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

**SECURITIES AND EXCHANGE COMMISSION,**

**Plaintiff,**

**v.**

**Case No: 8:20-cv-00325-MSS-AEP**

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

**Relief Defendants.**
_____/

**REPLY IN SUPPORT OF MOTION TO COMPEL RECEIVER TO BRING CLAIMS AGAINST MOVANTS IN THIS DISTRICT**

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# TABLE OF AUTHORITIES

## CASES



## OTHER AUTHORITIES

In our motion (Doc. 263), we laid out the problems that will result from the Receiver pursuing claims in California while *Gleinn* and other EquiAlt litigation proceeds here. We pointed out that coordinating between federal and state courts on opposite coasts, and discovery involving the same witnesses, documents, and issues, will waste judicial resources, invite conflicts between court systems, and impose unwarranted burdens on litigants and the Receivership Estate. Our brief did not suggest that Movants intend to interfere with any SEC enforcement action; rather, we highlighted conflict with *Gleinn*. We filed our motion in the SEC's action simply because that is the proceeding in which this Court exercises oversight of the Receiver.

The Receiver's opposition (and the SEC's, to the extent it joined) is flawed in three respects: *first*, it declines to explain why pursuing claims against Movants in California state court makes any sense;[1] *second*, it mischaracterizes the relief Movants seek as an attempt to interfere with the SEC's enforcement proceeding, when they do not; and *third*, it throws up a smokescreen of procedural arguments to prevent this Court from even considering the issues we raised. In fact, since we filed our motion, the Receiver has filed two additional lawsuits *here*, naming as defendants over 130 EquiAlt investors and 30 EquiAlt "sales agents." What has become clear is that the Receiver will not and cannot justify suing Movants in California state court: his position is that this Court gave him unfettered authority to sue wherever and however

[1] Hopes for coordination with *Gleinn* continue to diminish. Although the Receiver objected to the designation of his lawsuit as non-complex, the state court overruled that objection. Thus, it likely will proceed as a non-complex case in state court, making coordination difficult.

many times he chooses, and that no one can oversee his conduct. The Receiver enjoys no such autonomy; he is not beyond reach.

This Court has inherent oversight authority apart from any motion, and it can determine on its own whether the Receiver's actions further the goals of the Receivership Estate. Even if this Court accepts the Receiver's procedural defenses (which it should not), it can and should consider *sua sponte* whether the Receiver's conduct is in the interests of the Receivership Estate. It plainly is not.

## ADDITIONAL BACKGROUND

After we filed our motion, several relevant events occurred.

*First*, the Receiver filed two lawsuits in this Court that further justify bringing the Receiver's claims here. The first seeks to claw back profits from over 130 EquiAlt investors, including over 30 California residents. *Wiand v. Adamek*, No. 21-CV-360-TPB-CPT. The second seeks to claw back alleged commissions from over 30 EquiAlt "sales agents," including 10 California residents and 5 entities based in California. *Wiand v. Family Tree Estate Planning, LLC*, No. 21-CV-361-SDM-AAS. Clearly, investors' and sales agents' locations are not the impetus to sue Movants in California.

*Second*, Robert Mar, an alleged EquiAlt investor, filed a new class action lawsuit against Paul Wassgren and an alleged "sales agent," Benjamin Mohr, that overlaps the California class allegations in *Gleinn*. *See Mar v. Mohr*, No. 21-CV-1751-VC (N.D. Cal.). Mohr is also a defendant in the Receiver's sales agent "claw back" lawsuit in this Court. Wassgren removed the case to federal court and recently moved to stay it in favor of *Gleinn* or transfer it here. *See id.*, Doc. 14. That motion is pending.

*Third*, the Central District of California dismissed the Receiver's federal lawsuit for lack of subject matter jurisdiction. *See* Doc. 272, Ex. 1. The court declined to transfer the case but did not reject Movants' transfer arguments. Instead, it observed they "are better made to the appointing court in the context of the SEC Enforcement Action." *Id.* In other words, it recognized *this* Court is the appropriate forum to address these issues. Thus, while there no longer is a federal case to transfer, this Court still can instruct the Receiver to file a complaint here and dismiss his California state court case. Movants request that it do so, for the reasons they have stated.

