

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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

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

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

Defendants, and

128 E. DAVIS BLVD, LLC, et al.,

Relief Defendants.

**RECEIVER'S UNOPPOSED MOTION TO APPROVE
SETTLEMENT OF NON-INVESTOR CLAWBACK CLAIM**

Burton W. Wiand, as Receiver over the assets of the Corporate and Relief Defendants,¹ moves the Court to approve the Receiver's settlement of

¹ The (“**Receiver**” and the “**Receivership**” or “**Receivership Estate**”) has been expanded to include not only the Corporate and Relief Defendants but also the following entities: EquiAlt Qualified Opportunity Zone Fund, LP; EquiAlt QOZ Fund GP, LLC; EquiAlt Secured Income Portfolio REIT, Inc.; EquiAlt Holdings LLC; EquiAlt Property Management LLC; and EquiAlt Capital Advisors, LLC [Doc. 184, at 6–7] and EquiAlt Fund I, LLC [Doc. 284].

his clawback claims against sales agent Edgar Lozano and his affiliated business GIA LLC (“Lozano”).

BACKGROUND

On February 11, 2020, the Securities and Exchange Commission (“SEC”) filed a complaint (Doc. 1) against the above-captioned Defendants and Relief Defendants. On July 9, 2020, the SEC filed an amended complaint (Doc. 138) (the “Amended Complaint”) against the same Defendants and Relief Defendants.

On February 14, 2020, the Court entered an order (Doc. 11) appointing Burton W. Wiand as temporary Receiver. The Court 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 . . . and to administer such assets as is required in order to comply with the directions contained in this Order.” Doc. 11 at ¶1. The Court also entered a temporary restraining order (Doc. 10) imposing a temporary injunction against the Defendants and Relief Defendants, freezing their assets and granting other relief. On August 17, 2020, the Court issued an order (Doc. 184) granting the SEC’s request for a preliminary injunction, extending the temporary restraining order pending the issuance of the preliminary injunction, and granting the Receiver’s Motion to Expand the Receivership to Include REIT and QOZ Entities (Doc. 90).

The Amended Complaint charges the Defendants with violations of various federal securities laws and regulations for orchestrating a real estate Ponzi scheme that raised more than \$170 million from approximately 1,100 victim investors (the “Scheme”). The SEC alleges that the Defendants misrepresented the use of the proceeds of the investments and that Davison and Rybicki, who controlled the operations of the Receivership Entities prior to the appointment of the Receiver, misappropriated monies from the investors.

Pursuant to this Court’s Order, the Receiver was to “[i]nvestigate the manner in which the affairs of the Corporate 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 . . . against any transfers of money or other proceeds directly or indirectly traceable from investors in EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, LLC, and EA SIP, LLC; provided such actions may include, but not be limited to . . . recovery and/or avoidance of fraudulent transfers” [Doc. 11 at ¶2]

To that end, the Receiver tasked his forensic accountants at Yip Associates to identify those sales agents and their associated entities who received “commissions” or “marketing fees” based on their sales of the EquiAlt debentures. Based on this information, on February 13, 2021, the

Receiver filed an action, *Wiand v. Family Tree Estate Planning, LLC, et al.*, Case No. 8:21-cv-00361, naming 37 agents and entities as defendants. This complaint includes claims against Lozano for \$278,807.24 in payments received.

After the lawsuit was filed, counsel for Lozano contacted undersigned counsel regarding potential resolution of the Receiver's claim. After extended discussions and the exchange of financial information, the Receiver and Lozano agreed to settle the Receiver's claims for \$130,000, to be paid in monthly installments. *See Exhibit 1.* Under the terms of the settlement agreement, if the total settlement is not paid within 38 months of the Court's approval, Lozano would be subject to immediate entry of a judgment in the amount of \$317,358.42, less any payments received, plus fees and interest.

The Receiver believes this settlement is a practical result that benefits the Receivership Estate. While having no doubt as to the merits of his claims, the Defendant's ability to make additional payments is doubtful as are any potential collection efforts if the Receiver obtained a judgment after pursuing further litigation. Avoiding the expense of further litigation and gaining assets for the Estate result in a good outcome for this claim.

ARGUMENT

I. THE COURT HAS BROAD POWER OVER THIS RECEIVERSHIP, AND THE SETTLEMENT OF THESE CLAWBACK CLAIMS IS IN THE RECEIVERSHIP ESTATE'S BEST INTEREST.

The Court's power to supervise an equity receivership and to determine the appropriate actions to be taken in the administration of the receivership is extremely broad. *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 defrauded investors and other 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).

Based on these equitable principles, the Receiver believes that this Court should grant this motion. The Receiver has reviewed Lozano’s financial records and has determined that this settlement is reasonable, practicable and in the Receivership Estate’s best interests. Therefore, the Receiver requests that the Court approve the Receiver’s settlement with Lozano.

CONCLUSION

Based on the foregoing, the Receiver moves the Court for entry of an order approving the Receiver’s settlement of his clawback claim against Edgar Lozano and GIA LLC in the amount of \$130,000.

LOCAL RULE 3.01(G) CERTIFICATION

Counsel for the Receiver has conferred with counsel for the SEC and Defendants Brian Davison and Barry Rybicki and they do not object to the relief sought.

Respectfully submitted,

/s/ Katherine C. Donlon

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Attorneys for Burton W. Wiand Receiver

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 16, 2021, I electronically filed the foregoing with the Clerk of this Court by using the CM/ECF system which will send notification of electronic filing to all counsel of record.

