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, et al.,

Defendants, and

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

Relief Defendants.
_____/

DEFENDANT BRIAN DAVISON'S MEMORANDUM IN OPPOSITION TO MOTION TO ALLOW INVESTOR PLAINTIFFS TO ASSERT CLAIMS AGAINST DEFENDANT BRIAN DAVISON OR ALTERNATIVELY FOR A LIMITED AMENDMENT OF THE RECEIVERSHIP ORDER

By requesting permission to assert claims against Brian Davison, the Investor Plaintiffs[1]—and the Receiver—fail to realize that such an action would deplete the Receivership's assets. The EquiAlt entities are indispensable parties to any claims brought against Davison for actions he took while Chief Executive Officer of EquiAlt. Thus, the EquiAlt entities would incur costs associated with responding to discovery requests and attorney's fees—funds that otherwise would remain in the Receivership.

[1] "Investor Plaintiffs" refers to the plaintiffs in *Richard Gleinn, et al. v. Paul Wassgren, et al.*, No. 8:20-cv-1677-MSS-CPT. (*See* Doc. 459 at 1).

The Investor Plaintiffs cannot proceed with litigation against Davison without the EquiAlt entities because (1) the Court, EquiAlt, and Davison have an interest in resolving liability properly to all relevant parties, (2) the absence of the EquiAlt entities in litigation against Davison might result in incomplete or inconsistent verdicts or settlements among interested parties, and (3) the Investor Plaintiffs can wait until the Receivership is wound up before asserting claims against Davison Individually. As a result, the Investor Plaintiffs' motion to allow them to assert claims against Davison (Doc. 459) should be denied.

I. RELEVANT BACKGROUND

The Receivership Order enjoins any person from bringing claims that might disturb the Receivership's assets:

> During the period of this receivership, all persons, including creditors, banks, investors, or others, with actual notice of this Order, are enjoined from filing a petition for relief under the United States Bankruptcy Code without prior permission from this Court, or from in any way disturbing the assets or proceeds of the receivership or from prosecuting any actions or proceedings which involve the Receiver or which affect the property of the Corporate Defendants and Relief Defendants.

(Doc. 350-1 at ¶ 17).

By filing their current motion, the Investor Plaintiffs recognize that the Receivership Order bars them from bringing their claims against Davison individually. (*See* Doc. 459). The Investor Plaintiffs' motion[2] fails to provide any grounds justifying their requested relief. *Cf. In re Allstar Bldg. Prods. Inc.*, 834 F.2d 898, 899 (11th Cir. 1987)

[2] The Investor Plaintiffs' motion fails to include a legal memorandum required under Local Rule 3.01(a).

(stating that, in bankruptcy proceedings, the party seeking relief from stay bears the initial burden of proving equity in property at issue). Instead, Federal Rule of Civil Procedure 19 and relevant caselaw weigh against the Investor Plaintiffs' request.

II. LEGAL MEMORANDUM

Federal Rule of Civil Procedure 19 governs required joinder of parties. Whether a party is indispensable to a claim and must be joined under Rule 19 is a two-step process. *Kane v. Rose*, No. 06-81290-RYSKAMP/VITUNAC, at 5 (S.D. Fla. June 22, 2007).[3] First, under Rule 19(a), the Court analyzes whether joinder of parties is feasible. *Id.*; *see also* Fed. R. Civ. P. 19(a)(1) (listing factors that require joinder). If joinder is not feasible, then under Rule 19(b), the Court considers whether "based on equity and good conscience" the action should proceed without the interested party or entity. *Kane v. Rose*, at 5.

Here, the EquiAlt entities are indispensable parties to litigation against Davison, joinder is not feasible, and the Investor Plaintiffs' claims against Davison cannot proceed without the EquiAlt entities.

A. The EquiAlt Entities are Indispensable Parties to Litigation Against Davison and Joinder is Not Feasible

The EquiAlt Entities are indispensable parties to litigation against Davison because the Investor Plaintiffs' claims are inextricably tied to Davison's actions while CEO of EquiAlt. *See Rubenstein, et al. v. EquiAlt LLC, et al.*, No. 8:20-cv-448-WFJ-TGW

[3] The undersigned could not locate the June 22, 2007 order from *Kane v. Rose* on an online database. That order (Doc. 36 in that case) is attached to this response.

