

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

Case No. 8:20-cv-325-T-35AEP

v.

BRIAN DAVISON, BARRY M.
RYBICKI, EQUIALT LLC, EQUIALT
FUND, LLC, EQUIALT FUND II,
LLC, EQUIALT FUND III, EA SIP,
LLC,

Defendants, and

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, EA NY, 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.

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**RECEIVER'S MOTION TO APPROVE
INVESTOR CLAWBACK LITIGATION**

Burton W. Wiand, as receiver over the assets of the above-captioned defendants and relief defendants (the “**Receiver**” and the “**Receivership**” or “**Receivership Estate**”) moves the Court to approve his filing of “clawback” claims against EquiAlt investors who received false profits.

BACKGROUND

At the request of the Securities Exchange Commission (“**SEC**”), the Court appointed the Receiver on February 14, 2020, and directed him, in relevant part, to “[t]ake immediate possession of all property, assets and estates of every kind of the Corporate Defendants and Relief Defendants,” which includes “all real property of the Corporate Defendants and Relief Defendants, wherever situated, and to administer such assets as is required in order to comply with the directions contained in this Order.” Doc. 11 (the “**Order Appointing Receiver**”) at 2-3, ¶ 1.

The Court directed the Receiver to

Investigate the manner in which the affairs of the Corporate Defendants and Relief Defendants were conducted and institute such actions and legal proceedings, for the benefit and on behalf of the Corporate Defendants and Relief Defendants and their investors and other creditors as the Receiver deems necessary . . . ; provided such actions may include, but not be limited to, seeking imposition of constructive trusts, disgorgement of profits, recovery and /or avoidance of fraudulent transfers, rescission and restitution, the collection of debts, and such orders from this Court as may be necessary to enforce this Order;

Id. ¶ 2. Given the law and facts discussed below, the Receiver has a clear right to recover fraudulent transfers under governing and well-settled law. To recover such transfers, the Receiver is seeking the Court's approval to bring investor clawback claims in one action against those EquiAlt investors who have received false profits.

This Court's Order on SEC's Motion for Preliminary Injunction

On July 30, 2020, this Court held a hearing on the SEC's Motion for Preliminary Injunction and the Court granted that motion on August 17, 2020 [Doc. 184]. In that Order the Court made the following findings:

- “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.”

Id. at 2.

- “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.” *Id.* at 3.

- “the Commission will likely be able to prove . . .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.*

The Receiver’s Investigation Confirms EquiAlt Ponzi Scheme

The Receiver’s forensic accountants, Yip Associates, have conducted an analysis of 56 bank and brokerage accounts held in the name of the Defendants and Relief Defendants. *See* Declaration of Maria Yip (“Yip”) at ¶4 [Doc. 164-2], attached hereto as **Exhibit 1**. Additionally, they have reviewed general ledgers, financial statements, tax returns, investor files, sales agents files and other contracts and agreements. *Id.* at ¶3. Yip analyzed non-investor funds deposited to EquiAlt accounts as compared to distributions made to EquiAlt investors to determine the use of investor funds to meet obligations to other investors. Based on Yip’s analysis of data from December 2016 to December 2019, at least as early as December 2016, EquiAlt made distributions to investors using other investors’ funds. *Id.* at ¶8. Such activity is the definition of a Ponzi scheme. *See, e.g., Wiand*

v. Lee, 753 F.3d 1194, 1201 (11th Cir. 2014) (“A Ponzi scheme uses the principal investments of newer investors, who are promised large returns, to pay older investors what appear to be high returns, but which are in reality a return of their own principal or that of other investors.”).

The Receiver’s forensic accountants have generally determined the amount of funds contributed by each investor to the scheme and the amount of funds paid to each investor from the scheme. Amounts received in excess of amounts invested are typically referred to as “**false profits**” because the so-called profits were not derived from legitimate activity but from other investors’ principal investment amounts. To date, the Receiver has identified approximately 248 investors (“**Net Winners**”) who received a total of approximately \$4,299,028.09 in false profits. The Receiver is seeking the Court’s approval to bring claims against these Net Winners for violation of Florida’s Uniform Fraudulent Transfer Act, Fla. Stat. 726.105, and, alternatively, for Unjust Enrichment. **Given the statute of limitations for these claims, time is of the essence.**

ARGUMENT

I. THE REQUESTED RELIEF IS CONSISTENT WITH THE COURT'S EQUITABLE POWERS AND WILL CONSERVE RESOURCES

Importantly, the Receiver is not asking the Court to decide ultimate issues of fact or law through this motion; he is only asking the Court to approve the institution of clawback litigation, given the principles discussed above. The requested relief is consistent with the Court's extremely broad power to supervise this equity Receivership and to determine the appropriate actions to be taken in the administration of the Receivership. *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *S.E.C. v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). The Court's wide discretion derives from the inherent powers of an equity court to fashion relief. *Elliott*, 953 F.2d at 1566; *S.E.C. v. Safety Finance Service, Inc.*, 674 F.2d 368, 372 (5th Cir. 1982). A court imposing a receivership assumes custody and control of all assets and property of the receivership, and it has broad equitable authority to issue all orders necessary for the proper administration of the receivership estate. *See S.E.C. v. Credit Bancorp Ltd.*, 290 F.3d 80, 82-83 (2d Cir. 2002); *S.E.C. v. Wencke*, 622 F.2d 1363, 1370 (9th Cir. 1980).

