

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,

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.

ORDER

THIS CAUSE comes before the Court for consideration of Plaintiff Securities and Exchange Commission's request for a Preliminary Injunction as set forth in the Emergency *Ex Parte* Motion, (Dkt. 4), and the responses in opposition thereto from Defendant Barry M. Rybicki, (Dkt. 152), and Defendant Brian Davison, (Dkt. 160); the Receiver's Motion to Approve Engagement of Real Estate Valuation Consultant, Specifically, Coldwell Banker, (Dkt. 61); Defendant Davison's Motion to Clarify Scope of

Receivership, (Dkt. 81), and the Receiver's response in opposition thereto, (Dkt. 91); the Receiver's Motion to Expand Receivership, (Dkt. 90), and Defendant Davison's response in opposition thereto, (Dkt. 105); Defendant Davison's Motion to Modify Agreed Order Modifying Asset Freeze, (Dkt. 111), and the Receiver's response in opposition thereto, (Dkt. 129); Non-Party Ferrari Financial Services' Partial Motion for Attorney's Fees, (Dkt. 123); and the "Investor Plaintiffs' Notice of Special Appearance and Motion for Confirmation of Unimpeded Right to Prosecute Investor Claims." (Dkt. 145)

On July 31, 2020, the Court held a show cause hearing to address whether the temporary restraining Order granted by this Court on February 14, 2020, (Dkt. 10), should be converted into a preliminary injunction as requested by the Commission pursuant to Rule 65 of the Federal Rules of Civil Procedure. The Court also addressed various outstanding motions in this matter.

Additionally, the evidence shows that the Defendants most likely operated as a Ponzi scheme using new investor funds to pay old investor obligations while simultaneously siphoning funds for their own benefit far and above any amount that anyone might reasonably believe was disclosed to investors. Just by way of example, (a) money from one fund was used to purchase real estate for another fund or for third party entities owned by Defendant Davison; (b) money from one fund was used to pay investors in another fund; (c) substantial undisclosed commissions were paid to unregistered sales agents; (d) substantial undisclosed fees such as due diligence fees, management fees, success fees, auction fees, underwriting fees, and purchase discount fees were paid to Defendants EquiAlt and Davison; and (e) substantial improper distributions of cash to Defendants Davison and Rybicki in "bonuses" and "principal return." (Id. at ¶ 5)

Additionally, the Court finds that the Commission will likely be able to prove that Defendants Davison and Rybicki used the investor money to purchase high-end luxury items. The Commission demonstrates that it will be able to prove that Defendant Davison spent more than \$14 million of EquiAlt's funds on personal luxury expenses such as chartering private jets and purchasing jewelry and various cars, including multiple Ferraris, a Bentley, a Rolls Royce, and a Pagani. (Id. at ¶ 52) Similarly, it will likely be able to show that Defendant Rybicki purchased luxury items such as Porsches, a Ferrari, watches, and an interest in a soccer team with the investor money he received from EquiAlt and the Funds. (Id.)

Upon consideration of the matters presented and for the reasons set forth on the record at the hearing, the Court finds that the Commission has demonstrated a substantial likelihood of proving that it will prevail on its Section 5 and Section 10(b) registration claims based on the affirmative evidence developed to date demonstrating fraud, the sale of unregistered securities, and representations to investors that were materially false. Just by way of example, the Court finds that the Commission will likely be able to prove the following: that the "investments" — which were unregistered securities in the form of debentures issued by four real estate investment funds managed by Defendant EquiAlt— were falsely touted to investors as "secure," "safe," "low risk," and "conservative;" (Dkt. 138 at ¶ 3) that Defendants Davison and Rybicki also falsely touted that the "investments" had earned millions of dollars in profits, all the time knowing that since at least 2016 the investment funds' revenues failed to cover even their own expenses. (Id.)

In response to the Section 5 allegations, Defendant Davison's counsel cited SEC v. BIH Corp., 5 F. Supp. 3d 1342, 1344 (M.D. Fla. 2014), as a comparative case to this

action. Counsel asserts that the defendant in BIH admitted to a far greater range of activities in connection with the sale of purportedly unregistered securities¹ than Defendant Davison is alleged to have engaged in, yet the BIH Court determined that he was not a substantial and necessary participant in the sale of unregistered securities. Although the defendant in BIH is alleged to have violated many of the same securities' statutes alleged to have been violated in this action, the difference here is that Defendants Davison and Rybicki are controlling individuals of Defendant EquiAlt and the other Corporate Defendants. The Defendants appear to have had equally shared responsibilities and acted in concert to successfully perpetrate the Ponzi scheme. Consequently, the actions by the defendant in the BIH decision, see n.1, do not compare in scope, duration or effect to the Defendants' conduct in this action.

Though the argument was legally persuasive, the Court declines to address the Commission's request for the Court to draw an adverse inference from the assertion by Rybicki of his Fifth Amendment right against self-incrimination. The Court also declines to address any arguments pertaining to Defendants' reliance on counsel because Defendants cannot assert that they relied on the advice of counsel in the absence of a privilege waiver executed prior to the hearing. Additionally, the affidavits provided in

¹ In BIH, the Court analyzed the liability of one of the individual defendants, Edward Hayter, on a summary judgment motion. Hayter opposed entry of summary judgment but admitted that:

(1) [Defendants] Astrom and Guthrie, through their companies Bimini Reef and Riverview Capital, each wired over \$200,000 of the sales proceeds to [Defendant] Hayter in order to satisfy debt owed to him by BIH, (Doc. #137, pp. 2, 3, 4, 26, 28, 32, 33); (2) he provided the contact information for a broker to [Defendant] Astrom's father, (*id.*, p. 33); and (3) he was involved with writing some of BIH's press releases and disseminating them, (*id.*, p. 28). However, [Defendant] Hayter denies that he approached [Defendants] Astrom and Guthrie or structured the transactions, citing his declaration.