*Finally*, the California judge has informally stayed the Receiver's state court case until June 18, 2021, to allow this Court time to consider and rule upon this motion.

## ARGUMENT

### I. Exchange Act § 21(g) Does Not Bar This Motion.

#### A. Movants Do Not Seek Consolidation.

Misconstruing the relief Movants seek, the Receiver argues that Section 21(g) of the Exchange Act of 1934 bars review of his conduct. Section 21(g) provides that "no action for equitable relief instituted by" the SEC "shall be consolidated or coordinated with other actions not brought by" the SEC. 15 U.S.C. § 78u(g). The Receiver's argument fails because Movants do not seek to "consolidat[e] or coordinat[e]" with the SEC's action. We moved in this proceeding solely because this Court has oversight authority over the Receiver. We simply ask this Court, in connection with its oversight authority, to order the Receiver to bring his claims in this District, where they can be most efficiently managed and coordinated with the *Gleinn*

Action—a *non-SEC* lawsuit. To reiterate: Movants appeared here only because the Receiver was appointed in this action, and "[o]rdinarily questions concerning propriety of receivers' actions should be raised in the receivership proceeding." *Nat'l Ben. Life Ins. Co. v. Shaw-Walker Co.*, 111 F.2d 497, 507 (D.C. Cir. 1940).[2]

**B. Movants Do Not Seek To Interfere with the SEC's Lawsuit.**

The Receiver and SEC also argue that Section 21(g) bars Movants from intervening in the SEC's enforcement action. RO 11[3]; SO 1–3.[4] This Court need not reach that argument because, as Movants explain in their Notice of Limited Appearance, Movants can appear without formally intervening. *See* Doc. 262 at 1–3; *infra* Part IV. Alternatively, if the Court considers *sua sponte* the points we raise, it moots Movants' need to intervene under Rule 24.

Should the Court reach Movants' Rule 24 argument, it should permit intervention. Section 21(g) does not even mention intervention. The Receiver and SEC have seized on a statement in an unpublished *pro se* case, *S.E.C. v. Wozniak*, 1993 WL 34702 (N.D. Ill. Feb. 8, 1993). But the proposed intervenor there attempted to join an SEC action in order to file a complaint—plainly an effort to "consolidate[] or coordinate[]" under Section 21(g). *Id.* at *1. That is not what Movants seek here.

None of the cases the Receiver or SEC cite holds that Section 21(g) bars interventions that do not seek to "consolidate[] or coordinate[]." In fact, multiple

[2] Non-parties regularly appear or intervene in receivership actions (including this one) to raise receivership issues. *See* Docs. 93 (Bank of America), 145 (Investor Plaintiffs); *infra* Part IV.
[3] "RO" refers to the Receiver's opposition (Doc. 268) and "SO" to the SEC's opposition (Doc. 270).
[4] Neither the Receiver nor SEC disputes that the Rule 24 criteria for mandatory and permissive intervention are met. *See* RO 11–13; SO 1–4.

courts have held that Section 21(g) does not bar such interventions. *See, e.g., S.E.C. v. Kings Real Estate Inv. Tr.*, 222 F.R.D. 660, 666–67 (D. Kan. 2004); *SEC v. Credit Bancorp, Ltd.*, 194 F.R.D. 457, 466 (S.D.N.Y. 2000). Movants do not seek to participate as a party, assert claims, or coordinate with the SEC's proceeding. The SEC's concern that Movants might interfere with or disrupt their enforcement action is misplaced. Section 21(g) does not bar intervention for the limited purpose Movants request.

## II. The Anti-Injunction Act and Judicial Comity Are Irrelevant.

The Receiver argues this Court should "be guided" by the Anti-Injunction Act and "refrain from interfering with the Receiver's California lawsuit under the doctrine of judicial comity." RO 13, 17. Neither has any relevance here. Indeed, it is ironic the Receiver advances these arguments when he has initiated conflicting litigation that will create confusion, competing jurisdiction, and friction between court systems.

