.04(c) which, if granted, will allow this Court to oversee and manage any discovery in the Investor Class Action directed to the Receiver.

Any professed concern over the financial capacity of the Lawyer Defendants or the limits or "self consuming" nature of their insurance coverage is not only speculative and unsubstantiated, it is a legally insufficient basis to enjoin prosecution of the Investor Claims. *See*, *In re:FoodServiceWarehouse.com, LLC v. Pride Centric Resources, Inc. et. al.*, 601 B.R. 396, 411-12 (E.D. La. 2019) (rejecting bankrupty trustee's requested injunction because litigation of creditor's claims against third-party auditor "does not threaten to interfere with the administration of the" estate, the auditor's E&O insurance was "not the Debtor's property" and injunctive relief was not justified where the "Trustee's confessed purpose in enjoining Pride's claims is to clear the field of competition from any other claimants … so that the Trustee can obtain the entirety of the available insurance proceeds without interference from Pride"); *In re CHS Elecs.* 261 B.R. 538, 544 (Bankr. S.D. Fla. 2001) ("…the Court is unaware of any Bankrutpcy Code provision or case law that would give a bankruptcy trustee any different status than a non-bankruptcy plaintiff with an unliquidated cliam against third-parteis which may be covered by insurance proceeds…); *In re Reliance Acceptance Grp. Inc.,* 235 B.R. 548, 561-62 (D. Del. 1999). Furthermore, as already noted, the Receiver has indicated no intention of bringing any claims whatsoever against the Fox Rothschild firm.

In short, Investor Plaintiffs' claims against the Lawyer Defendants, who have no financial entanglement with the Corporate Defendants and Relief Defendants, will have no effect on the property or assets of the Receivership and thus are not barred by either the TRO or the Receivership Order. *See Ritchie Capital Mgmt., L.L.C. v. Jeffries*, 653 F.3d 755, 762 (8th Cir. 2011) ("[T]he court's power to stave off suits by third parties turns on these suits' ability to deplete the res of the receivership estate. The court's equitable powers do not reach cases that pose no threat to the assets of the receivership.") (citations omitted).

C. The Receiver Has No Standing Even to Assert the Investor Claims

As now unequivocally confirmed by the Eleventh Circuit, "[i]t is axiomatic that a receiver obtains only the rights of action and remedies that were possessed by the person or corporation in receivership." *Isaiah*, 960 F.3d at 1307. Applying these well-established principles, courts have repeatedly held that a receiver lacks standing to pursue claims that could only be brought by creditors or investors of the company in receivership. *See, e.g., id.* at 1306 ("[T]he receiver is not the class representative for creditors and cannot pursue claims owned directly by the creditors."); *Freeman v. First Union Nat'l*, 329 F.3d 1231, 1235 (11th Cir. 2003) (holding receiver lacked standing to assert negligence claim on behalf of company's creditors against bank arising from bank's participation in Ponzi scheme); *Wiand*, 2007 WL 963162, at *8 (holding receiver "does not have authority to redress injuries on behalf of the investors, who are actual or potential creditors of the Receivership Entities"); *see also Liberte Capital Grp., LLC v. Capwill*, 248 F. App'x 650, 656 (6th Cir. 2007) (holding receiver lacked standing to bring investor's claims for mandatory arbitration against brokers); *Fleming v. Lind–Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (holding receiver lacked standing to bring claims on behalf of investors against commodities firm that mismanaged investors' accounts).

As set forth above, Investor Plaintiffs seek to assert claims against the Lawyer Defendants under causes of action that cannot be asserted by the Receiver, who by contrast holds essentially professional malpractice claims. The Investor Claims are thus non-derivative causes of action for damages to investors that exist ***independently*** of any claims of the EquiAlt Estate or the Receiver, who at best simply stands in the shoes of EquiAlt and can therefore assert only the Company Claims against the Lawyer Defendants.

The Eleventh Circuit's recent decision in *Isaiah* provides controlling precedent. There, the

court appointed a receiver for businesses that were used in a Ponzi scheme executed by principals of the businesses. The receiver sought to recover funds that were fraudulently diverted from the businesses' bank accounts in connection with the scheme. The district court dismissed the receiver's aiding and abetting claims against the bank and the receiver appealed. The Eleventh Circuit affirmed, noting that the receiver did not have standing to bring common law aiding and abetting claims against third parties to recover damages for fraud because the receivership entities themselves could not pursue those claims:

> Isaiah's complaint depicts the Receivership Entities as the robotic tools of the Ponzi schemers, alleging that the Ponzi schemers "asserted complete control over the Receivership Entities in operating the Ponzi Scheme and improperly diverting funds from the bank accounts of the Receivership Entities." Compl. ¶ 20. ... At least on the basis of this complaint, the Ponzi schemers' torts cannot properly be separated from the Receivership Entities, and the Receivership Entities cannot be said to have suffered any injury from the Ponzi scheme that the Entities themselves perpetrated. ***As in Freeman, any claims for aiding and abetting the torts of the Receivership Entities' corporate insiders belong to the investors who suffered losses from this Ponzi scheme, not the Receivership Entities. The Receivership Entities thus cannot assert tort claims against third parties like JPMC for aiding and abetting the Ponzi scheme. Because Isaiah, as receiver, stands in the shoes of the Receivership Entities, he too lacks standing to bring these aiding and abetting claims against JPMC.***

