

**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 FOR REAPPOINTMENT

Burton W. Wiand, as Receiver (the "Receiver"), by and through his undersigned counsel, moves the Court for an Order Reappointing Receiver. In support of this Motion, the Receiver asserts:

1. The Securities and Exchange Commission (the "Commission") instituted this action to "halt [an] ongoing fraud, maintain the status quo, and preserve investor assets. . . ." (Compl., ¶9 (Dkt. 1)). To further these

goals, Burton Wiand, on motion of the Commission, was appointed Receiver over Defendants EquiAlt LLC, EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, LLC and EA SIP, LLC and over all Relief Defendants by Order Appointing Receiver entered February 14, 2020 (the "Order Appointing Receiver") (Dkt. 11). The Receivership was expanded to include EquiAlt QOZ Fund GP, LLC, EquiAlt Qualified Opportunity Zone Fund, LP, EquiAlt Secured Income Portfolio REIT, Inc., EquiAlt Holdings, LLC, EquiAlt Property Management LLC, and EquiAlt Capital Advisors, LLC on August 17, 2021 (Dkt. 184), and EquiAlt Fund I, LLC on March 31, 2021 (Dkt. 284) (the entities in receivership are collectively referred to as the "Receivership Entities").

2. Under the Order Appointing Receiver, the Receiver was authorized, empowered, and directed to, among other things:

[i]nvestigate 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 against those individuals, corporations, partnerships, associations and/or unincorporated organizations which the Receiver may claim have wrongfully, illegally or otherwise improperly misappropriated or transferred 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, their officers, directors, employees, affiliates, subsidiaries, or any persons acting in concert or participation with them, or 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, 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. . .

Dkt. 11 at ¶2.

The Receiver has instituted actions, including, but not limited to actions against investors in the Receivership Entities who profited at the expense of other investors and against persons and entities that received funds from the Receivership Entities that were not related to the recipient's investments (for example, person and entities that received purported commissions). These actions were filed to "marshal and safeguard all of the assets of the Defendants and Relief Defendants" in order to distribute those assets equitably among investors and other creditors who suffered losses as a result of the investment scheme orchestrated through Receivership Entities.

3. The Receiver makes this motion so that he may satisfy the 10-day requirement of 28 U.S.C. § 754 to invoke the jurisdiction of the United States District Court for the Middle of Florida over these actions as will be explained more fully below.

MEMORANDUM IN SUPPORT

Jurisdiction and Venue

While the actions the Receiver has filed are based on state law, those Courts have subject matter jurisdiction over the actions based on ancillary or supplemental jurisdiction as set forth in 28 U.S.C. § 1367. *See Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (receiver's state law fraudulent conveyance action against Ponzi scheme investors for recovery of profits is ancillary to federal court SEC enforcement action which appointed receiver, and subject matter jurisdiction is provided by 28 U.S.C. § 1367). When, as here, a receiver's action is brought to accomplish the objectives of the receivership order, it is ancillary to the court's exclusive jurisdiction over the receivership estate. *See SEC v. Bilzerian*, 378 F.3d 1100, 1107 (D.C. Cir. 2004).

Venue for all of these actions is also appropriate in this district under 28 U.S.C. § 754, which states:

A receiver appointed in any civil action or proceeding involving property, real, personal, or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.

He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title.

Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

See Scholes, 56 F.3d at 753 (Section 754 provides venue in receivership district). This section "allows a receiver to sue in the district in which he was appointed to enforce claims anywhere in the country." *Id.* Section 754 extends "the territorial jurisdiction of the appointing court. . . to any district of the United States where property believed to be that of the receivership estate is found, provided that the proper documents have been filed in each such district as required by § 754." *Bilzerian*, 378 F.3d at 1104 (citing *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 823 (6th Cir. 1981)).

In addition, the Court will have personal jurisdiction over the defendants under the nationwide service of process statute for receiverships, 28 U.S.C. § 1692, which states:

In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts.

See Bilzerian, 378 F.3d at 1104 (personal jurisdiction is established by the nationwide service of process authorized in receivership proceedings by 28 U.S.C. § 1692, under which "[t]he appointment court's process extends to any

judicial district where receivership property is found." (*quoting Haile*, 657 F.2d at 826)).

Need for Reappointment

Under 28 U.S.C. §754, in order to invoke personal jurisdiction over defendants residing outside of this district, the Receiver must file a copy of the complaint and the order appointing the Receiver in the districts in which the receivership property is located within 10 days from the date of the order appointing a receiver. *SEC v. Bilzerian*, 378 F.3d 1100, 1103 (D.C. Cir. 2004).

