UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. **Case No: 8:20-cv-325-MSS-AEP**

BRIAN DAVISON, BARRY M. RYBICKI, EQUIALT LLC, EQUIALT FUND, LLC, EQUIALT FUND II, LLC, EQUIALT FUND III, LLC, and 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, and TB OLDEST HOUSE EST. 1842, LLC,

Relief Defendants.

ORDER

THIS CAUSE comes before the Court for consideration of Defendant Brian Davison's Motion to Dismiss the Amended Complaint, (Dkt. 177), and Plaintiff's

response in opposition thereto. (Dkt. 195) Upon consideration of all relevant filings, case law, and being otherwise fully advised, the Court **DENIES** the Motion to Dismiss the Amended Complaint.

I. BACKGROUND

A. Factual Background

The Securities and Exchange Commission ("SEC") brought this civil enforcement action, alleging that EquiAlt LLC—a real estate investment company controlled by Brian Davison and Barry Rybicki—defrauded investors who participated in EquiAlt's unregistered securities offerings. (Dkt. 1; Dkt. 138 at ¶ 1) The SEC alleges that Davison and Rybicki promised investors that (i) approximately 90% of investor money would be used to purchase real estate in distressed markets and (ii) the investments would generate fixed annual returns of 8% to 10%. (Dkt. 138 at ¶¶ 1, 46, 57) Instead, Davison and Rybicki allegedly "misappropriated millions in investor funds for their personal benefit." (Id. at ¶ 1)

EquiAlt began raising money from investors in 2011 through the sale of unregistered debentures issued by EquiAlt-managed funds. (Id. at ¶ 45) Beginning in 2016, EquiAlt allegedly operated as a Ponzi scheme, paying existing investors' monthly interest payments with funds raised from new investors. (Id. at ¶ 48) Meanwhile, Davison and Rybicki are alleged to have received millions of dollars in undisclosed cash distributions, funds they used "to purchase high-end luxury items." (Id. at ¶¶ 51-52)

The SEC alleges that Davison and Rybicki made several material misrepresentations and omissions to raise money from investors. (Id. at ¶¶ 57-82) Some of the alleged misrepresentations appeared in private placement memoranda ("PPMs") used to solicit investments. (E.g., id. at ¶ 57) Both Davison and Rybicki are alleged to have "controlled the content included in the PPMs," "review[ing], revis[ing], and ma[king] changes" to the offering documents. (Id. at ¶¶ 40, 57) According to the SEC, the PPMs for several of the funds stated that approximately 90% of investor funds would be used to "invest in property," when in fact "less than 50% of investor funds were actually used for that purpose." (Id. at ¶ 57) The SEC also alleges that the PPMs failed to adequately disclose, among other things, that (i) money raised for one fund would be used to pay investors in another fund, (ii) investor funds would be used to pay "substantial undisclosed commissions to unregistered sales agents," and (iii) Davison and Rybicki would receive "substantial improper" cash distributions. (Id. at ¶¶ 54-56, 63)

Some of the alleged misrepresentations were made orally and in EquiAlt marketing materials. For example, the SEC alleges that, "[w]hile pitching investments in the [f]unds," Davison and Rybicki represented that the investments were "low risk," "safe," and "conservative," when in fact the funds "ha[d] suffered substantial financial losses since their inception." (Id. at ¶ 72) Likewise, Davison and Rybicki allegedly "exercised control over the drafting of marketing materials and 'fact sheets' that falsely stated," among other things, that "assets are quickly brought to cash flowing (28 day

average)" and investors' "principal is not brokered or lent on someone else's asset." (Id. at ¶ 74)

B. Procedural History

The SEC commenced this civil enforcement action in February 2020, alleging that the conduct described above violated (i) Sections 5(a) and (c) of the Securities Act of 1933; (ii) Sections 17(a)(1), (2) and (3) of the Securities Act; (iii) Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; (iv) Section 20(a) of the Exchange Act; and (v) Section 15(a) of the Exchange Act. (Dkts. 1, 138) The SEC sought and obtained a temporary restraining order, which was subsequently converted into a preliminary injunction that, among other things, forbade Defendants from violating the securities laws mentioned above during the pendency of this litigation. (Dkts. 10, 184) The Court also appointed a receiver to exercise authority over EquiAlt and the funds it managed. (Dkt. 11)

Now before the Court is Davison's Motion to Dismiss the Amended Complaint. (Dkt. 177)[1] Davison advances several arguments in support of dismissal, but his principal contention is that the fraud claims against him fail because he "did not communicate directly with investors and was not responsible for any misrepresentations that might have been made to them." (Id. at 3)

[1] The other Defendants have not moved to dismiss the Amended Complaint.