(M.D. Fla. Feb. 26, 2020) (Doc. 1) (alleging various securities claims against Davison and EquiAlt entities). The Investor Plaintiffs' original complaint puts forth multiple allegations of fraud against Davison for actions he took as CEO of EquiAlt. *See e.g.*, *id.* at ¶ 6 ("EquiAlt and the EquiAlt Principals perpetuated this Ponzi scheme with the knowledge and specific assistance of Defendant [Tony] Kelly. Kelly was Davison's right-hand person in EquiAlt's Tampa office and handles much of the day-to-day events and actions."). Thus, the EquiAlt entities are indispensable parties to the Investor Plaintiffs' claims against Davison individually because their claims are inextricably tied to Davison's actions while CEO of EquiAlt.

Joinder is not feasible because—as the Investor Plaintiff recognize—the Receivership Order prohibits claims against the Receivership (i.e., EquiAlt). (*See* Doc. 350-1 at ¶ 17). If EquiAlt is joined as a party to the Investor Plaintiffs' claims against Brian Davison, then the Receivership will incur costs associated with discovery requests, including depositions, requests for production, and attorney's fees. These costs will deplete the Receivership's assets, violating the Court's Receivership Order. As a result, joinder cannot occur without violating the injunction provision in the Receivership Order.

The trial court's order in *Kane v. Rose* is instructive on this point. In ruling on a motion to dismiss an ancillary complaint in a receivership action, the court concluded that the entity in receivership was an indispensable party to the ancillary complaint. *Id.* at 6–7. The court arrived at this conclusion because the ancillary complaint alleged that the entity in receivership and a receivership individual were "primary

participants" in the alleged fraud. *Id.* at 6–7. Further, the SEC alleged in its own complaint that the receivership individual and entities "were not only the central figures perpetuating the fraud, but also were the actual wrongdoers who committed fraud." *Id.* at 7. Thus, the court concluded that the receivership entity was an indispensable party to the ancillary complaint. And because a Receivership Order prohibited joinder of the receivership entity, the Court found that joinder was not feasible because joinder would result in costs incurred to the Receivership. *See id.*

Just as the receivership entity was an indispensable party to the ancillary complaint in *Kane v. Rose* because the entity was a primary participant in the alleged fraud, so too is EquiAlt an indispensable party to the Investor Plaintiffs' claims because their allegations are based on Davison's actions while CEO of EquiAlt. Because the Investor Plaintiffs' allegations against Davison and EquiAlt are inextricably intertwined, EquiAlt is an indispensable party to the Investor Plaintiffs' claims. And because the Receivership Order prohibits actions that would deplete the Receivership's assets, the Court should find joinder not feasible.

B. Claims Against Davison Cannot Proceed without the EquiAlt Entities

Without EquiAlt's joinder in the Investor Plaintiffs' claims against Davison individually, their claims cannot proceed. To determine whether an action should procced without an indispensable party under Rule 19(b), courts consider the following:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence will be adequate; and
>
> (4) whether the plaintiff will have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

The factors under Rule 19(b) weigh in Davison's favor, and *Kane v. Rose* is again instructive. In that case, the court concluded that the ancillary complaint could not proceed without the receivership individuals or entities because (1) the defendant and the court had an interest in "having the liability issue decided properly as to all relevant wrongdoers;" (2) the absence of the receivership individuals and entities would "violate a public policy of reaching complete and consistent settlement among interested parties;" and (3) the plaintiff had an adequate forum for relief in case of dismissal because she could file a proof of claim in the receivership estate. *Kane v. Rose*, at 8–9. As a result, the court dismissed the ancillary complaint. *Id.* at 9.[4]

