

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE 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,
and 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,
and TB OLDEST HOUSE EST. 1842, LLC,

Relief Defendants.

**NOTICE OF FILING AND MOTION FOR ENTRY OF PROPOSED ORDER
EXTENDING AND MODIFYING ASSET FREEZE**

1. Defendant Barry Rybicki files a proposed Order Extending and Modifying Asset Freeze. In support whereof, Defendant Rybicki states as follows:

2. On February 28, 2020, this Court entered an agreed order extending and modifying an asset freeze in the case. In the order, the Court carved out \$85,000 of money held in a J.P. Morgan Chase bank account, \$75,000 of which would be applied to attorneys' fees "incurred or to be incurred on behalf of Barry Rybicki." Agreed Order Extending and Modifying Freeze (DE 31) at 5.

3. Thereafter, on March 11, 2020, this Court issued an order clarifying that the \$75,000 referenced in its Feb. 28, 2020 Agreed Order could be used to pay legal fees incurred on or after February 14, 2020. Mar. 11, 2020 Order on Rybicki's Motion to Modify Asset Freeze (DE 48) at 2. The Order also provided that counsel would prepare a budget for the Court for *in camera* inspection, and that the Court would "determine whether additional funds are needed and should be paid from the assets frozen by the Court's prior Orders." *Id.* at 3. The March 11, 2020, Order also limited attorneys' fees to \$400 per hour for the most experienced counsel and \$320 per hour for a second lawyer. *Id.* at 2-3.

4. At an average rate of \$360 per hour, \$75,000 would reimburse approximately 208 hours of legal work, a small number of hours considering that the amended complaint alleges three separate schemes to defraud investors over a nine-year period and involved the raising of about \$170 million dollars through four separate funds, each of which had multiple versions of offering materials. This amount would permit, at best, a limited review of discovery for purposes of an early resolution.

5. Given the complexity of this case and Mr. Rybicki's desire to challenge the SEC's allegations, there could be no reasonable expectation that undersigned counsel could adequately represent Mr. Rybicki in the course of just 208 hours.

6. As such, the undersigned understood this Court's ruling limiting reimbursement rates to \$400 and \$320 per hour to mean that legal fees would not be limited to the \$75,000 ordered unfrozen by this Court. If the Court had intended to limit legal fees to the \$75,000 ordered unfrozen by the Court, the Court would have had no need to limit the rate at which the attorneys could bill, and would not have created a mechanism by which counsel, through a budget prepared for *in camera* review, could request additional funds.

7. To date, the undersigned and his law firm has logged 772 hours in the nearly fourteen months that the undersigned and his law firm began work on this case. Just in preparation for the July 31, 2020 preliminary injunction hearing, the undersigned and his law firm incurred over \$40,000 in legal fees in interviewing witnesses, responding to the motion for preliminary injunction, preparing for and appearing at the preliminary injunction hearing, and preparing and submitting a post-hearing filing.

8. Given the complex nature of this matter, 772 hours in nearly fourteen months—which equates to roughly 55 hours per month—is a reasonable number of hours to expend. It is, for example, far smaller than the number of hours expended by the Receiver. In his last three motions seeking fees, the Receiver and his legal team reported expending 659 hours in October, November, and December 2020, 795 hours in July, August, and September 2020, and 980 hours in April, May, and June 2020. Receiver's Fourth Quarterly Fee Application, DE 266 at 10, 12. Receiver's Third Quarterly Fee Application, DE 218 at 9-10; Second Quarterly Fee Application, DE 186 at 9-10. The 2,434 hours expended by the Receiver and his legal team over nine months,

while reasonable given the complexity of the case, dwarfs the 772 hours expended by Rybicki's legal team in nearly fourteen months.

9. Undersigned counsel provides, under separate cover, a second revised budget for the Court for *in camera* inspection setting forth the breakdown of fees incurred by the undersigned and his firm for which compensation has not yet been made.

10. Leaving the detailed breakdown for the revised budget filed with the Court, the undersigned can represent that all the \$75,000 initially allotted by the Court on February 28, 2020 and the additional \$30,000 allotted by the Court after agreement by the parties on July 17, 2020 has been expended on attorneys' fees incurred after February 14, 2020.

11. To date, counsel for Mr. Rybicki has incurred at least \$140,789 in legal fees for which they have not been compensated. This amount does *not* include, for example, fees incurred when two attorneys from the undersigned's firm are consulting with each other, fees which, in the ordinary course of business, are fair and reasonable but have not been charged here.