II. LEGAL STANDARD

The threshold for surviving a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a low one. Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A., et al., 711 F.2d 989, 995 (11th Cir. 1983). A plaintiff must plead only enough facts to state a claim to relief that is plausible on its face. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1968-69 (2007) (abrogating the "no set of facts" standard for evaluating a motion to dismiss established in Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Although a complaint challenged by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff is still obligated to provide the "grounds" for his entitlement to relief, and "a formulaic recitation of the elements of a cause of action will not do." Berry v. Budget Rent A Car Sys., Inc., 497 F. Supp. 2d 1361, 1364 (S.D. Fla. 2007) (quoting Twombly, 127 S. Ct. at 1964-65). In evaluating the sufficiency of a complaint in light of a motion to dismiss, the well pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff. Quality Foods, 711 F.2d at 994-95. However, the court should not assume that the plaintiff can prove facts that were not alleged. Id. Thus, dismissal is warranted if, assuming the truth of the factual allegations of the plaintiff's complaint, there is a dispositive legal issue that precludes relief. Neitzke v. Williams, 490 U.S. 319, 326 (1989).

III. DISCUSSION

A. Rule 9(b)

Davison contends that the SEC has failed to plead fraud with the particularity required by Federal Rule of Civil Procedure 9(b). (Dkt. 177 at 9) Specifically, Davison argues that although "the Amended Complaint asserts that investors were misled, it does not contain the kind of detailed statements required to demonstrate that it was Davison who misled them, let alone specify the time or place of each such misstatement or identify the investors to which they were made." (Id.) This argument fails.

Rule 9(b) requires a party "alleging fraud or mistake" to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "The particularity rule serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001). "The application of Rule 9(b), however, must not abrogate the concept of notice pleading." Id. "Rule 9(b) is satisfied if the complaint sets forth (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a

consequence of the fraud." Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1237 (11th Cir. 2008).

The allegations against Davison plead fraud with the particularity required by Rule 9(b). For example, the SEC alleges that the PPMs—whose content was "controlled" by Davison and Rybicki—contained several material misrepresentations and omissions. (E.g., Dkt. 138 at ¶¶ 57-60) Among other things, the PPMs are alleged to have "misrepresented how investor funds would be used" by stating that "approximately 90% of investor funds would be used to 'invest in property,'" when in fact "less than 50% of investor funds were actually used for that purpose." (Id. at ¶ 57) These allegations are sufficient to plead that Davison was responsible for a specific set of misrepresentations in the PPMs, thereby satisfying Rule 9(b)'s requirement to "plead the who, what, when, where, and how of the allegedly false statements." Mizzaro, 544 F.3d at 1237; see also Nichols v. Merrill Lynch, Pierce, Fenner & Smith, 706 F. Supp. 1309, 1344 (M.D. Tenn. 1989) ("Plaintiffs' reference to the PPM satisfies Rule 9(b)'s requirements as to identification of the time, place and content of the alleged misrepresentations.").

B. Section 10(b)

Davison also contends that the Section 10(b) claims should be dismissed because (i) the SEC fails to allege that Davison was the "maker" of any misstatement, (ii) "there are no allegations that Davison directly disseminated misleading materials to investors," (iii) the SEC fails to adequately plead materiality, and (iv) the SEC does not allege "facts that would, if true, demonstrate that Davison's conduct was 'in

connection with' the purchase or sale of securities." (Dkt. 177 at 11-15) None of these arguments is persuasive.

To state a claim under Rule 10b-5(b), the SEC must allege "(1) material misrepresentations or materially misleading omissions, (2) in connection with the purchase or sale of securities, (3) made with scienter." SEC v. Merch. Capital, LLC, 483 F.3d 747, 766 (11th Cir. 2007).