The court may enter such orders as may be appropriate and necessary for a receiver to fulfill his duty to preserve and maintain the property and funds

within the receivership estate. *See, e.g., Official Comm. Of Unsecured Creditors of Worldcom, Inc. v. S.E.C.*, 467 F.3d 73, 81 (2d Cir. 2006). Any action taken by a district court in the exercise of its discretion is subject to great deference by appellate courts. *See United States v. Branch Coal*, 390 F. 2d 7, 10 (3d Cir. 1969). Such discretion is especially important considering that one of the ultimate purposes of a receiver's appointment is to provide a method of gathering, preserving, and ultimately liquidating assets to return funds to creditors. *See S.E.C. v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 372 (5th Cir. 1982) (court overseeing equity receivership enjoys "wide discretionary power" related to its "concern for orderly administration") (citations omitted). The Receiver believes the relief requested in this motion is consistent with both his mandate under the Order Appointing Receiver and the Court's equitable powers. The Receiver anticipates bringing these claims in one action as was done in *Commodity Futures Trading Commission v. Oasis International Group, et al.*, Case No. 8:19-CV-886-T-33SPF (M.D. Fla.) which has proven to be a cost-effective and efficient means of litigating this type of claim. Additionally, the Receiver will exercise his discretion to possibly exclude *de minimis* claims that may not be economical for the Receiver to pursue.

II. THE ELEVENTH CIRCUIT HAS EXPRESSLY ADOPTED THE PONZI PRESUMPTION AND RECOGNIZED A RECEIVER'S RIGHT TO RECOVER FALSE PROFITS

Again, the Receiver is not asking the Court to decide ultimate issues of fact or law through this motion. This section is included only to demonstrate that the Receiver's claims are well-founded and that the proposed pre-suit settlement is fair and reasonable. As noted above, "[a] Ponzi scheme uses the principal investments of newer investors, who are promised large returns, to pay older investors what appear to be high returns, but which are in reality a return of their own principal or that of other investors." *See, e.g., Lee*, 753 F.3d at 1201. Given this Court's Order on the Motion for Preliminary Injunction and his own investigation, the Receiver believes the scheme underlying this action qualifies as a Ponzi scheme.¹ The Eleventh Circuit has expressly adopted the "Ponzi presumption," which provides that transfers from Ponzi schemes are recoverable under pertinent fraudulent transfer law:

Other circuits have held that in a receiver's suit under a state uniform fraudulent transfer law, proof that a transfer was made from an entity used to perpetrate a Ponzi scheme is sufficient to establish the transfer was made with actual fraudulent intent without a consideration of the badges of fraud. *See Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008) (applying California's UFTA); *S.E.C. v. Res. Dev. Int'l, LLC*, 487 F.3d 295,

¹ Even if it did not, fraudulent transfers are nevertheless recoverable using statutory "badges of fraud." *See, e.g., Lee*, 753 F.3d at 1200.

301 (5th Cir. 2007) (applying Texas's UFTA); *Warfield v. Byron*, 436 F.3d 551, 558-59 (5th Cir. 2006) (applying Washington's UFTA); *see also Wing v. Dockstader*, 482 Fed. Appx. 361, 363 (10th Cir. 2012) (applying Utah's UFTA). This court has embraced the so-called "Ponzi scheme presumption" in applying the Bankruptcy Code's fraudulent transfer provisions. *Perkins v. Haines*, 661 F.3d 623, 626 (11th Cir.2011) ("With respect to Ponzi schemes, transfers made in furtherance of the scheme are presumed to have been made with the intent to defraud for purposes of recovering the payments under [11 U.S.C.] §§ 548(a) and 544(b).") (citations omitted). We now clarify that, under FUFTA's actual fraud provision, proof that a transfer was made in furtherance of a Ponzi scheme establishes actual intent to defraud under § 726.105(1)(a) without the need to consider the badges of fraud.

Lee, 753 F.3d at 1200-01.

Courts recognize a receiver's right to recover, at minimum, "false profits" from investors because "[t]he investors who profited ... did not receive income from their investments, but received principal funds from other investors." *Id.* at 1200; *see also Wiand v. Lee*, 2012 WL 6923664, at *17 (M.D. Fla. Dec. 13, 2012), *adopted* 2013 WL 247361 (M.D. Fla. Jan. 23, 2013) ("[A]s the Receiver indicates, it is well-settled that a receiver is entitled to recover from winning investors profits above the initial outlay, also known as 'false profits,' and an investor in a scheme does not provide reasonably equivalent value for any amounts received from [the] scheme that exceed the investor's principal investment."); *Perkins v. Haines*, 661 F.3d 623, 627 (11th Cir. 2011) ("Any transfers over and above the amount of the principal—*i.e.*, for fictitious profits—are not made for 'value' because they

exceed the scope of the investors' fraud claim and may be subject to recovery...."). Given the Receiver's own investigation, and this well-settled, governing law, the Receiver respectfully requests that the Court allow him to pursue these claims.

CONCLUSION

For the foregoing reasons, the Receiver requests the Court's approval to pursue clawback litigation against those investors who received false profits.

LOCAL RULE 3.01(G) CERTIFICATION

Counsel for the Receiver has conferred with counsel for the SEC and the SEC does not object to the relief sought. Counsel for the individual defendants do not agree to the relief sought.

Respectfully submitted,

/s/ Katherine C. Donlon

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 20, 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/ Katherine C. Donlon
Katherine C. Donlon, FBN 0066941