[4] The Eleventh Circuit affirmed the district court's order in all respects except for its dismissal of the ancillary complaint with prejudice. *See Kane v. Rose*, 259 F. App'x 258 (11th Cir. 2007). The Eleventh Circuit said, "[T]he [district] court . . . concluded, correctly that all of [the plaintiff's] claims were currently enjoined by the stay [under the Receivership Order] and that the stay rendered infeasible the joinder of necessary parties." *Id.* at 260. But the Eleventh Circuit remanded the district court's order to dismiss the ancillary complaint without prejudice because the plaintiff could bring her claims after the receivership wound up or after

Similarly here, the Court, EquiAlt, and Davison have an interest in deciding all liability issues uniformly. Further, allowing the Investor Plaintiffs to proceed in their claims against Davison without EquiAlt could result in incomplete or inconsistent settlements. And the Investor Plaintiffs have an adequate forum for relief: they can bring their claims against Davison after the Receivership is wound up or can file claims in the Receivership which Davison believes will have sufficient assets to pay the claims of all investors in full.

In his quarterly reports, the Receiver has repeatedly cautioned EquiAlt investors about third-party attempts to purchase their claims for pennies on the dollar, stating that, "[t]he assets in this Receivership are of substantial value." *See* Receiver's Fifth Quarterly Status Report (Doc. 319 at 30).[5] The various Receiver's Quarterly Reports reflect the sale of assets and operating income bringing millions of dollars into the Receivership, despite the less than optimum values obtained for some of the assets sold.

The Receiver's Seventh Quarterly Report (Doc. 441) showed that income exceeded expenses during the third quarter of 2021 and reflects an ending fund balance of $14,447,777.35 as of September 30, 2021. (*Id.* at p. 4). That balance does not take

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obtaining relief from the stay. *Id.* at 261. Thus, the Eleventh Circuit affirming the district court's order in *Kane v. Rose* provides more persuasive value.

[5] The Receiver's Fifth Quarterly Report states, "In other Receiverships in which the Receiver has been involved, various entities have approached investor victims and offered to purchase an assignment of their claims for pennies on the dollar. **Any investor who is approached with such a proposal should carefully review the information provided by the Receiver as it appears unwise to accept such an offer**." *Id.* at 30-31 (emphasis added).

into account the assets of the Receivership. Those assets are part of the reason provided to the Court to continue the Receivership. "The Receiver recommends continuation of the Receivership because he still has (1) the ongoing need to manage and in part develop, the real property business of the Receivership; (2) **hundreds of properties to liquidate** . . . ." (*Id.* at 25) (emphasis added). Davison believes that even after the costs of the Receivership, liquidation of the remaining Receivership property and claims will result in full repayment of at least all EquiAlt investor principal.

Alternatively, if the Court is inclined to grant the Investor Plaintiffs' motion, Davison asks the court to stay those claims until the Receivership is wound up. *See Rose v. Kane*, No. 08-80456-CIV-RYSKAMP/VITUNAC, 2008 WL 11331770 (S.D. Fla. Sept. 18, 2008) (staying ancillary proceeding pending resolution of receivership action).

III. CONCLUSION

The Investor Plaintiffs' motion is devoid of any authority supporting their requested relief. In contrast, Davison has shown that allowing the Investor Plaintiffs to assert claims against him individually would violate the Court's Receivership Order and Federal Rule of Civil Procedure 19. Ultimately, any claim brought by the Investor Plaintiffs against Davison would result in depleting the Receivership's assets because the Receivership would incur litigation costs. Therefore, Davison respectfully asks that the Court deny the Investor Plaintiffs' motion to file claims against Davison individually (Doc. 459).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed via the Court's CM/ECF system on this 30th day of December 2021.

/s/ Stanley T. Padgett
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-81290-RYSKAMP/VITUNAC

ELIZABETH KANE,

Plaintiff,

v.

LANNY ROSE,

Defendant.
_____/

ORDER GRANTING MOTION TO DISMISS ANCILLARY COMPLAINT FOR DAMAGES AND CLOSING CASE

THIS CAUSE comes before the Court pursuant to Defendant Lanny Rose's ("Defendant") Motion to Dismiss Ancillary Complaint for Damages, filed March 1, 2007 **[DE 19]**. Plaintiff Elizabeth Kane ("Plaintiff") responded on March 26, 2007 **[DE 22]**. Defendant replied on April 5, 2007 **[DE 23]**.[1] This motion is ripe for adjudication.