12. This Court has the discretion to modify the asset freeze to allow a carve-out for reasonable attorneys' fees incurred in the defense of an S.E.C. action with a showing of a factual basis justifying the carve-out. *S.E.C. v. Founding Partners Capital Mgmt.*, No. 209CV229FTM29SPC, 2009 WL 10669238, at *4 (M.D. Fla. May 7, 2009); *see also S.E.C. v. Duclaud Gonzalez de Castilla*, 170 F. Supp. 2d 427, 430 (S.D.N.Y. 2001) (appropriate to modify asset freeze to permit payment of legal fees incurred as a result of SEC action); *S.E.C. v. Schiffer*, No. 97 CIV. 5853(RO), 1998 WL 307375, at *7 (S.D.N.Y. June 11, 1998) (permitting carve-out for attorneys' fees substantiated by court).

13. The undersigned therefore seeks an Order carving out \$140,789.00 in attorneys' fees from the frozen accounts to compensate the undersigned and his law firm for work already

performed and a mechanism to seek reasonable attorneys' fees in the future. Specifically, the undersigned moves this court for an Order allowing the undersigned to follow the same procedure employed by the receiver; namely, that the undersigned would file a quarterly motion for a carve-out of attorneys' fees.

14. Counsel for the Receiver and the SEC have advised the undersigned that they oppose this Motion.

15. This Motion is accompanied by a proposed attached Order as Exhibit "A."

WHEREFORE, Defendant Barry Rybicki respectfully requests that this Court grant the instant motion.

Respectfully submitted,

/s/ Adam S. Fels
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Attorneys for Defendant Barry Rybicki

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 5th day of April, 2021.

s/Adam S. Fels

EXHIBIT “A”

**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 et al.,**

Defendants.

ORDER MODIFYING ASSET FREEZE

This cause comes before the Court upon the Motion by Plaintiff Barry Rybicki. The Court, having originally imposed a Temporary Restraining Order, Asset Freeze and Other Injunctive Relief on February 14, 2020 and having extended that Order, and imposed a Preliminary Injunction, is duly informed in the premises of the Motion, the Court therefore orders as follows:

I.

MODIFICATION OF ORDER FREEZING ASSETS

IT IS ORDERED that, for the period from the date of this Order through the Court's disposition of the Preliminary Injunction:

A. Defendants and the Relief Defendants and their respective directors, officers, agents, servants, employees, attorneys, depositories, banks, and those persons in active concert or participation with any one or more of them, and each of them, who receive notice of this order by personal service, mail, email, facsimile transmission or otherwise, be and hereby are, restrained from, directly or indirectly, transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of, or withdrawing any assets or property, including but not limited to cash, free credit balances, fully paid for securities, personal property, real property, and/or property pledged or hypothecated as collateral for loans, or charging upon or

drawing from any lines of credit, owned by, controlled by, or in the possession of, whether jointly or singly,
and wherever located:

1. BRIAN DAVISON,
2. BARRY M. RYBICKI,
3. EQUIALT LLC,
4. EQUIALT FUND, LLC,
5. EQUIALT FUND II, LLC,
6. EQUIALT FUND III, LLC,
7. EA SIP, LLC,
8. 128 E. DAVIS BLVD, LLC,
9. 310 78TH AVE, LLC,
10. 551 3D AVE S, LLC,
11. 604 WEST AZEELE, LLC,
12. 2101 W. CYPRESS, LLC,
13. 2112 W. KENNEDY BLVD, LLC,
14. 5123 E. BROADWAY AVE, LLC,
15. BLUE WATERS TI, LLC,
16. BNAZ, LLC,
17. BR SUPPORT SERVICES, LLC,
18. BUNGALOWS TI LLC,
19. CAPRI HAVEN, LLC,
20. EA NY, LLC,
21. EQUIALT 519 3RD AVE S., LLC,
22. MCDONALD REVOCABLE LIVING TRUST,
23. SILVER SANDS TI, LLC,
24. TB OLDEST HOUSE EST. 1842, LLC,
25. TB OLDEST HOUSE EST. 1842, LLC,

B. Notwithstanding the foregoing:

1. Of the monies held in the Barry M. Rybicki account held at E*TRADE Account number XXXX6205, \$140,789.00 shall not be frozen and may be applied as attorneys' fees incurred on behalf of Barry Rybicki.
2. The actions described in paragraph 1 above shall not be deemed a violation of this Order.
3. Upon request of the Commission, the parties shall within seven days produce to the Commission bank records relating to how the funds were expended pursuant to paragraph 1, herein.
4. Any additional requests for attorneys' fees incurred or to be incurred on behalf of Barry Rybicki shall be made on a quarterly basis, and counsel for Mr. Rybicki shall submit to the Court for *in camera* review a breakdown of the legal expenses sought.

II.

RETENTION OF JURISDICTION

IT IS HEREBY FURTHER ORDERED that this Court shall retain jurisdiction over this matter, the Defendants, and the Relief Defendant in order to implement and carry out the terms of all Orders and Decrees that may be entered and/or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court, and will order other relief that this Court deems appropriate under the circumstance.

DONE and **ORDERED** in Chambers this ____ day of April, 2021.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record