Davison first contends that the SEC has failed to allege facts showing that he was the "maker" of any misstatements. (Dkt. 177 at 11) For purposes of Rule 10b-5(b), only the "maker" of a statement—meaning "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it"—can be held liable for it. Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 142-43 (2011). The SEC sufficiently alleges that Davison was the "maker" of several misstatements. For example, the SEC points to multiple misrepresentations in the PPMs, whose content Davison and Rybicki "controlled" by "review[ing], revis[ing], and ma[king] changes" to the documents. (Dkt. 138 at ¶¶ 40, 57) These allegations adequately plead that Davison exercised "authority over the content of the statement[s] [in the PPMs] and whether and how to communicate [them]." Janus Capital Grp., Inc., 564 U.S. at 144.

Next, Davison maintains that the claims under Rule 10b-5(a) and (c) fail because the SEC does not allege that "Davison directly disseminated misleading materials to investors." (Dkt. 177 at 14) "To state a claim under Rule 10b-5(a) or (c), the SEC must sufficiently allege that a defendant, with scienter, committed a

manipulative or deceptive act in furtherance of an alleged scheme to defraud that affected the market for securities or was otherwise in connection with their purchase or sale." SEC v. Glob. Dev. & Envtl. Res., Inc., No. 8:08-CV-993-T-27MAP, 2008 WL 11338454, at *3 (M.D. Fla. Nov. 26, 2008). A defendant may be found to have violated Rule 10b-5(a) or (c) if he "disseminate[s] false or misleading statements to potential investors with the intent to defraud." Lorenzo v. SEC, 139 S. Ct. 1094, 1099 (2019). Here, the SEC expressly alleges that both Davison and Rybicki "oversaw the distribution of the[ ] [PPMs]" while knowing that the documents "misrepresented how investor funds would be used." (Dkt. 138 at ¶ 57) This is sufficient to plead that Davison knowingly disseminated false statements to EquiAlt investors. See SEC v. Kameli, No. 17 C 4686, 2020 WL 2542154, at *15 (N.D. Ill. May 19, 2020) (holding that complaint adequately pled that defendants "disseminated the false/misleading statements" by alleging that defendants "approved the distribution of the PPMs and their attachments to prospective [ ] investors").

Davison also contends that, because the alleged oral misrepresentations "are contradicted by written disclosures," the SEC has failed to allege any material misstatements for purposes of its Section 10(b) claims. (Dkt. 177 at 14-15) For example, Davison points to the allegation that "EquiAlt falsely told investors in at least one [f]und [that] it was registered with the [SEC]," and claims this alleged oral misstatement is contradicted by the disclosure in the PPMs that the debentures were unregistered. (Id. at 7) "[A] misstatement or omission is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed

by the reasonable investor as having significantly altered the total mix of information made available." SEC v. Morgan Keegan & Co., 678 F.3d 1233, 1245 (11th Cir. 2012). "Materiality [ ] is a question of fact that may rarely be resolved at the motion to dismiss stage." SEC v. BIH Corp., No. 2:10-CV-577-FTM-29, 2011 WL 3862530, at *5 (M.D. Fla. Aug. 31, 2011). Indeed, "whether written disclosures should trump oral misrepresentations is highly fact-specific." Morgan Keegan & Co., 678 F.3d at 1252. For example, written disclosures may not trump oral misrepresentations where "[t]he oral misrepresentations were made directly to customer-investors who aver they never received or knew about the written disclosures at the time of their purchases." Id. Here, the SEC alleges that "in many cases investors never received the PPMs" that contained the disclosures on which Davison relies. (Dkt. 138 at ¶ 63) Accordingly, the Court declines to determine at the pleading stage whether any disclosures in the PPMs neutralized the alleged oral misrepresentations. Davison may raise this fact-intensive issue at a later stage of the proceedings.

