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

**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 III, LLC,**
**EA SIP, LLC,**

**Defendants, and**

**128 E. DAVIS BLVD, LLC, et al.,**

**Relief Defendants.**
_____/

**PLAINTIFF'S RESPONSE TO DEFENDANT BRIAN DAVISON'S MOTION TO DISMISS AMENDED COMPLAINT**

Defendant Brian Davison's Motion to Dismiss the Amended Complaint (D.E. 177) is a re-tread of arguments he already made in his Memo in Opposition to the request for a preliminary injunction (D.E. 160) which the Court already rejected. On August 17, 2020, the Court entered its Order granting the Securities and Exchange Commission's (hereinafter "SEC" or "Commission") request for a Preliminary Injunction (D.E. 184). In its Order, the Court found that the evidence shows the Defendants most likely operated as a Ponzi scheme using new investors' funds to pay old investor obligations while simultaneously siphoning funds for their own benefit far above any amount that anyone might be reasonably believe was disclosed to investors. The Court further found that the

Commission has demonstrated a substantial likelihood of proving it will prevail on its Section 5 registration claims against Mr. Davison. *Id*. Based on these finding alone, the Court should summarily deny Davison's motion to dismiss. As to the spurious claims raised in the Motion to Dismiss, the Commission responds below.

## Legal Analysis

### A. The Court Should Reject Davison's Attempt To Re-Argue the Same Positions as Rejected in the Court's Order Granting a Preliminary Injunction

As stated above, this Court rejected the misguided arguments Davison now raises again in his Motion to Dismiss when the Court granted the SEC's request for preliminary injunction. *See generally,* Order Granting the Preliminary Injunction (D.E. 184). Thus, the Motion to Dismiss is a waste of judicial resources, and the Court should summarily reject Davison's effort to repackage his arguments in a motion to dismiss. The law-of-the-case doctrine holds that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Klay v. All Defendants*, 389 F. 3d 1191, 1197 (11th Cir. 2004), *quoting Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (citations omitted). This promotes the finality and efficiency of the judicial process by protecting against the agitation of settled disputes.

Under the law-of-the case doctrine, the court may revisit previously decided issues when: (1) new and substantially different evidence emerges at a subsequent trial; (2) controlling authority has been rendered that is contrary to the previous decision; or (3) the earlier ruling was clearly erroneous and would work a manifest injustice if implemented. *Klay*, 389 F. 3d at 1197-98. Plainly, none of these circumstances has occurred here. There has not been a change in the law since August 17, 2020 when this Court made its ruling on

the Motion for Preliminary Injunction. There is no new evidence, and the Court did not make any error of law. Thus, the Court should deny the Motion on its face.

**B. Standard of Review**

Davison moves to dismiss the Amended Complaint (D.E. 138) arguing the Commission has (1) failed to plead fraud with the particularity required under Federal Rules of Civil Procedure 9(b); (2) failed to state a cause of action pursuant to Rule 12(b)(6); (3) failed to state an aiding and abetting claim; and (4) failed to state a claim under Section 5 of the Securities Act of 1933 ("Securities Act").[1] However, the motion engages in no discussion of the high burden Davison must meet to warrant dismissal under any of these theories. The Court must accept as true all facts alleged in the Complaint in the light most favorable to the Commission. *American United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1057 (11th Cir. 2007). All reasonable inferences in the Complaint must be drawn in the Commission's favor. *Ventrassist Pty.*, 377 F. Supp. 2d at1285.

The Court's inquiry at the motion to dismiss stage still focuses on whether the challenged pleadings "give the defendant fair notice of what the … claim is and the grounds upon which it rests." *McMillian v. AMC Mortgage Servs, Inc.*, 560 F. Supp. 2d 1210, 1213 (S.D. Ala. 2008) (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). The proper test is

[1] Davison's motion also argues briefly that the Claims must be dismissed because some of the facts alleged are contracted or disclosed in the offering documents. The premise of this argument—that disclosure in one place somehow cancels out the misrepresentations—is incorrect. *See Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1097 (1991) ("[N]ot every mixture with the true will neutralize the deceptive."). Given that the standard at the motion to dismiss stage requires the Court to accept the Plaintiff's alleged facts as true, Davison's argument must be rejected. *See e.g. Ventrassist Pty. Ltd. v. Heartware, Inc.,* 377 F. Supp. 2d 1278, 1285 (S.D. Fla. 2005) ("[a motion to dismiss] is not a procedure for resolving a contest between the parties about the facts or the substantive merit of the plaintiff's case"); *Chudasama v. Mazda Motor Corp.,* 123 F.3d 1353, 1367 (11th Cir. 1997) (there are no issues of fact at the motion to dismiss stage because the allegations contained in the pleading are presumed to be true).