I. BACKGROUND

Plaintiff initially filed this action in Georgia state court on February 6, 2006. This action was then removed to the United States District Court for the Northern District of Georgia. Defendant moved to dismiss, arguing that the Receivership Orders entered in SEC v. KL Group, LLC, et al., Case No. 05-80186-CIV-RYSKAMP, barred this action. Defendant also argued that the Complaint was an ancillary action to the KL Group action and therefore must be brought in this Court. The United States District Court for the Northern District of Georgia agreed, dismissing the action without prejudice on the

[1]Plaintiff filed a sur-reply on April 16, 2007 **[DE 25]**. Plaintiff filed the sur-reply without leave of court in violation of Local Rule 7.1(C). Defendant moved to strike the sur-reply on April 23, 2007 **[DE 29]**. The motion to strike is granted.

grounds of improper venue. Plaintiff filed this action against Defendant in this Court on December 20, 2006. This matter was originally set before the Honorable Daniel T.K. Hurley, but was transferred to the undersigned on April 20, 2007.

Plaintiff, a resident of Fulton County, Georgia, brings this action against Defendant, a resident of Fort Lauderdale, Florida, alleging that, as an employee and/or agent of the KL Entities, he fraudulently misrepresented the nature of the KL investment funds and the level of securities trading knowledge KL principal John Kim possessed. Plaintiff claims she lost her $1 million investment.

Plaintiff brings an 11 count Complaint. Count I seeks a declaration that this action is not subject to the injunctions in the Receivership Orders. Count II is a cause of action for violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder for the making of misrepresentations and omissions in the sale of securities. Count III is a cause of action for violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b thereunder, as well as Section 20 of the Securities Exchange Act of 1934, alleging that Defendant was acting as an agent or employee of the KL Entities at the time he made the alleged misrepresentations and omissions. Count IV is a cause of action for violation of Section 12(a)(1) of the Securities Act of 1933 for sale of unregistered securities. Count V is a cause of action for violation of the Georgia Securities Act of 1973, O.C.G.A. Section 10-501 et seq., for the making of false and misleading statements in the sale of securities. Count VI, also brought pursuant to the Georgia Securities Act, is a cause of action for the sale of unregistered securities. Counts VII and VIII are common law causes of action for negligent misrepresentation and

negligence. Counts IX, X and XI contain demands for punitive damages, litigation costs and Plaintiff's prayer for relief.

II. DISCUSSION

Defendant moves to dismiss the Complaint on three grounds: that the Court's Order Appointing Receiver and Case Management Order prohibit third-parties such as Plaintiff from filing any claims against agents and professionals of the Receivership Entities, that the Receivership Entities and Individuals were the central participants in the subject fraud and are thus indispensable parties in this action, that Counts IV and VI fail to state a claim because the securities sold to Plaintiff were exempt from the registration requirements and, finally, that Count IV is barred by the statute of limitations. The Court will discuss each contention individually.

A. The Receivership Orders Bar the Complaint

The March 3, 2005 Order Appointing Receiver prohibited any claims by third parties against the Receivership Entities:

> During the period of this receivership, all persons, including creditors, banks, investors, or others, with actual notice of this Order, are enjoined from... prosecuting any actions or proceedings which involve the receiver which affect the property of Shoreland or the KL Funds.

The Court then entered the July 18, 2005 Case Management Order in which it again enjoined claims by any third parties against agents of, professionals of, or other third parties affiliated with the Receivership Entities:

> The Court hereby enjoins any party... with notice of this Order from initiating, maintaining, or in any way

> prosecuting in any other court any proceeding, suit, or action against any of the Receivership Entities or Individual Defendants. Additionally, the Court hereby enjoins any party...with notice of this Order from filing, initiating, maintaining, or in any way prosecuting in any court any proceeding, suit, or action that may diminish or usurp property of the Receiver or the Receivership Entities including, but not limited to, causes of action that belonged to the Receiver for which the Receiver may have standing to bring, or any causes of action that may belong to any investors or any class or group of investors against the Individual Defendants, the Receivership Entities, their former principals, professionals, banks, brokerage houses, service providers or other third parties.