960 F.3d at 1307–08 (emphasis added).

Like the Ponzi scheme at issue in *Isaiah*, the Ponzi scheme alleged by the SEC in this case depicts a scheme in which the Corporate Defendants asserted complete control over the Receivership entities. [Compl., ECF No. 1, ¶¶ 4, 37.] Accordingly, any claims against the Lawyer Defendants for aiding and abetting the misconduct of the Corporate Defendants belong to the investors who suffered losses from the scheme, not the Corporate Defendants in Receivership. The Receivership entities thus cannot assert the Investor Plaintiff's statutory and tort claims against the third-party Lawyer Defendants for aiding abetting the Ponzi scheme. *See, e.g., 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'") (citation omitted); *Scholes*, 744 F. Supp. at 1422–23 ("Fraud on ***investors*** that damages those ***investors*** is for those ***investors*** to pursue – not the receiver.") (emphasis original). Finally, as perhaps the most obvious example, the receiver lacks standing under California's elder abuse statutes, which affords relief only to persons residing in the state of California 65 years of age or older. *See* Cal. Welf. & Inst. Code §§ 15610.07, 15610.27, 15610.30.

The distinct nature of the Investor Claims and the Company Claims here was driven home by the Eleventh Circuit concern in *Isaiah* that Receiver's appointment has no tolling effect on the running of the limitations period on the investor claims:

> To allow receivers to bring these types of lawsuits purportedly for the benefit of the entities' creditors is really to usurp the claims that properly belong to those creditors. And while the receiver continues to litigate these claims in his own suit, ***the statute of limitations may be running on those claims that the creditors actually possess and for which, if enough time has passed, they may lose the ability to recover.***

960 F.3d at 1308 (emphasis added). As *Isaiah* makes clear, the Receiver's interests are limited to collecting the assets of the EquiAlt Estate as a potential ***additional*** source of relief for victimized investors should they choose to file a claim in the Receivership. *Id.* Because no receiver has the standing to assert the investors' claims on the investors' behalf, the Investor Plaintiffs must act on their own behalf.

D. The Receiver Cannot Justify a Stay under the Eleventh Circuit's Stringent Standards

The Receiver may argue that the Investor Plaintiffs should sit on their hands with the Investor Claims while the Receiver pursues its weaker, more complicated Company Claims. But "[o]nly 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. 13, 2009) (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 will suffer no prejudice, let alone "hardship or inequity," in allowing Investor Plaintiffs to pursue their claims against the Lawyer Defendants. As set forth above, Investor Plaintiffs' claims are in no way derivative of the Receiver's claims, nor does the Receiver otherwise have standing to assert the claims on behalf of Investor Plaintiffs. Moreover, any claims that the Receiver may choose to assert against the Lawyer Defendants on behalf of the Receivership entities in the future are at this point entirely speculative, and thus cannot support a total stay of Investor Plaintiffs' claims. *See Mitchell v. Total Wealth Mgmt. Inc.*, No. 14cv1552–GPC–JLB, 2015 WL 2239494, at *3-4 (S.D. Cal. May 12, 2015) (denying stay of investor claims against defendants who were not currently part of receivership action, noting that "Plaintiffs' interest in proceeding outweighs the Receiver's interest in preventing any future, theoretical

impact on the receivership *res*"); *see also Bank v. Simple Health Plans, LLC*, No. 18-CV-6457 (MKB) (ST), 2019 WL 7878570, at *3 n.9 (E.D.N.Y. Dec. 12, 2019) ("[B]ecause the Individual Defendants' personal assets are only *potentially* subject to the receivership rather than definitively subject to the receivership, the existence of the receivership does not provide a basis to stay Plaintiff's action against the Individual Defendants.") (emphasis original). And in any event, this is not a situation in which the Investor Plaintiffs are rushing ahead while the Receiver is sidelined.

To the contrary, the Receiver has already retained counsel to pursue the Company Claims. If anything, the cooperative simultaneous prosectution of the Investor Claims and the Company Claims against the Lawyer Defendants will be mutually beneficial and synergistic given the prospects for shared discovery and the inevitable desire for "global peace" in any settlement negotiations.

CONCLUSION

For the foregoing reasons, Investor Plaintiffs respectfully request that the Court enter an order confirming that Investor Plaintiffs may proceed forthwith with the prosecution of the Investor Claims against the Lawyer Defendants in the Investor Class Action.

Dated: July 22, 2020

Respectfully submitted,

By: *s/ Adam M. Moskowitz*
Adam M. Moskowitz, Esq.
Fla. Bar No. 984280
Adam@moskowitz-law.com
Adam A. Schwartzbaum
Fla. Bar No. 93014
Adams@moskowitz-law.com
The Moskowitz Law Firm, PLLC
2 Alhambra Plaza, Suite 601
Coral Gables, Florida 33134
Telephone: (305) 740-1423
Facsimile: (786) 298-5737

Jeffrey R. Sonn, Esq.
Fla. Bar. No. 773514
jsonn@sonnlaw.com
Sonn Law Group
One Turnberry Place
19495 Biscayne Blvd. Suite 607
Aventura, FL 33180
Tel. 305-912-3000
Fax: 786-485-1501

Andrew S. Friedman, Esq.
(to be admitted pro hac vice)
afriedman@BFFB.com
Francis J. Balint, Jr., Esq.
(to be admitted pro hac vice)
fbalint@BFFB.com
Bonnett Fairbourn Friedman & Balint, P.C.
2325 E. Camelback Rd., Suite 300
Phoenix, AZ 85016
Telephone: (602) 274-1100
Facsimile: (602) 274-1199

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing was filed on July 22, 2020 with the Court via CM/ECF system, which will send notification of such filing to all attorneys of record.

By: *<u>/s/ Adam M. Moskowitz</u>*
ADAM M. MOSKOWITZ
Florida Bar No. 984280