whether the complaint contains either direct or inferential allegations respecting all material elements necessary to sustain a recovery under some viable legal theory. *Financial Sec. Assur. Inc., v. Stephens Inc.,* 500 F.3d 1276, 1282 (11th Cir. 2007). The threshold for withstanding a motion to dismiss based on a claim of inadequate pleading is "exceedingly low." *In the Matter of Southeast Banking Corp.*, 69 F.3d 1539, 1551 (11th Cir. 1995). The Commission has more than satisfied this pleading standard.

Davison overstates the requirements for pleading fraud with particularity under Federal Rule of Civil Procedure 9(b). Rule 9(b) does not abrogate the concept of notice pleading set forth in Rule 8(a). *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001); *SEC v. Physicians Guardian Unit Inv. Trust*, 72 F. Supp. 2d 1342, 1353 (M.D. Fla. 1999) (denying motion to dismiss). The purpose of Rule 9(b) is to ensure allegations of fraud are specific enough to provide sufficient notice of the acts complained of and eliminate those complaints filed as a pretext for discovery of unknown wrongs. *SEC v. Ginsburg*, 2000 WL1299020, at *6 (S.D. Fla. Jan. 10, 2000). Pleading fraud with particularity does not require pleading "detailed evidentiary matter." *Coquina Invs. v. Rothstein*, 2012 WL 4479057, at*12 (S.D. Fla. Sept. 28, 2012). *See also Ross v. A.H. Robins Co.*, 607 F.2d 545, 557 n.20 (2d Cir. 1979) (reversing dismissal of a private Section 10(b) action). The complaint need only provide a reasonable delineation of the underlying acts and transactions constituting the fraud. *Anderson v. Transglobe Energy Corp.*, 35 F. Supp. 2d 1363, 1369-70 (M.D. Fla. 1999) (denying motion to dismiss). A complaint pleads fraud with particularity if it alleges the substance of the fraudulent acts, who engaged in the fraud, and when the fraud occurred. *Hekker v. Ideon Grp., Inc.*, 1996 WL 578335, at*4 (M.D. Fla. Aug. 19, 1996) (denying motion to dismiss).

Under these standards, the Commission's detailed Amended Complaint, which includes 82 paragraphs of underlying facts (identifying who, what, when, where, and how) satisfies the requirements for pleading fraud with particularity. *See also SEC v. Homa*, 2000 WL 1100783, at *3-4 (N.D. Ill. Aug. 4, 2000) (Commission "pleaded the who, what, when, where, and how of the fraud in sufficient detail" by setting forth the role of the defendants in the offerings, how the securities were marketed to investors nationwide, the time frames of the offerings, and the substance of the misrepresentations).

In his motion, Davison wrongly asserts that the SEC's submission demonstrates Davison played no role in making the alleged misrepresentations. Such assertions completely ignore or outright contradict the allegations in the Amended Complaint (and the Court's findings regarding same) that Davison was a controlling person of EquiAlt who ran EquiAlt as a Ponzi scheme, while hiding the scheme, as well as other misappropriations, from the Funds' investors. As alleged in the Amended Complaint, Davison omitted such actions from the Funds' PPMs and from subsequent communications sent to investors. Moreover, as alleged in the Amended Complaint, and found by the Court in preliminary injunction order, in his role as a control person, Davison was responsible for the unregistered sales of the securities.

**C. The Allegations of the Amended Complaint Sufficiently Plead Fraud Against Davison**

A simple reading of the Amended Complaint belies Davison's allegations and shows the SEC has sufficiently pled a fraud case against Davison. In addition to the detailed summary of the frauds at issue, the Amended Complaint clearly delineates Davison's role in the scheme, and states that:

1. Davison controlled EquiAlt and the Funds, and their bank accounts and real estate activities: "Davison personally controlled the bank accounts, finances and accounting for

each of the Funds. Davison was in control of most of the real estate activities and administrative activities of the Funds" (Amended Complaint ¶ 10). "Davison owned EquiAlt, whose primary business was to manage the operations of the Funds." (Amended Complaint ¶ 38). "Davison, the CEO, formed EquiAlt in 2011 and had signature authority over the bank accounts for EquiAlt and the Funds. Davison controlled the real estate investment portfolio and the Funds' day-to day activities and general affairs." (Amended Complaint ¶¶ 38, 59).