Per Plaintiff's allegations, Plaintiff is suing Defendant because he was allegedly "acting as an agent/employee of 'KL'... and was acting within the scope of his agency/employment with 'KL.'" (Complaint, 31.) Plaintiff has further alleged that Defendant "was paid for [his] service by 'KL' for soliciting and bringing Plaintiff's investment into the 'KL' Fund." (Complaint, 15.) Plaintiff has thus alleged that Defendant was a KL "Principal," "Professional," "Service Provider," or "Other Third Part[y]" under the Receivership Orders, and, therefore, those orders bar this litigation. This Court has already ruled that a creditor such as Plaintiff cannot sue individuals associated with the Receivership Entities because such a suit would violate the injunction provisions of the Receivership Orders. As the court noted,

> Allowing creditors to file and maintain independent actions in any court serve no useful purpose. The only significant result of such actions is an unnecessary increase in the cost of administering the Receivership as a diversion of the Receiver's attention for maximizing the receivership assets. Allowing such piecemeal litigation would severely hamper the Receiver's ability to perform duties by shifting the focus for preserving and enhancing the value of the estate to defending cases.

SFM Holdings, Ltd. v. John Kim, et al., Case No. 06-80801-CIV-RYSKAMP, February 12, 2007, p. 5. The express terms of the two Receivership Orders, which prohibit "any party" from initiating "any proceeding" against individuals associated with the Receivership Entities, such as Defendant, enjoin Plaintiff from filing the present action.

B. Indispensability of Individual Defendants and the KL Receivership Entities

Whether a party is indispensable under Fed. R. Civ. P. 19 requires a multi-step inquiry. First, according to Rule 19(a), the Court inquires whether joinder of the person/entity is feasible. See Dou Yee Enters. (S) PTE, Ltd. v. Advantek, Inc., 149 F.R.D. 185, 188 (D. Minn. 1993). This determination centers on concerns of efficacy and fairness growing out of the specific circumstances of the case. See id. The Court must then determine whether joinder of the person/entity is feasible. See id. Joinder is feasible if the person/entity is, for example, subject to service of process or the joinder will not deprive the court of subject matter jurisdiction. See id. When joinder is not feasible, the Court must then proceed under Rule 19(b) to determine whether, based on concerns of equity and good conscience, to proceed in the absence of the interested person/entity or whether to dismiss the action on the grounds that the absent person/entity is indispensable. See id. This analysis requires examination of four factors: (1) to what extent a judgment rendered in that person/entity's absence might be prejudicial to that person/entity, (2) to what extent the prejudice can be lessened or avoided, (3) whether a judgment rendered in the person/entity's absence will be adequate, and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. See id.

In Advantek, the Court found that the disputed entity was, in fact, indispensable because it was the primary participant, and thus the actual wrongdoer, in the subject fraud

underlying the plaintiff's claims: "Advantek-Singapore was a primary participant in the alleged fraudulent acts underlying Dou Yee's claims." 149 F.R.D. at 188. This case also held that the disputed entity was indispensable because if the defendant were to lose the litigation, the defendant would likely pursue a separate action against the alleged indispensable parties involving the same facts and issues that would have been considered in the primary action, thereby frustrating judicial economy. See id. at 189. Similarly, in Circle Industries, Division of Nastasi-White, Inc. v. City Federal Savings Bank, 749 F. Supp. 447, 457 (E.D.N.Y. 1990), the court found that the disputed entity was an indispensable party because it was both the "lead" bank and the lending consortium, and, given its role as the sole money negotiator regarding the terms of the subject financing agreements, complete relief could not be afforded among those already parties. The court found that City Federal was an indispensable party because it was the primary participant underlying the plaintiff's claims: "City First's alleged conduct is central to the plaintiff's causes of action." Id. at 456. See also Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525, 537 (S.D. Tex. 1994) (finding that airplane owners were indispensable parties because they may have been solely liable, and thus actual wrongdoers who were responsible for airplane crash); Whyham v. Piper Aircraft Corp., 96 F.R.D. 557, 561 (M.D. Penn. 1982) (finding that companies who owned and maintained aircraft were active participants in claims).