/s/ Katherine C. Donlon

Attorney

EXHIBIT 1

SETTLEMENT AGREEMENT

WHEREAS, by order dated February 14, 2020, the Court in *Securities and Exchange Commission v. Brian Davison, et al.*, Case No. 8:20-cv-325-T-35AEP (M.D. Fla.) (the “**EquiAlt Receivership Action**”), appointed Burton W. Wiand as Receiver (the “**Receiver**”) for (1) corporate defendants EquiAlt LLC, EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, LLC and EA SIP, LLC (“**Corporate Defendants**”) and (2) 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, TB Oldest House Est. 1842, LLC (“**Relief Defendants**”) and all of their subsidiaries, successors, and assigns (collectively, the “**Receivership Entities**”); and

WHEREAS, on February 13, 2021, the Receiver commenced a lawsuit in the United States District Court for the Middle District seeking the return of funds alleged to have been fraudulently transferred by certain Receivership Entities to various sales agents, including Lozano, who sold EquiAlt debentures without federal securities registration. (“**Transfers**”) *See Burton Wiand, as Receiver, et al. v. Family Tree Estate Planning, LLC, et al.*, Case No.: 8:21-cv-0361-SDM-AAS; and

WHEREAS, GIA LLC and Edgar Lozano (collectively, “**Lozano**”) received \$278,807.24 in Transfers from 2016 to 2019;

WHEREAS, Lozano contends he did not knowingly participate in any fraudulent securities scheme;

WHEREAS, Lozano has cooperated with, and provided to the Receiver evidence documenting that he has insufficient assets to satisfy the total monetary demands made by the Receiver;

WHEREAS, Lozano, without admitting liability, and cooperating to the satisfaction of the Receiver for purposes of settlement, wish to resolve the Receiver's claims amicably.

NOW, THEREFORE, Lozano has agreed to pay the Receiver and the Receiver has agreed to accept a total of \$130,000.00 (the "**Settlement Amount**") in full settlement of the claims asserted in the lawsuit. The Settlement Amount shall be paid pursuant to the following payment schedule:

- A payment of \$20,000.00 to the Receiver within 15 days of the Court's approval of this Settlement;
- A monthly payment of \$3,000.00 to the Receiver for 36 months to begin on the first of the month following the Court's approval of the Settlement;
- A payment of \$2,000 on or before the first of the 37th month following the Court's approval of the Settlement.

Each payment towards the Settlement Amount shall be made payable to "Burton W. Wiand, as Receiver" and sent to the Receiver's counsel (c/o Katherine C. Donlon, Esq.) at Johnson, Cassidy, Newlon & DeCort, 2802 N. Howard Avenue, Tampa, FL 33607.

If full payment of the Settlement Amount is not received within 38 months of the Court's approval of the Settlement, Lozano agrees that he shall be in default of his obligations and consents to – and agrees not to oppose – the immediate entry of a joint

and several judgment against Lozano in the amount of \$317,358.42, less any payments made, plus reasonable attorneys' fees and interest at 4.31% from the date of this Settlement Agreement. Such judgement will be entered upon the filing of an affidavit from the Receiver certifying failure of payment.

Upon receipt and clearing of the full settlement payment and interest, if any, the Receiver, on behalf of the Receivership Entities, and their employees, agents, representatives, beneficiaries, and assigns, shall be deemed to have released and forever discharged Lozano of and from any liability for any claims related to the allegations asserted against Lozano in *Wiand v. Family Tree Estate Planning, LLC, et al.*

In further consideration of the release of claims described above, Lozano agrees to waive and does hereby waive any claim he or it had, has, or hereafter may have against the Receiver and/or assets of the Receivership Entities in connection with the EquiAlt Receivership Action.

The Receiver and Lozano understand and agree that the payment of the aforesaid total sum and waiver of claims is in full accord and satisfaction of and in compromise of disputed claims regarding the receipt of commissions and the payment and waiver are not an admission of liability, which is expressly denied, but are made for the purpose of terminating a dispute and avoiding litigation.

Lozano understands and agrees that each party to this agreement shall bear its own individual costs and attorneys' fees incurred in the resolution of this matter and further agrees to assist the Receiver should any additional steps be necessary to effectuate this agreement.

The Receiver and Lozano agree this Settlement Agreement shall be governed by and be enforceable under Florida law through a summary proceeding in the United States District Court for the Middle District of Florida, Tampa Division. The Receiver further agrees that no adverse reporting will be made to any of the credit reporting agencies, credit bureaus, regulatory agencies, state or federal, or any other enforcement agency unless Lozano defaults on his financial obligations under this agreement. However, the Receiver shall not be restricted in sharing any information with any governmental entity in the event that the Receiver is requested or required (by oral questions, interrogatories, requests for information or documents in legal proceedings, subpoena, civil investigative demand or other similar process or by any law, rule or regulation of any governmental agency or regulatory authority) to disclose the terms of this Settlement Agreement.

The Receiver and Lozano also agree that electronically transmitted copies of signature pages will have the full force and affect of original signed pages.

In witness whereof, the parties have set their hands as of the dates indicated.

GIA, LLC

By: Edgar Lozano
Edgar Lozano

By: Burton W. Wiand
Burton W. Wiand, as Receiver
for the Receivership Entities

Its: President

Date: 5-21-2021

Date: 5-17-2021

By: Edgar Lozano
Edgar Lozano

Date: 5-17-2021