2. Davison controlled the sales activities with Rybicki: "Davison and Rybicki worked jointly to establish the Funds' sales operations and investor communications." Amended Complaint ¶ 38). [2]

3. EquiAlt was run as a Ponzi scheme since at least 2016 (Amended Complaint ¶¶ 48-50) at Davison's direction: "he supervised and directed the controller and accounting personnel for the company. He also signed numerous debentures and checks authorizing the use of new investor proceeds to make interest payments to old investors, and checks misappropriating money to himself and Rybicki." (Amended Complaint ¶ 39).

4. Davison misappropriated millions of dollars directly from the Funds for his own benefit, including $7.8 million in "principal returns," $4 million to pay personal credit cards, $1.8 million to pay personal income taxes, and millions to pay for his residence and other properties for his personal use. (Amended Complaint ¶¶ 51-53).

[2] Indeed, in his testimony before the SEC, a transcript of which was filed simultaneously with the Complaint as an exhibit in support of the Motion for TRO, Davison stated that Rybicki "reports to me." Motion for TRO (D.E. 7), Ex. 4 at p. 76, line 19.

5. As alleged in the Amended Complaint, neither the Ponzi scheme nor the misappropriation were disclosed to investors in the offering documents or elsewhere. (Amended Complaint ¶¶ 57, 60, 62-63, 69-70).

6. "Both Davison and Rybicki reviewed, revised, and made changes to private placement memoranda ("PPMs"), debentures, and subscription agreements for the Funds." (Amended Complaint ¶ 40). In his testimony, Davison states that "I created documents like these with counsel about the time period of . . . 2011, private placement memorandum generally," Motion for TRO (D.E .7), Ex. 4, at 92, lines 12-15.

7. Davison "misused millions of investors' dollars in a manner inconsistent with the PPMs and account statements provided to investors, drafted and approved by Davison." (Amended Complaint ¶¶ 54-56, 70). Such misrepresentations and omissions included not informing investors of the Ponzi operation, misuse of funds, commingling of money between funds, undisclosed fees paid to Davison and misrepresenting in PPMs that 90% of investor funds would be used to "invest in property" when less than 50% was used for that purpose. (Amended Complaint ¶¶ 54-62, 70).[3]

8. Davison also paid himself millions in extraneous fees that were never disclosed to investors. (Amended Complaint ¶¶ 56, 60, 62-63, 69-70).

9. As a result of his knowledge and control of the Funds' bank accounts, accounts, and real estate investments and revenues, "Davison knew or was reckless in not knowing that

[3] The PPMs include charts showing how the money raised from investors will be used that have a column for "Working Capital (i.e. investments in real property)" that, when reviewed as a percentage of funds used, purport that 89 to 95% of the monies raised will be used for "Working Capital." As the SEC's analysis shows, less than 33% of the $171 million raised from investors was used to invest or improve real properties. *See* TRO Exhibits (D.E. 7), Declaration of Marc Dee Ex. 4 at ¶ 10.

EquiAlt was not investing in the Funds' assets as promised and in failing to disclose the various fees he was taking in the offering documents which he helped author and authorized be disseminated." (Amended Complaint ¶¶ 59-62).

The SEC has more than met its "exceedingly low burden" by identifying in the Amended Complaint the what, when, and where of how Davison committed fraud, thus satisfying Rule 9(b)'s requirements for pleading fraud with particularity. Davison completely ignores the Complaint's allegations that he controlled EquiAlt, participated in the drafting and approval of misleading PPMs sent to investors, and was responsible for orchestrating the Ponzi scheme and misappropriation of investor money, but never disclosed these material facts to investors.

