UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CIVIL ACTION NO. 20-cv-00325-MSS-AEP

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BRIAN DAVISON, BARRY RYBICKI, EQUIALT LLC et al.,

Defendants.
_____/

PLAINTIFF'S RESPONSE IN OPPOSTION TO DEFENDANT BRIAN DAVISON'S MOTION TO RECONSIDER

Following a full hearing, and having reviewed the briefings by all parties, on August 17, 2020, the Court entered its Order granting the SEC's request for a preliminary injunction. (D.E. 184). Defendant Brian Davison now moves for reconsideration of that Order, arguing the Court erred in finding that the SEC has demonstrated a substantial likelihood of showing that it will prevail on its claims pertaining to Davison's sale of unregistered securities. In support of his Motion for Reconsideration (D.E.193), Davison offers no new law or evidence. Instead, Davison alleges the Court erred in its review of the facts regarding his role in the sale of securities.

Davison's assertions are both incorrect and woefully inadequate. Davison previously raised these exact same misguided arguments in his Memorandum of Law in Opposition to SEC Order to Show Cause. *See* D.E. 160 at pp. 4-9. After a full review, the

Court soundly rejected them. Raising the exact same arguments, in the guise of a Motion for Reconsideration, is a waste of the Court's resources. Thus, the Court should summarily deny the already-rejected arguments raised in the motion.

LEGAL ARGUMENT

A motion for reconsideration should not be used to "repackage familiar arguments to test whether the Court will change its mind." *Brogdon v. Nat'l Healthcare Corp*., 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000). A Court will grant a motion for reconsideration of an interlocutory order only if the movant demonstrates there has been an intervening change in the law, new evidence has been discovered which was not previously available to the parties in the exercise of due diligence, or the court made a clear error of law. *McCoy v. Macon Water Authority*, 966 F. Supp. 1209, 1222-23 (M.D. Ga. 1997); *Daub v. Allstate Ins. Co.,* 2017 WL 2868406, * 1 (M.D. Fla. Apr. 26, 2017). A court will not alter a prior decision absent a showing of "clear and obvious error" where "the interests of justice" demand correction. *Prudential Securities Inc., v. Emerson*, 919 F. Supp. 415, 418 (M.D. Fla. 1996).

Plainly, Davison's Motion meets none of these elements. There has not been a change in the law since August 17, 2020 when the Court made its ruling. There is no new evidence, and the Court certainly did not make any error of law. Thus, the Court should deny the Motion.

In support of his Motion, Davison merely asserts that the Court made a clear error of fact. Namely, Davison contends that the Court misapprehended his "role in connection with the purported sale of unregistered securities" and mistakenly found that Davison was

involved both in the sale of unregistered securities and that he shared in the responsibility for the distribution of unregistered securities. Such arguments should be summarily denied as they: 1) are just a rehash of what Davison argued previously but was rejected by the Court, and 2) completely ignore the allegations of the Amended Complaint and this Court's findings.

As stated above, Davison's arguments that he did not bear responsibility for the sales process of the Funds was previously made in his Memorandum of Law in Opposition to SEC Order to Show Cause--almost word for word, as in his present motion. *See* Memorandum of Law, D.E. 160 at pp. 4-9. This assertion was also specifically addressed and rejected by the Court in its Order granting the preliminary injunction (D.E. 184). In its Order, the Court specifically found that "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." Order at p. 4.

The Court's finding is sufficient to form the basis that Davison bore responsibility for the sales of unregistered securities under Section 5 of the Securities Act. In order to establish Section 5 liability, a person can be liable if he/she was a "necessary participant" and "substantial factor" in the transaction. *SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004); s*ee also 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."); *SEC v. Alternative*

Green Technologies, Inc., 2012 WL 4763094, *7 (S.D.N.Y. Sept. 24, 2012) ("Parties who misrepresent the relevant facts in order to facilitate the distributions of unregistered offerings may be liable as necessary participants and substantial factors for violations of Section 5 "). 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).

Here, as the Court correctly found, Davison was a control person of EquiAlt and shared in the responsibility of selling the unregistered shares. This finding is buttressed by the record facts and evidence. Thus, the Court did not err in finding Davison may be held liable for violations of Section 5.

Second, Davison's argument that the disclosure documents provided to investors state that they were unregistered somehow corrects Davison's sales of these unregistered securities under Section 5 is without legal support. Indeed, Davison cites no law in support of this novel proposition. Nor can he, as 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, Section 5 is a strict liability provision. *See SEC v. Tuchinsky*, 1992 WL 226302, at *2 (S.D. Fla. June 29, 1992) ("The Securities Act imposes strict liability on offerors and sellers of unregistered securities, who are held accountable regardless of whether there was any degree of fault, negligent or intentional."). There is no exception to Section 5 where the investor is informed that they are buying unregistered securities. Instead, the violation is for the act of offering or selling the unregistered securities itself, not for the information provided to investors. Here, as the Court correctly found, the SEC has shown that Davison was both a necessary participant and a substantial factor in the sale of the securities (which he admits were unregistered).

Similarly, the Court did not err in finding that Davison's actions were in connection with the sale of securities so that he may be held liable for violations of Section 10(b) of the Exchange Act. 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'"); *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 where investors purchased and sold the funds' securities); *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").

Davison completely ignores that the Court found the SEC presented sufficient proof that Davison was a control person of EquiAlt and was operating a Ponzi scheme (which in

itself is 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."). As such, Davison was responsible for the actions of EquiAlt, including the sales of the unregistered securities. *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation,* 2011 WL 3444199, *25 (D.N.J. Aug. 8, 2011) (a "corporation can act only through its employees and agents" and holding *Janus* "certainly cannot be read to restrict liability for Rule 10b-5 claims against corporate officers"); *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). Thus, there can be no question that the Court did not err when it found 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, and therefore Davison may be held liable under Section 10(b).

CONCLUSION

Accordingly, for all of the reasons stated above, Defendant Davison's Motion for Reconsideration should be summarily denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 15, 2020 the foregoing document was filed electronically with the Clerk of Court using CM/ECF and that a true and correct copy of the filed document was served via CM/ECF on all counsel or parties of record.

s/ Alise M. Johnson
Alise M. Johnson, Esq.