– ***Anti-Injunction Act:*** The Anti-Injunction Act provides that a federal court "may not grant an injunction to stay proceedings in a State court," subject to certain exceptions. 28 U.S.C. § 2283. But Movants do not seek "an injunction to stay proceedings in State court." *Id.* Rather, they ask this Court to supervise the actions of the Receiver and issue instructions, as this Court clearly has the power to do. *See, e.g.*, *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005) (observing "district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad"); *Fed. Home Loan Mortg. Corp. v. Spark Tarrytown, Inc.*, 829 F. Supp. 82, 85 (S.D.N.Y. 1993) ("Subsequent to the appointment of a receiver, a court retains the equitable power to

review the actions of the receiver"); *S.E.C. v. Elliott*, 953 F.2d 1560, 1577 (11th Cir. 1992) (Receiver "is an officer of the court"; "[e]ven though the Receiver may at times take adverse positions to certain claimants, the Receiver acts under supervision of the court").[5] It would be strange indeed if a receivership court could supervise a receiver in all matters except the receiver's decision to file suit in state court.

– ***Judicial Comity:*** The doctrine the Receiver refers to as "judicial comity" calls for federal courts, out of respect for concurrent sovereigns, to defer deciding certain types of federal claims to give state courts the first opportunity to decide them. *See, e.g.*, *Rhines v. Weber*, 544 U.S. 269, 273–74 (2005). Examples include declining to hear a habeas corpus petition challenging a state court conviction until the prisoner exhausts state appellate rights, *id.*, or declining to hear § 1983 actions challenging the constitutional validity of state tax systems, *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116 (1981). In other words, judicial comity arises when a federal court is asked to preempt state laws or judicial decisions.

Judicial comity is not implicated here. The Receiver's state court lawsuit is three months old, and nothing of significance has occurred in it. In fact, the court recently continued the case management conference to June 18, 2021, to give this Court time to rule on our motion. California's interests in its laws and decisions are not implicated

[5] Even if the Anti-Injunction Act applied, it does not bar injunctions "necessary in aid of [a court's] jurisdiction." 28 U.S.C. § 2283. Review of the Receiver's actions and instructions to the Receiver are "necessary in aid of [this Court's] jurisdiction" over the Receivership Estate. *See, e.g.*, *Covil Corp. by Protopapas v. Zurich Am. Ins. Co.*, 2020 WL 951052, at *12 (D.S.C. Feb. 27, 2020) (enjoining receiver from actions in state tort suits as "necessary in aid of its jurisdiction" under Anti-Injunction Act).

by Movants' motion in any way. Indeed, it is puzzling that the Receiver invokes "comity" towards a state court when he first chose to sue Movants in federal court.

At bottom, the Receiver's Anti-Injunction Act and judicial comity arguments are an attempt by the Receiver to insulate his conduct from review by claiming that such review would offend state court systems. But there is no such exception to this Court's oversight authority. The Receiver is not an independent sovereign but an officer of this Court, whose powers derive entirely from this Court, and whose decisions and actions are subject to the supervision and instructions of this Court.

**III. The Motion Is Timely.**

The Receiver also argues that the motion is "untimely" because it postdates his "first California filing . . . by more than four months." RO 7. The Receiver cites no authority for this proposition, and there is none. We ordinarily would not describe the parties' discussions, but in this case they affected this motion's timing. Between September 28, 2020, and December 30, 2020, the Receiver's only lawsuit against Movants was in federal court in the Central District of California. During that time, there was no need to seek judicial relief because it appeared the Receiver voluntarily might transfer his case to this Court. In December 2020, Movants and the Receiver negotiated a written agreement to transfer. The Receiver first informed Movants he would not sign that agreement on December 29, 2020. He then filed his state court complaint on December 30, 2020 and moved to dismiss his federal complaint on January 13, 2021—less than one month (not four months) before Movants filed this motion. In any event, the date we filed our motion does not affect the Court's inherent

authority to review the Receivers' actions.