Davison's reliance on *SEC v. Spinosa,* 31 F. Supp. 1371 (S.D. Fla. 2014) is misguided as that case involved allegations against an executive at a third-party bank who made misrepresentations to certain investors that aided in the continuance of the Ponzi scheme. The defendant in *Spinosa* was not, as is the case here, the orchestrator and control person of the Ponzi scheme. In that case, the court found the complaint to be deficient as it did not adequately identify the investor recipients of letters written by the defendant. Thus, the *Spinosa* court gave the SEC leave to amend its pleadings to include the names of the recipients of the misrepresentations to put the defendant on notice of the exact statements upon which the SEC's claims were based.

Similarly, the court's decision in *SEC v. Radius Capital Corp.*, 2012 WL 695668 (M.D. Fla. Mar. 1, 2012), is easily distinguishable from the instant case. In *Radius*, the court found in that the minimal allegations in the SEC's complaint regarding misrepresentations in the prospectuses did "not explain the process by which the prospectuses were issued" and "does

not identify who was ultimately responsible for the content of the prospectuses" or "explain the defendants' specific role in the process." *Radius*, at *7.

Here, there is no confusion that the SEC has pled sufficient facts that if taken as true show Davison to be the author and ultimate authority and disseminator of misstatements and omissions. The SEC has alleged Davison did not disclose to investors that he: (1) orchestrated a Ponzi scheme, (2) misappropriated investor money for personal use, (3) helped to draft PPM's that contained knowing misrepresentations as to how investor money would be used, and (4) authorized and approved the PPMs for dissemination to almost every investor. Thus, the Commission has adequately pled its fraud claims. *See e.g., SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972) ("We hold that the misappropriation of the proceeds [of a securities offering] is a garden variety type of fraud.") (*quoting Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 10 n.7 (1971)).

**D. The Amended Complaint Sufficiently Pleads Davison Violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act")**

**1. <u>Davison was the "maker" of several false statements and omissions told to Investors</u>**

Davison misapplies the Supreme Court's decision of *Janus Capital Grp., Inc. v. First Derivative Traders,* 564 U.S. 135 (2011), to allege that the SEC's Rule 10b-5(b)[4] claims against him are deficient, inaccurately asserting that the Amended Complaint does not demonstrate that he is the author of any misstatement. *Janus* turned on the interpretation of

[4] *Janus* "considered the language in [Exchange Act Rule 10b-5(b)]." *Lorenzo v. SEC*, 139 S. Ct. 1094, 1103 (2019). *Janus* therefore does not apply to claims under Section 17(a) of the Securities Act or Rules 10b-5(a) or (c) of the Exchange Act. *See SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 797-98 (11th Cir. 2015); *SEC v. Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014).

the word "make" in Rule 10b-5(b) of the Exchange Act. Specifically, a defendant may be responsible for a misstatement under Rule 10b-5(b) if it is the "person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Id*. at 142.

Davison takes the *Janus* holding out of context. As alleged in the Amended Complaint, Davison made the statements and omissions pursuant to his responsibilities and authority as a control person on EquiAlt in order to market the EquiAlt securities, not as in *Janus*, on behalf of some separate entity. *Janus* does not alter the well-established authority that a "corporation can act only through its employees and agents." *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation,* 2011 WL 3444199, *25 (D.N.J. Aug. 8, 2011) (holding *Janus* is limited to claims against "separate and independent" entities and "certainly cannot be read to restrict liability for Rule 10b-5 claims against corporate officers").

Here, the Amended Complaint sufficiently alleges Davison was the maker of many false statements as well as the person with ultimate authority over disseminating these false statements, including their content and whether and how to communicate it. In his Motion, Davison glosses over the numerous allegations in the Amended Complaint that set forth his misrepresentations to investors. Instead, Davison blames Defendant Barry Rybicki, a person who he testified reported to him, for statements made by EquiAlt, the company solely owned by Davison. Motion for TRO (D.E. 7), Ex. 4 at p. 76, line 19. In addition, Davison neglects to acknowledge that the Commission alleges that:

- both Davison and Rybicki reviewed, revised, and made changes to private placement memoranda ("PPMs"), debentures, and subscription agreements for the Funds." (Amended Complaint ¶ 40).
- Davison testified that "I created documents like these with counsel about the time period of . . . 2011, private placement generally," Motion for TRO, Ex. 4, at 92, and that he gave Rybicki "full authorization to provide document to the prospective investors." *Id*. at 93, and
- Davison "misused millions of investors' dollars in a manner inconsistent with the PPMs and account statements provided to investors, drafted and approved by Davison." (Amended Complaint ¶¶ 54-56, 70). Such misrepresentations and omissions included not informing investors of the Ponzi operation, misuse of funds, mingling of money between funds, undisclosed fees paid to Davison and misrepresenting in PPMs that 90% of investor funds would be used to "invest in property" when less than 50% was used for that purpose. (Amended Complaint ¶¶ 54-62, 70).