Davison also argues that the "SEC fails to allege facts that would, if true, demonstrate that [his] conduct was 'in connection with' the purchase or sale of securities." (Dkt. 177 at 15) "In SEC enforcement actions, courts broadly construe the 'in connection with' language to effectuate the securities statutes' remedial purposes and to protect investors." SEC v. Huff, 758 F. Supp. 2d 1288, 1353 (S.D. Fla. 2010), aff'd, 455 F. App'x 882 (11th Cir. 2012).[2] "[W]henever assertions are made . . . in a

[2] The Court notes that "[a]lthough an unpublished opinion is not binding on this court, it is persuasive authority. See 11th Cir. R. 36-2." United States v. Futrell, 209 F.3d 1286, 1289 (11th Cir. 2000).

manner reasonably calculated to influence the investing public, the 'in connection with' requirement is satisfied." Id. For example, the requirement is met if the misstatements "occurred in the context of public dissemination in a document such as a press release, annual report, investment prospectus or other such document on which an investor would presumably rely." Id. The allegations against Davison plainly satisfy the "in connection with" requirement. The SEC pleads that Davison was responsible for misrepresentations and omissions in, among other places, the PPMs—documents designed to solicit investments. (Dkt. 138 at ¶¶ 40, 57) No more is required to plausibly plead that Davison engaged in misconduct in connection with the sale of securities.[3]

C. Control Person Liability

Davison additionally contends that the SEC fails to plead control person liability under Section 20(a) of the Exchange Act because there are no allegations that "Davison controlled Rybicki or the sales agents." (Dkt. 177 at 16) This argument fails.

"[A] plaintiff alleging controlling person liability under [S]ection 20(a) 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. Grp., Inc., 526 F.3d 715, 723 (11th Cir. 2008). The allegations against Davison sufficiently plead that he

[3] Davison also seeks dismissal of the Section 17(a) claims on the grounds that the SEC fails to plead that he committed fraud "in the offer or sale of securities." (Dkt. 177 at 15-16) Courts "have frequently treated" the phrases "in connection with the purchase or sale of a security" and "in the offer or sale of securities" as "interchangeable." SEC v. Mahabub, No. 15-CV-2118-WJM-MLC, 2017 WL 6555039, at *6 n.7 (D. Colo. Dec. 22, 2017). Accordingly, for the reasons explained above, the allegations against Davison sufficiently plead that he committed fraud "in the offer or sale of securities" for purposes of the Section 17(a) claims.

controlled both "the general affairs" of EquiAlt and "the specific corporate polic[ies] that resulted in the primary violation[s]." Id. Davison served as EquiAlt's CEO, "personally controll[ing] the bank accounts, finances, and accounting for each of the [f]unds" and managing "most of [the funds'] real estate activities and administrative activities." (Dkt. 138 at ¶ 10) Davison is also alleged to have (i) "controlled the content included in the PPMs" by "review[ing], revis[ing], and ma[king] changes" to the offering documents, and (ii) "misused millions of investors' dollars in a manner inconsistent with the PPMs and account statements provided to investors." (Id. at ¶¶ 40, 54, 57) These allegations, if true, would show that Davison both controlled EquiAlt and directed the fraudulent scheme that gave rise to this enforcement action, including by participating in the creation and dissemination of EquiAlt offering documents that contained material misrepresentations and omissions.

Davison responds that, because Rybicki "controlled the sales staff," "someone other than Davison [ ] controlled the persons committing the purportedly violative conduct." (Dkt. 177 at 17) Davison is correct that the SEC alleges that "Rybicki primarily controlled the sales force and communications with investors." (Dkt. 138 at ¶ 40) Davison ignores, however, that the "violative conduct" alleged in the Amended Complaint is not limited to oral misstatements made by the sales staff. As explained above, the SEC also alleges that Davison, the CEO of EquiAlt, was directly responsible for the company's distribution of PPMs that contained materially misleading statements and omissions. (Id. at ¶¶ 40, 54, 57) These allegations are

sufficient to plead control person liability against Davison for primary violations committed by EquiAlt and the funds it managed.

D. Section 5

Davison contends that the Section 5 claims fail because the SEC does not allege that he "was a 'necessary participant' and a 'substantial factor' in the sale of the unregistered securities at issue." (Dkt. 177 at 17).[4]

"In order to establish a prima facie case for a violation of [Section] 5 of the Securities Act, the SEC must demonstrate that (1) the defendant directly or indirectly sold or offered to sell securities; (2) through the use of interstate transportation or communication and the mails; (3) when no registration statement was in effect." SEC v. Calvo, 378 F.3d 1211, 1214 (11th Cir. 2004). "To demonstrate that a defendant sold securities, the SEC must prove that the defendant was a 'necessary participant' or 'substantial factor' in the illicit sale." Id. at 1215. "The defendant need not have directly sold the unregistered security" to be held liable for a Section 5 violation. SEC v. Curshen, 888 F. Supp. 2d 1299, 1308 (S.D. Fla. 2012). "Neither negligence nor scienter is an element of a prima facie case under Section 5 of the Securities Act." Id.