Plaintiff attempts to characterize her Complaint as a simple action for negligent misrepresentation brought against a securities broker. Yet the KL fraud is inextricably tied to Plaintiff's negligent misrepresentation claim. In her own Complaint, Plaintiff has alleged that John Kim and the KL Financial Group were the primary participants in

committing the subject fraud against her. (Complaint, 5, 6, 7, 8, 10, 11, 13, 32, 35, 52.) Furthermore, the SEC has alleged in its Complaint that the Receivership Individuals and Entities were not only the central figures perpetrating the fraud, but also were the actual wrongdoers who committed fraud. The Court takes judicial notice of the SEC's Complaint, which establishes that these individuals and entities were active wrongdoers.[2]

Joinder of the Receivership Individuals and Entities is not feasible, however, because the Receivership Orders prohibit their joinder. Defendant plans to demonstrate that he was himself a victim of the KL fraud. Such will require him to take discovery of the Receivership Individuals and Entities, as well as the Receiver. For example, Defendant contends that the Individual Defendants sent him fraudulent marketing materials about John Kim's alleged prior career as a successful Wall Street investment banker, fraudulent private placement memoranda, and fraudulent account statements on which Defendant allegedly relied and for which Plaintiff is attempting to hold him responsible. Yet Defendant cannot take discovery from these individuals and entities because such would violate the injunction provisions in the Receivership Orders, which prohibit lawsuits against the Receivership Individuals and Entities. Both the prosecution and defense of this action would therefore deplete Receivership property and assets, as such would require deposing the Receivership Defendants, deposing the Receiver and requesting documents of the Receiver. Consequently, the joinder of the Receivership

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[2] Pursuant to Rule 201(b) of the Federal Rules of Evidence, the Court may take judicial notice of facts that are "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(d) states that the Court "*shall* take judicial notice if requested by a party and supplied with the necessary information." (Emphasis added.) The SEC's Complaint is a matter of public record. See Cash Inn of Dade, Inc. v. Metro. Dade County, 938 F.2d 1239, 1243 (11th Cir. 1991) (judicial notice of public records appropriate); Ubuy Holdings, Inc. v. Gladstone, 340 F.Supp.2d 1343, 1346 (S.D. Fla. 2004) ("A district court may . . . take judicial notice of public records") (citation omitted).

Defendants cannot be obtained without violating the injunction provisions Receivership Orders.

Nor has the Receiver authorized the Complaint in the instant action. Plaintiff attaches certain correspondence from the Receiver transmitted during the early stages of the Georgia litigation in which the Receiver apparently states that this action does not violate the Receivership Orders. Plaintiff may not rely on this correspondence, as stated by the Georgia Federal Court in its dismissal order:

> Weighing in favor of this determination are the facts that [Defendant] has not yet joined the receivership entities in this lawsuit, as he had stated he will do if the suit is allowed to continue in this Court, and that the receivership entities would be heavily involved in discovery even if they were not joined as parties... It is unclear whether the receiver's view on allowing the lawsuit to proceed in this court would change under the circumstances.

(Defendant's Motion, Ex. E.) Thus, even the Georgia court recognized the significant burdens that discovery would impose on the Receiver. Additionally, the Court cannot see how the Receiver's preliminary viewpoint on the Georgia case, which was later dismissed, can have any bearing in this matter.

Since joinder of these the Receivership Individuals and Entities is not feasible, the Court must proceed with its analysis under Rule 19(b) to determine whether to proceed in their absence. First, Defendant and the Court have an interest in having the liability issue decided properly as to all relevant wrongdoers. Second, the absence of the Receivership Individuals and Entities from this case would violate a public policy of reaching complete and consistent settlements among interested parties. See Advantek, 149 F.R.D. at 189 (finding that disputed entity's absence would thwart policy of reaching complete