In addition, in his role as CEO of EquiAlt, Davison controlled EquiAlt and the Funds and thus was ultimately responsible for the misstatements made by the Funds. Other courts have also held individual officers to be "makers" under *Janus*. *See e.g., SEC v. Carter*, No. 10 C 6145, 2011 WL 5980966, at *2-3 (N.D. Ill. Nov. 28, 2011); *SEC v. Das*, No. 8:10CV102, 2011 WL 4375787, at *6 (D. Neb. Sep. 20, 2011); *SEC v. Landberg*, No. 11 Civ. 0404, 2011 WL 5116512, at *4 (S.D.N.Y. Oct. 26, 2011).

**2. <u>The Misrepresentations Were Material</u>**

Davison also wrongly asserts that the Amended Complaint fails to allege facts that demonstrate materiality. Materiality is a "mixed question of law and fact" because it involves

the application of a legal standard to a particular set of facts, and accordingly, depends on the relevant circumstances of the case. *SEC v. Scoppetoulo*, 2011 WL 294443, at *2 (S.D. Fla. Jan. 27, 2011) (citing *TSC Indus., Inc*., v. *Northway, Inc.*, 426 U.S. 438, 449-50 (1976)). It is inappropriate to dismiss a securities fraud complaint at the pleading stage unless a reasonable person cannot identify the significance of the alleged misstatement or omission. *TSC Indus.*, 426 U.S. at 450. Moreover, a "misstatement made in any phase of the selling transaction can be material if a reasonable investor would have considered the defendant's alleged misrepresentations important, even if the statement is not made directly to the investor." *SEC v. Czarnik*, 2010 WL 4860678, at *5 (S.D.N.Y. Nov. 29, 2010). The Commission is not required to prove that any investor actually relied on the misrepresentations or that the misrepresentations caused any investor to lose money. *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1244 (11th Cir. 2012).

Here, the SEC has adequately pled that reasonable investors would have considered the following facts material: that EquiAlt was a Ponzi scheme and Davison was paying himself and otherwise misappropriating millions of dollars, contrary to what was alleged in the offering documents.

**3. <u>Section 10(b)'s "In Connection With" Requirement is Met</u>**

Davison contends that the Section 10(b) claims must fail because the misconduct with respect to managing the funds was not made "in connection with" the purchase or sale of securities. This contention again misstates the allegations against Davison. As set forth above, the Amended Complaint alleges several instances of misstatements and omissions made to investors by Davison to entice them into investing in the Funds. In addition to the back office misconduct of misappropriating funds, the Amended Complaint alleges the offering materials

authored and authorized by Davison misstated to investors how their funds would be invested, the source of revenues for their interest payments, and the risks involved in the investments. The Supreme Court has often stated that the Exchange Act should be "construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (citations omitted).

Here, Davison's hyper-technical argument lacks merit. See e.g., *SEC v. Zouvas*, 2016 WL 6834028, at *7-9 (S.D. Cal. Nov. 21, 2016) (stating that "the 'in connection' condition is met if the fraud alleged 'somehow touches upon' or has 'some nexus with 'any securities transaction'") (citations omitted). *SEC v. DCI Telecomm., Inc.,* 122 F. Supp. 2d 495, 499–500 (S.D.N.Y. 2000) (statements in press releases and website content satisfy the "in connection" with requirement); *SEC v. Lauer,* 2008 WL 4372896, *23 (S.D. Fla. Sept. 24, 2008) (misrepresentations and omissions were made "in connection" with the purchase and sale of investments in the funds were investors purchased and sold the funds' securities). Davison's "in connection argument" is also contrary to established case law. *SEC v. Radius Capital Corp.*, 653 Fed. App'x. 744, 751 (11th Cir. 2016) ("Misrepresentations themselves need not be explicitly directed at the investing public or occur during the transaction to be 'in connection with the purchase or sale of' or 'in the offer or sale of' any security", and rejecting argument that for liability to attach, the misrepresentations must be disseminated into the public arena). *See e.g., In re Software Toolworks Inc. Sec. Litig.,* 50 F.3d 615, 628–29 & n. 3 (9th Cir.1994) (holding that drafting or editing false statements that the person knows will be publicly disseminated constitutes a primary violation).

