UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
v.
BRIAN DAVISON;
BARRY M. RYBICKI;
EQUIALT LLC;
EQUIALT FUND, LLC;
EQUIALT FUND II, LLC;
EQUIALT FUND III, LLC;
EA SIP, LLC;

Defendants, and

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

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

DEFENDANT BRIAN DAVISON'S MOTION
TO RECONSIDER AND SUPPORTING MEMORANDUM OF LAW

Through counsel below, defendant Brian Davison ("Davison") hereby moves pursuant to Fed.R.Civ.Proc. 59(e) and 60(b)(1) and (6) for a reconsideration of the Court's Decision on August 17, 2020 (Docket Entry 184). The basis of this motion is that the Court's decision relied on an inadvertent factual error relating to Davison's role in the purported securities laws regulations.

ARGUMENT

A motion for reconsideration based on a mistake by the court of an issue of fact can be premised on either Fed.R.Civ.Proc. 59(e) or 60(b)(1) or (6). Fed. R. Civ.Proc. 60 provides that the Court "may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." *See also* Fed.R.Civ.Proc 60(b)(1) and (6). Applicable case law also provides that these types of applications may also be brought under Fed.R.Civ.Proc. 59(e) to correct clear error.

As this Court held in *Daub v. Allstate Ins. Co*., 2017 WL 2868406, * 1 (M.D. Fla. Apr. 26, 2017), reconsideration is appropriate to "correct clear error" (among other reasons) (granting motion to reconsider). *See also ALPS South, LLC v. Ohio Willow Wood Co*., 2013 WL 12161867, *1 (M.D. Fla. Nov. 12, 2013) (granting motion for reconsideration under Rule 59(e)). *Compare Z.K. Marine Inc. v. M/V Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) ("purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence."); *Offices Togolais Des Phosphates v. Mulberry Phosphates, Inc*., 62 F. Supp. 2d 1316, 1331 (M.D. Fla. 1999) ("Rule 59(e), Fed.R.Civ.P., gives the court broad discretion to reconsider an order which it has entered."); *Sussman v. Salem, Saxon & Nielsen, P.A*., 153 F.R.D. 689, 694 (M.D. Fla. 1994).

Here, the basis of the motion for reconsideration is that there has been an inadvertent but clear error of fact. That error seems to be related to a misapprehension regarding Davison's role in connection with the purported sale of unregistered securities.

In the Court's Order of August 17, 2020, Docket Entry 184 ("Order") the Court appeared to premise its decision on the belief that the SEC 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, [and] the sale of unregistered securities . . .". The Order also stated that "Defendants appear to have had equally shared responsibilities and acted in concert to successfully perpetrate the Ponzi scheme." Order, at 4. Thus, it appears that the Court's Order was premised on a belief that Davison was involved both in the sale of unregistered securities and that he shared equally in the responsibility for the distribution of unregistered securities.

This is an error of fact for two reasons.

First, it was the SEC that alleged – repeatedly – that Davison did not bear responsibility for the sales process, and that Defendants did not have "equally shared responsibilities" or "act in concert." In fact, the SEC alleged exactly the opposite. *See* Amended Complaint ("Am.Cmplt.") ¶ 38 ("Davison and Rybicki largely split their primary functions"); ¶ 4 ("Rybicki primarily controlled communications with investors [and] marketing" and executed agreements with investors); ¶ 11 ("Rybicki's activities were largely directed toward soliciting and raising money from investors" and "Rybicki communicated directly with investors, and raised money from investors for the Funds"), ¶ 41 ("Rybicki was otherwise primarily responsible for raising money for the Funds from investors.")[1]

[1] *See also* Am. Cmplt. ¶ 40 ("Rybicki created, reviewed, or approved changes to marketing materials" and "controlled the distribution or dissemination of the Funds offering documents to prospective investors"); ¶ 41

Second, the disclosure documents provided to investors, and included in the submissions made by the SEC, clearly disclose that the securities were not registered. "THESE SECURITIES HAVE NOT BEEN REGISTERED WITH NOR APPROVED OR DISAPPROVED BY THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION. . . . THIS OFFERING HAS NOT BEEN APPROVED OR DISAPPROVED UNDER APPLICABLE STATE SECURITIES LAWS" Fund II May 10, 2013 PPM, at I (capitalization in original). *See also* March 29, 2017 PPM at i, 4; Subscription Agreement at Section 4.6; EA SIP LLC PPM at i, 5; 2018 EquiAlt Fund, LLC Subscription Agreement, at Section 4.6 ("The Subscriber understands that the Units have not been registered.").[2]

CONCLUSION

As set forth above, the Court's Order of August 17, 2020 was premised on two, but related, inadvertent errors regarding Davison's involvement in the selling process and misstatements as to whether or not the securities were registered. Consequently, to that extent the Order was premised on these errors it should be reconsidered.

LOCAL RULE 3.01(g) CERTIFICATE

Pursuant to Local Rule 3.01(g), counsel for Defendant Brian Davison has conferred with counsel for Plaintiff, Alise Johnson, and counsel for Co-Defendant Barry Rybicki, Adam Fels, both of whom did not consent to the requested relief.

("Rybicki primarily controlled the sales force and communications with investors" (id.) and that he "managed EquiAlt's relationships with various third-party sales agents," "provided those agents with marketing and offering materials" and "advised third-party sales agents that neither a license nor registration were required to sell EquiAlt securities."); *id*. at ¶¶ 58, 64-67, 71-72, 76.

[2] Furthermore, the fact that the Funds owned hundreds of properties, and that the Receiver has not only retained most of the former employees but has sold some of these properties for multiples of their acquisition cost, negates the assumption that this was a classical Ponzi scheme.

/s/ Gerald D. Davis
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed via the Court's CM/ECF system, which will send an electronic copy of the foregoing and a notice of filing same to all counsel of record, on this 1st day of September, 2020.

/s/ Gerald D. Davis
Attorney