The SEC adequately alleges that Davison was both a "necessary participant" and a "substantial factor" in the sale of unregistered securities. Calvo, 378 F.3d at 1214. The SEC expressly alleges that the EquiAlt debentures were "unregistered securities." (Dkt. 138 at ¶ 3) The SEC further pleads that Davison—EquiAlt's CEO—

[4] Davison does not dispute that the SEC adequately alleges the debentures were unregistered.

played a significant role in the sale of these unregistered securities by, among other things, (i) "exercis[ing] control over the drafting of marketing materials and 'fact sheets'" distributed to investors and (ii) "controll[ing] the content included in the PPMs" used to solicit investments. (Id. at ¶¶ 40, 57, 74) Moreover, as the Court explained in granting the SEC's request for a preliminary injunction, Davison was a "controlling individual[ ]" of EquiAlt and allegedly "acted in concert [with Rybicki] to perpetrate the Ponzi scheme." (Dkt. 184 at 4) Taken together, these allegations are sufficient to state a Section 5 claim against Davison.

E. Aiding and Abetting Liability

Finally, Davison maintains that the SEC fails to state an aiding-and-abetting claim against him because "the Amended Complaint is devoid of allegations that [he] 'knowingly and substantially assisted' the purportedly violative conduct of Rybicki and the sales staff Rybicki supervised." (Dkt. 177 at 17) This argument lacks merit.

"[T]o impose aiding and abetting liability under [Section] 20(e) there must be: (1) a primary violation of the securities laws; (2) the aider and abettor must have knowledge of the primary violation; and (3) the aider and abettor must provide substantial assistance in the commission of the primary violation." SEC v. Goble, 682 F.3d 934, 947 (11th Cir. 2012). Here, the primary violation that serves as the basis for the aiding-and-abetting claim is that third-party sales agents solicited investments in EquiAlt funds despite not being registered with the SEC or associated with a registered broker-dealer. (Dkt. 138 at ¶¶ 111-12) This conduct allegedly violated Section 15(a) of

the Exchange Act, which "makes it unlawful . . . for an unregistered dealer to purchase or sell securities." SEC v. Almagarby, 479 F. Supp. 3d 1266, 1271 (S.D. Fla. 2020).

The SEC sufficiently alleges that Davison knowingly provided "substantial assistance in the commission of" the alleged primary violation. Goble, 682 F.3d at 947. For example, the SEC pleads that although Davison and Rybicki learned from multiple sources that "the [f]unds could only be sold by a registered broker-dealer," they nevertheless "chose to ignore these warnings and continued to willfully and intentionally violate the registration laws and to inform third-party sales agents that they did not need to be registered to sell the [f]unds." (Dkt. 138 at ¶ 81; see also id. at ¶ 47 ("Davison and Rybicki misrepresented to outside sales agents that it was permissible for these agents to sell these securities while not registered with state and federal regulatory authorities.")) These allegations are sufficient to state an aiding-and-abetting claim against Davison.[5]

[5] In his Motion, Davison contends that the SEC's request for injunctive relief should be "denied" because "there is no likelihood of the purported wrong continuing." (Dkt. 177 at 20-21) The Court considered and rejected the same argument in granting the SEC's request for a preliminary injunction, and there is no basis to revisit that ruling. (Dkt. 184)

IV. CONCLUSION

Upon consideration of the foregoing, it is hereby **ORDERED** as follows:

1. Defendant Brian Davison's Motion to Dismiss the Amended Complaint, (Dkt. 177), is **DENIED**.

2. Davison shall file an answer to the Amended Complaint within **twenty-one (21) days** of the date of this Order.

DONE and ORDERED in Tampa, Florida this 8th day of March 2021.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Any Unrepresented Party