Moreover, as alleged in the Amended Complaint, Davison was essentially operating a Ponzi scheme, which is itself a violation of Rule 10b-5. *See SEC v. Watermark Fin. Serv. Grp.*, No. 08-cv-361S, 2012 WL 501450, at *6 (W.D.N.Y. Feb. 4, 2012) (defendants "never disclosed that they were essentially operating a Ponzi scheme."). Thus, there can be no question that Davison's actions, which allowed the sale of investments in the Fund he owned and operated as a Ponzi, were "in connection with" the purchase or sale of a security.[5]

**E. Control Person Liability Can Be Established**

Perhaps the most dubious of Davison's contentions is that the SEC does not allege facts sufficient to prove control person liability under Section 20(a) of the Exchange Act of 1934, 15 U.S.C. §§ 78t(a). To plead a violation under Section 20(a), the Commission must allege "that (1) the defendant had the power to control the general affairs of the primary violator, and (2) the defendant had the power to control the specific corporate policy that resulted in the primary violation." *Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 723 (11th Cir. 2008); *Brown v. Enstar Group, Inc.*, 84 F.3d 393, 396 (11th Cir. 1996).

Here, the Amended Complaint is replete with allegations demonstrating Davison had control over EquiAlt and its affairs and had the power to control and stop the violations. As alleged in the Amended Complaint (and indeed testified to by Davison himself):

[5] To the extent that Davison asserts that the Section 17(a) claims fail because the SEC has not alleged that Davison committed fraud "in the offer or sale of securities", this argument must fail for the same reasons S*ee Lorenzo*, 139 S. Ct. at 1101 (knowing dissemination of false statement made by another constitutes violation of Securities Act § 17(a)(1) and Exchange Act Rule 10b-5(a), (c)); *Radius Capital Corp.*, 653 Fed. App'x. at 750 .

- Davison, EquiAlt's CEO, personally controlled the bank accounts, finances and accounting for each of the Funds. Davison was in control of most of the real estate activities and administrative activities of the Funds" (Amended Complaint ¶ 10). "Davison owned EquiAlt, whose primary business was to manage the operations of the Funds." (Amended Complaint ¶ 38). Davison "had signature authority over the bank account for EquiAlt and the Funds. Davison controlled the real estate investment portfolio and the Funds' day-to day activities and general affairs." (Amended Compliant ¶¶ 38, 59).
- Davison controlled the sales activities with Rybicki "Davison and Rybicki worked jointly to establish the Funds sales operations and investor communications." (Amended Complaint ¶ 38).
- Davison "reviewed, revised, and made changes to private placement memoranda ('PPMs'), debentures, and subscription agreements for the Funds." (Amended Complaint ¶ 40).
- Davison testified that "I created documents like these with counsel about the time period of . . . 2011, private placement generally," Motion for TRO, Ex. 4, at 92, line 12-15.
- Davison "misused millions of investors' dollars in a manner inconsistent with the PPMs and account statements provided to investors, drafted and approved by Davison." (Amended Complaint ¶¶ 54-56, 70). Such misrepresentations and omissions included not informing investors of the Ponzi operation, misuse of funds, mingling of money between funds, undisclosed fees paid to Davison and misrepresenting in PPMs that 90% of investor funds would be used to

"invest in property" when less than 50% was used for that purpose. (Amended Complaint ¶¶ 54-62, 70).

Such allegations are more than adequate to establish control person liability. *Laperriere,* 526 F.3d at 723.

**F. The Commission's Claims for Aiding and Abetting are Sufficiently Pled**

Davison contends that the Commission fails to state a claim for aiding and abetting in Counts IX. In support, he claims the Amended Complaint fails to allege that Davison "knowingly and substantially assisted" the conduct that constitutes the violation. A simple review of the Amended Complaint shows this arguments to be spurious.