BIH Corp., 5 F. Supp. 3d at 1347 (internal citations omitted).

support of Defendant Rybicki's claims are insufficient to illustrate that he relied on the advice of counsel, as such statements are offered as improper triple hearsay (sales representatives' out of court statements of what Rybicki says his attorney told him), and they are not subject to any of the delineated exceptions to the hearsay rules. (Dkts. 152-3-4, 6-7) These statements are also self-serving and do not bear any indicia of reliability such that the Court is willing to rely upon them as evidence for the limited purpose of these proceedings to find that entry of a preliminary injunction is unwarranted. Further, it remains to be seen to what extent Defendant Davison can waive the privilege on behalf of Rybicki, as Defendant Davison apparently is prepared to do, since the claimed attorney-client relationship is alleged to give rise to either a joint privilege shared with Defendant Davison or a privilege solely held by Defendant EquiAlt and not the individual Defendants. Moreover, to the extent Defendant Davison waived the privilege, he did not do so in advance of the hearing, and thus, the Court does not have any evidence of the claimed advice to support a decision to absolve either Defendant from liability at this juncture of this case.

Accordingly, the Court hereby **ORDERS** as follows:


1. The Commission's request for entry of a preliminary injunction is **GRANTED**. The Commission is **DIRECTED** to file a proposed preliminary injunction Order within **fourteen (14) days** from the date of this Order, setting forth the full list of all assets sought to be frozen. The proposed Order shall reflect any applicable modifications that have been made to the Court's temporary restraining Order, such as those modifications made for living expenses and legal fees.

2. The Court finds good cause to believe that unless restrained and enjoined by Order of this Court, Defendants and Relief Defendants will dissipate, conceal or transfer from the jurisdiction of this Court assets which could be subject to an Order of Disgorgement. Consequently, **the temporary restraining Order SHALL remain in effect up to the date the Court issues the Preliminary Injunction.**
3. The Receiver's Motion to Approve Engagement of Real Estate Valuation Consultant, Specifically, Coldwell Banker, (Dkt. 61), is **WITHDRAWN AS STATED AT THE HEARING.**
4. Defendant Davison's Motion to Clarify Scope of Receivership, (Dkt. 81), which the Court construes as a Motion to Exclude the REIT and QOZ Entities from the Receivership, is **DENIED.** The Court finds that the QOZ and REIT Entities are properly within the scope of the Receivership estate.
5. The Receiver's Motion to Expand Receivership, (Dkt. 90), is **GRANTED.** The Receivership is expanded to include the following entities, all associated with the REIT and QOZ:
 - a. EquiAlt Qualified Opportunity Zone Fund, LP ("QOZ");
 - b. EquiAlt QOZ Fund GP, LLC;
 - c. EquiAlt Secured Income Portfolio REIT, Inc. ("REIT");
 - d. EquiAlt Holdings LLC (sponsor of the QOZ and REIT);
 - e. EquiAlt Property Management LLC (property manager of the QOZ and REIT); and

- f. EquiAlt Capital Advisors, LLC (manager of day to day operations for the QOZ and REIT).
6. Non-Party Ferrari Financial Services' Partial Motion for Attorney's Fees, (Dkt. 123), is **RESOLVED AS STATED AT THE HEARING**. The Parties informed the Court that the issue of attorney's fees for non-party Ferrari Financial Services' involvement in this action was resolved prior to the hearing. Ferrari Financial Services will retain its claim for fees as an unsecured creditor's claim in the Receivership. The request for attorney's fees was included in Ferrari Financial Services' Limited Objection, (Dkt. 123), to the Receiver's Motion to Approve Sale of Personal Property (Luxury Vehicles), (Dkt. 109), which was otherwise resolved prior to the hearing. (Dkt. 126)
7. Defendant Davison's Motion to Modify Agreed Order Modifying Asset Freeze, (Dkt. 111), which the Court construes as a Motion for Clarification, is **GRANTED AS STATED HEREIN**. The Court does not preclude more than two attorneys within the same firm working on the case. However, the Court does preclude the attorneys from withdrawing from the case without the Court's approval. Should any matter arise causing counsel to believe that withdrawal is necessary, such attorney(s) may file a motion detailing the reasons why withdrawal is appropriate, and the Court will make a determination based upon the circumstances presented therein.
8. "Investor Plaintiffs' Notice of Special Appearance and Motion for Confirmation of Unimpeded Right to Prosecute Investor Claims," (Dkt. 145),

is **DENIED WITHOUT PREJUDICE** as to the Investors' ability to raise these defenses either affirmatively or defensively in the related action, (8:20-cv-1677-T-35CPT), as appropriate.

DONE AND ORDERED in Tampa, Florida this 17th day of August, 2020.



MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Any Unrepresented Person