## IV. Movants Have Standing.

The Receiver contends Movants lack standing[6] "without proper intervention," and that Movants "have not even attempted" to seek intervention. RO 8–10. Both propositions are incorrect.[7] It is well-settled that non-parties affected by a receiver or receivership court's actions may appear in that court without formally intervening. *See, e.g.*, *Alexander v. Hillman*, 296 U.S. 222, 238 (1935) (non-parties presenting claims "became entitled to adjudication without petition for intervention"); *SEC v. Provident Royalties, LLC*, 2011 WL 2678840 (N.D. Tex. July 7, 2011) (hearing non-party's motion); *FTC v. Global Mktg. Grp.*, No. 06-cv-2272 (M.D. Fla. Apr. 5, 2007) (Doc. 74) (same); *CFTC v. Topworth Inten., Ltd.*, 205 F.3d 1107, 1113 (9th Cir. 1999) (same). Intervention is not required; a receivership court "may deviate from the Federal Rules of Civil Procedure in favor of exercising its broad powers and wide discretion." *SEC v. Torchia*, 922 F.3d 1307, 1316 (11th Cir. 2019). And, even if intervention was necessary, Movants requested it. *See* Doc. 262 (alternatively moving to intervene).

The Receiver contends Movants "really seek[] a rehearing of, and geographic limitation on, the Receiver's ability to pursue litigation." RO 10. But the Receiver gives no reason why that would prevent consideration of Movants' arguments. Movants

[6] To the extent the Receiver means Article III standing, Movants plainly have it. The burden of defending the Receiver's lawsuit in an inconvenient forum is their "injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). His decision to sue in California, not here, is their injury's cause. *Id.* And ordering the Receiver to sue in this Court would redress their injury. *Id.*

[7] The Receiver attempts a Catch-22. He argues Movants lack standing because they have not intervened, but also argues that Movants cannot intervene under Exchange Act § 21(g). In other words, he attempts to foreclose the Court from hearing from Movants under any circumstances.

were not parties when the relevant Court orders were entered, were not heard on those orders, and the Receiver's conduct *after* entry of the orders was not before the Court. And this Court has inherent authority to amend its orders. *See, e.g.*, *Keepseagle v. Perdue*, 856 F.3d 1039, 1048 (D.C. Cir. 2017).

**V. The Receiver Fails To Justify Pursuing His Claims in California.**

The Receiver contends his lawsuit should proceed in California by advancing generalized statements that do not respond to our points. He confuses a plaintiff's right to sue (in California state court or elsewhere) with whether his doing so adversely affects the Receivership Estate. He may have the *ability* to file suit in the courts of all 50 states, but this Court can review the propriety of his doing so.

Contrary to the Receiver's claims, California is not the "natural center of gravity" of this case. RO 7, 16. Although some of the legal work at issue was performed by lawyers in California, legal work is not fixed to a locale. The recipient of the legal advice (EquiAlt) was in Florida, not California. All but one of the other EquiAlt-related cases are pending here, the primary witnesses (Wassgren and Davison) live here, nearly all of EquiAlt's real estate assets are here, and the Receivership Court is here. Conversely, few relevant witnesses live in California—in fact, according to the Receiver, only one of EquiAlt's "top ten" salespeople lives there, meaning the nine others live elsewhere. RO 16. When the Receiver sued those salespeople, he sued them *here*, not in California. That Wassgren *used to* work in California does not bear on where it is appropriate to litigate *now*.

As for *Gleinn*, it is surprising that the Receiver dismisses its relevance. *Gleinn* is

more advanced than the Receiver's case and overlaps almost completely with it on witnesses, documents, and issues. It will have a different discovery schedule, pretrial procedures, and trial setting. Obviously, *Gleinn* should be considered when evaluating how to manage efficiently the litigation. Further, that the *Gleinn* Plaintiffs sued here, not California, dispels the myth that California is the "natural" forum for the Receiver's claims.

## CONCLUSION

In sum, the Receiver has failed to rebut Movants' arguments and the SEC's fears of interference are mislaid. Movants respectfully request the Court to direct the Receiver to file his claims in this Court and dismiss his state court action.

Dated: April 12, 2021

Respectfully submitted,

*/s/ Simon A. Gaugush*

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 12, 2021, I electronically filed the foregoing with the Clerk of Court by using the Court's CM/ECF system, thereby serving this document on all attorneys of record in this case.

*/s/ A. Lee Bentley, III*
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