Section 20(e) of the Exchange Act provides that "any person that knowingly or recklessly provides substantial assistance to another person in violation of provision of" that act "shall be deemed to be in violation of such provision." To establish aiding and abetting liability, the Commission must prove: (l) a primary violation; (2) that the defendant knew or recklessly disregarded that his role was part of an overall activity that was improper; and (3) substantial assistance of the conduct that constitutes the violation. *See SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 800 (11th Cir. 2015). Here, the Commission has sufficiently shown Davison knowingly or recklessly provided such assistance to EquiAlt.

In the instant case, there are primary violations of Section 15(a) by the sales agents who solicited investments in the Funds and received transaction-based compensation in the form of commissions. (Amended Complaint ¶ 112). The sales agents were never registered with the Commission as broker-dealers or associated with a registered broker-dealer.

(Amended Complaint ¶¶ 111-112). Davison knew that unregistered sales agents were selling EquiAlt's securities and assisted those violations by masking their role as third party agents (falsely calling them EquiAlt employees), and encouraging the agents to sell the securities by misinforming them that they did not need to be registered. Davison and EquiAlt had agreements with a number of unregistered sales people to solicit investors to purchase EquiAlt securities and paid them transaction-based commissions through BR Support Services. These allegations are more than sufficient to show that Davison aided and abetted the unregistered brokers' primary violations.

**G. The Commission Adequately States a Section 5 Violation of the Securities Act**

Section 5(a) of the Securities Act provides that, unless a registration statement is in effect as to a security, it is unlawful for any person, directly or indirectly, to engage in the offer or sale thereof in interstate commerce. A prima facie case for a violation of Section 5 is established by showing that: (1) the defendant sold or offered to sell securities; (2) no registration statement covered the securities; and (3) the sale or offer was made through the use of interstate facilities or mails. *See SEC v. Calvo*, 378 F.3d 1211, 1214 (11th Cir. 2004). Scienter is not an element of a Section 5 violation. *Id.* at 1215. Moreover, a defendant does "not have to be involved in the final step of the distribution to have participated in it." *Zacharias v. SEC*, 569 F.3d 458, 464 (D.C. Cir. 2009). A person can be liable if he/she was a "necessary participant" and "substantial factor" in the transaction. *Calvo*, 378 F.3d at 1215. Here, the SEC has adequately pled that Davison was both a necessary participant and a substantial factor in the sale of the unregistered securities.

Davison relies on the inapposite case of *SEC v. CMKM Diamonds, Inc.*, in which the court held that the Commission was *not entitled to summary judgment* on a Section 5 claim

against the defendant, finding the issue of whether the defendant was a substantial factor in the sales was a question for the jury. 729 F.3d 1248, 1257-59 (9th Cir. 2013). First, *CMKM* is procedurally distinguishable because it addressed the Commission's summary judgment motion, not the defendant's motion to dismiss. Second, regardless of whether the Commission eventually will be entitled to summary judgment, the evidence will be more than sufficient for a jury to find that Davison was a substantial participant in the offer or sale here in light of his specific awareness of the fraud and control over the sales of the investments. Davison may not avoid Section 5 liability by simply pointing the finger at Rybicki to whom he supervised, and authorized to sell the investments. *See SEC v. Friendly Power Co. LLC*, 49 F. Supp. 2d 1363, 1369 (S.D. Fla. 1999) ("Even where the person . . . does not have individual contact with the purchasers of the securities, that person . . . has indirectly offered or sold that security to the public if he . . . has employed or directed others to sell or offer them, or has conceived of and planned the scheme by which the unregistered securities were offered or sold.").

Lastly, as the Court has already found in its Order Granting the Preliminary Injunction, Davison's reliance on *SEC v. BIH Corp*., 5 F. Supp. 3d 1342, 1347 (M.D. Fla. 2014), is unavailing as it was decided on summary judgment. As this Court explained:

> 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, (footnote omitted), do not compare in scope, duration or effect to the Defendants' conduct in this action.

Order on Preliminary Injunction (D.E. 184) at p. 4.

## CONCLUSION

For all of the foregoing reasons, the Commission respectfully requests that the Court deny Davison's Motion to Dismiss.

Dated: September 8, 2020

Respectfully submitted,

By: s/ Alise Johnson

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## CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, I electronically filed the foregoing with the Clerk of the Court using CM/ECF, which will send a notice of such filing to all counsel of record.

s/ Alise Johnson