In the instant case, the Receiver, upon appointment, did not know (nor could know) the districts of domicile and identity of parties against whom actions could be brought. Rather a thorough investigation was necessary to assure that actions would be brought in good faith under the Receivership Order. Through investigation, the Receiver has learned the identity of parties against whom actions may be (or have been) brought and their districts of domicile. Thus, the Receiver requests an order reappointing him as Receiver so that he may timely file the requisite papers in the appropriate jurisdictions as required by Section 754 to obtain jurisdiction over assets and defendants against whom actions have been or will be commenced.

Reappointment of a receiver for the purpose of re-starting the 10-day time limit under § 754 has been expressly approved by many courts. *See Bilzerian*, 378 F.3d at 1105 (citing *SEC v. Vision Communications, Inc.*, 74

F.3d 287, 291 (D.C. Cir. 1996)) ("On remand, the court may reappoint the receiver and start the ten-day clock ticking once again."); *SEC v. Aquacell Batteries, Inc.*, 2008 WL 2915064, at *3 (M.D. Fla. July 24, 2008) (citing *Warfield v. Arpe*, 2007 WL 549467, at *12 (N.D. Tex. Feb. 22, 2007)) ("A district court may reappoint a federal equity receiver in a securities fraud case in order to 'reset' the 10-day clock under § 754"); *Terry v. June*, 2003 WL 21738299, at *3 (W.D. Va. July 21, 2003) ("Courts having addressed this issue unanimously suggest that an order of reappointment will renew the ten-day filing deadline mandated by section 754."); *SEC v. Heartland Group, Inc.*, 2003 WL 21000363, at *5 (N.D. Ill. May 2, 2003) ("[T]he court can easily correct [the Receiver's] failure to file such a claim by merely reappointing the Receiver and thereby starting the 10-day time period under § 754 ticking once more."). "Permitting a receiver to reassume jurisdiction in this manner is consistent with the role and purpose of a federal receivership. Were this not the rule, a receiver would be forced to file the required documentation in all ninety-four federal districts to protect jurisdiction over any potential, but presently unknown, receivership assets-a result that would produce a needless waste of time and lead to dissipation of assets otherwise returnable to defrauded investors." *Terry v. June*, 2003 WL 21738299, at *3 (citing *Heartland Group*, 2003 WL 21000363, at *5; *SEC v. Infinity Group Corp.*, 27 F. Supp. 2d 559, 563 (E.D. Pa. 1998)). This procedure has been utilized in this

District. See, e.g., *Commodity Futures Trading Commission v. Oasis International Group, Limited*, Case No. 8:19-cv-00886-VMC-SPF (M.D. Fla. Apr. 23, 2021)(Doc. 390)(approving reappointment of Receiver for similar purposes); *Securities and Exchange Commission v. Nadel et al.*, Case No. 8:09-cv-00087-VMC-CPT (M.D. Fla. January 21, 2009); *SEC v. HKW Trading, LLC, et al.*, Case No. 8:05-cv-1076-T-24TBM (M.D. Fla. Feb. 22, 2006) (Order Reappointing Receiver (Dkt. 75)) (order reappointing Receiver).

WHEREFORE, the Receiver moves the Court to reappoint him as Receiver over all of the Receivership Entities and for such other relief as the Court deems appropriate.

LOCAL RULE 3.01(g) CERTIFICATE OF COUNSEL

Counsel for the Receiver has conferred with counsel for the SEC and Counsel for Defendant Barry Rybicki and they do not object to the relief sought. Counsel for Brian Davison does not agree with the characterization of the facts but does not oppose the relief sought.

Respectfully submitted,

/s/ Katherine C. Donlon

Katherine C. Donlon, FBN 0066941

kdonlon@jclaw.com

JOHNSON, CASSIDY, NEWLON &
DeCORT P.A.

2802 N. Howard Avenue

Tampa, FL 33607

Tel: (813) 291-3300/Fax: (813) 324-4629

and

Jared J. Perez, FBN 0085192
jperez@guerraking.com
R. Max McKinley, FBN 119556
mmckinley@guerraking.com
GUERRA KING P.A.
5505 West Gray Street
Tampa, FL 33609
Tel: (813) 347-5100/Fax: (813) 347-5198

Attorneys for Burton W. Wiand Receiver

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 8, 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