adjudication of interested parties); City Federal Savings Bank, 749 F. Supp. at 457 (finding that City Federal was an indispensable party because it was in the public's interest in the efficient settlement of controversies that City Federal be a party to the action to ensure complete, consistent, and efficient adjudication of the plaintiff's claims). Finally, Plaintiff has an adequate forum for relief should the Court dismiss this case, as Plaintiff has every right to file a proof of claim in the KL receivership estate. See Advantek, 149 F.R.D. at 189 (finding that plaintiff had alternative form for relief); Whyham, 96 F.R.D. at 563 (finding that plaintiff still had adequate remedy even if potential damage award may be smaller) (quotation omitted). Accordingly, the Court finds that the Receivership Individuals and Entities are indispensable parties, the joinder of which is not feasible, and that this action cannot proceed in their absence. This action is therefore dismissed as violative of the injunction provisions of the Receivership Orders.

C. The Claims for Sale of Unregistered Securities Must Fail

A private offering of securities is exempt from registration under the securities laws. See 15 U.S.C. § 77d(2). Plaintiff alleges that the subject fraud consisted of the KL "hedge fund." (Complaint, 6, 17.) A hedge fund is a private offering of securities, which therefore does not need to be registered under the Securities Act of 1933. See Collier v. Aksys Ltd., No. 3:04CV1232(MRK), 2005 WL 1949868, at *3 n.2 (D.Conn. Aug. 15, 2005) ("according to a recent report of the SEC, '[a]lthough financial service providers, regulators and the media commonly refer to "hedge funds," the term...generally identifies an entity that holds a pool of securities and perhaps other assets that does not register its securities offerings under the Securities Act."). Therefore, because the hedge fund

securities purchased by Plaintiff, by definition, consisted of a private offering, the securities were exempt from registration, thereby dooming the claim for the sale of unregistered securities.

Additionally, the claim under Georgia's O.C.G.A. section 10-5-1 for the sale of unregistered securities must fail due to preemption by the National Securities Market Improvement Act of 1996, which preempts state laws concerning the registration of securities. See 15 U.S.C. § 77r. Georgia law provides that it is unlawful to sell or offer to sell unregistered securities unless, among other things, the security is a federal covered security. See O.C.G.A. section 10-5-5(a)(3). A security is "covered" if it is sold in a transaction exempt from SEC registration requirements. See 15 U.S.C. § 77r(b)(4)(D). The securities sold here are covered securities, as they were sold pursuant to a private offering and were therefore exempt from federal registration requirements. Thus, any attempt to require registration of the securities under Georgia law would be preempted by the federal statute. See Temple v. Gorman, 201 F. Supp. 2d 1238, 1242-44 (S.D. Fla. 2002) (finding that federal law preempted claim under Florida statutory law for private sale of unregistered securities).

Furthermore, the claim for sale of unregistered securities is time barred. A claim for the sale of unregistered securities is time barred unless brought within one year after the violation upon which it is based. See 15 U.S.C. § 77m; Temple, 201 F. Supp. 2d at 1242. No delayed discovery rule is applied to claims because nonregistration violations are easily uncovered. See Temple, 201 F. Supp. 2d 1242 (finding that claim under section 12(a)(1) was time barred because plaintiff had knowledge of nonregistration violation in August of 1999 but failed to bring lawsuit until after August of 2000). Here,

Plaintiff alleges that she made her investment in the KL entities in December of 2004. (Complaint, 12.) Yet Plaintiff filed this action more than one year later, in February of 2006. Plaintiff suggests that the stay provisions and accounts and receivership orders apply here to suspend the statute of limitations, but, according to Plaintiff, the same provisions do not apply here to preclude the Complaint. Plaintiff may not have it both ways. The Complaint, filed in February of 2006, is untimely.

IV. CONCLUSION

THE COURT, having considered the pertinent portions of the record and being otherwise fully advised, hereby

ORDERS AND ADJUDGES that Defendant's Motion to Dismiss Ancillary Complaint for Damages, filed March 1, 2007 **[DE 19]** is GRANTED. This dismissal is with prejudice and without leave to amend, as Plaintiff cannot allege these claims without violating the Receivership Orders. This dismissal does not prevent Plaintiff from filing a claim to the Receivership Estate. The Clerk of Court shall CLOSE this case and DENY any pending motions as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida this 20 day of June, 2007.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE