

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA

CIVIL ACTION NO. 20-cv-00325-MSS-AEP

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BRIAN DAVISON, et al.,

Defendants.

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SECURITIES AND EXCHANGE COMMISSION'S RESPONSE  
OPPOSING DEFENDANT BARRY RYBICKI'S RENEWED MOTION  
TO MODIFY THE ASSET FREEZE

Plaintiff Securities and Exchange Commission ("Commission") files this response in opposition to Defendant Barry Rybicki's Renewed Motion To Modify the Asset Freeze (DE 532) to carve out *additional funds* from those earmarked to be returned to investors in order to pay his legal defense costs. In opposition to Rybicki's request for additional attorney's fees, the Commission states:

INTRODUCTION

Having fraudulently procured millions of dollars of investors' funds, Rybicki now seeks to drain additional assets -currently earmarked to be returned to investors - to pay attorney's fees almost double of what the

Court has previously allowed. Thus, the Commission requests that the Court deny Rybicki's request as it threatens to further deplete the resources currently available for the benefit of investors. Moreover, Rybicki has not shown why the requested 772 hours his attorneys have logged defending this case (and not on settlement matters) is not excessive.

As an attempt to fairly resolve the motion, the SEC does not object to Mr. Rybicki's request for a carve out of those fees reasonably incurred at mediation and in post-mediation settlement negotiations to the extent that they were used to resolve the matter efficiently and helped to secure that assets would be turned over to the Receiver in the most efficient manner. Ultimately, these efforts saved litigation expenses and led to a quicker resolution for investors.<sup>1</sup>

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<sup>1</sup> As Rybicki has filed his billing records *in camera* and not copied the SEC on those submissions, the SEC cannot determine how much of counsel's time was spent on settlement efforts, and whether it was time reasonably spent. Counsel for Rybicki has represented to the SEC that all of the time billed in the last eleven months, wherein Rybicki incurred an additional \$67,507.07 in legal fees, was spent on settlement matters. Thus, the SEC does not object to a carve out for fees up to \$67,507.07, if the Court finds that the time was reasonably spent on settlement issues and/or securing assets for turnover to the Receiver.

The SEC does object, however, to any additional carve out for legal fees. Briefly, additional fees should not be made available from the Receivership assets because Rybicki has already been given \$155,000 in legal defense fees (plus an additional \$16,000 in legal costs) which should have been adequate to pay for his defense in this matter.<sup>2</sup>

#### BACKGROUND

1. This action was filed on February 11, 2020, following months of investigation by the SEC during which time Defendants were all represented by the same counsel, DLA Piper, LLC. In the months immediately preceding this action (from 09/1/19-1/31/20), DLA Piper was paid more than \$500,000<sup>3</sup> by EquiAlt for their representation of EquiAlt, Davison and Rybicki in the SEC's investigation.

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<sup>2</sup> The Receiver objects to *any* additional fees being carved out for Rybicki's attorney's fees and asserts those funds should rightfully be returned to investors.

<sup>3</sup> DLA had a separate billing number for work done relating to the SEC's inquiry to separate that work from other corporate work DLA performed for EquiAlt. The \$500,000 does not include an additional \$75,000 DLA billed in February 2020 on the SEC inquiry that the Receiver has not paid.

2. In January 2020, Rybicki retained independent counsel and on February 13, 2020, *one day* before the asset freeze was entered, EquiAlt paid Rybicki's new counsel, Sidley Austin, a \$50,000 retainer.

3. On February 14, 2020, the Court entered an Order freezing the Defendants' assets (D.E. 10). As part of that Order, the Court included a provision that additional attorney's fees be provided for the individual defendants, Brian Davison and Rybicki. The Order states that, "The Commission and the Receiver appointed by this Court shall provide the Individual Defendants access to *reasonable* amounts of their personal assets for necessary living expenses and legal fees." (*italics added*).

4. On February 28, 2020, pursuant to the Court's order, the SEC and Receiver agreed that an additional \$75,000 be provided to Rybicki's counsel. (D.E. 31). On July 28, 2020, the SEC and the Receiver agreed and the Court permitted the asset freeze to be lifted to allow Rybicki's counsel an additional \$30,000 in attorney's fees (D.E. 157). Thus, since February 1, 2020, Rybicki's various counsel have received \$155,000 in attorney's fees, in addition to \$16,000 in costs for experts and discovery for their representation of Rybicki in this action.

5. In addition to the fees allowed above, the Court has also entered an Order outlining the process under which additional fees are to be requested. (D.E. 54). In the Renewed Motion, Defendant Rybicki requests that the asset freeze be lifted so that his counsel may be given yet another \$140,789 for his attorney's fees (for work performed up to April 5, 2021) and \$67,507 (for the time period from April 5, 2021 to the present). For the reasons set forth below, the SEC requests that additional fees not be provided from the Receivership assets.

#### ARGUMENT

##### **A. The Time Billed for the Work Performed Appears Excessive**

In support of the motion, Rybicki's counsel submitted an *in camera* breakdown of fees incurred for which compensation has not been paid. Although the details of how these fees were incurred are unknown to the SEC, on their face the 772 hours counsel asserts that they have logged appears excessive for the limited amount of work that was done pretrial. The work done by Rybicki's counsel primarily consists of drafting a motion to dismiss, arguing that motion at a hearing, defending Rybicki's deposition (wherein he invoked his 5<sup>th</sup> Amendment right not to testify to all questions) and taking the deposition of a former EquiAlt employee.

Rybicki did not produce discovery, but Rybicki's counsel did apparently review the discovery produced by the SEC. On its face, it appears that 772 hours to complete these tasks is excessive.

**B. Frozen Assets Should Not Be Used to Fund Rybicki's Defense**

Here, Rybicki is requesting that his attorney's fees be paid from money that was subject to the assets freeze, money that he has already agreed to turn over to the Receivership to be ultimately returned to investors as part of the settlement of this matter. Under well-established law, there is no entitlement to such fees nor would such a carve out be equitable. *See SEC v. Comcoa*, 887 F. Supp. 1521, 1524 (S.D. Fla. 1995) ("In imposing a freeze of assets, there is no requirement that the court exempt sufficient assets for the payment of legal fees."); *CFTC v. United Investors Group, Inc.*, 2005 WL 3747596, n. 1 (S.D. Fla. Jan. 3, 2005) ([T]he court has discretion to limit or forbid payment of attorney fees out of frozen assets). Furthermore, Sixth Amendment considerations do not support modifying an asset freeze where, as here, criminal charges have not been filed. *CFTC v. Rust Rare Coin Inc.*, 2019 WL 752424 (D. Utah, April 4, 2019); *SEC v. Santillo*, 2018 WL 3392881, \*5 (S.D.N.Y. July 11, 2018) (requests for attorney's fees for defense of a parallel criminal matter are not ripe until charges have

been brought). Here, such a carve out would not be equitable given that the fees requested would come from assets that should rightfully be returned to investors.

### C. Rybicki's Ill-Gotten Gains Exceed the Frozen Assets

It is routine in SEC cases for assets to remain frozen when the defendant has not demonstrated that there are sufficient frozen assets to pay disgorgement. *Santillo*, 2018 WL 3392881 at \*4 (citing *SEC v. Lauer*, 445 F. Supp. 2d 1362, 1369 (S.D. Fla. 2006)); *SEC v. Current Fin. Servcs.*, 62 F. Supp. 2d 66, 68 (D.D.C. 1999)). Therefore, defendants have been “barred from utilizing frozen assets to pay legal fees associated with representation in a civil action when it is not clear ‘whether the frozen assets exceed the SEC’s request for damages’ or disgorgement.” *Id.* at 4 (quoting *SEC v. FTC Capital Mkts, Inc.*, 2010 WL 2652405, \*7 (S.D.N.Y. June 30, 2010)); *FTC v. RCA Credit Services, LLC*, 2008 WL 5428039, \*4 (M.D. Fla. Dec. 31, 2008) (defendants “may not use their victims’ assets to hire counsel to help them retain the fruits of their violations”); *see also FTC v. Simple Health Plans LLC*, 379 F.Supp.3d 1346, 1364 (S.D. Fla. 2019) (denying carve out for attorneys’ fees and living expenses given the “vast disparity between Defendants’ substantial ill-gotten gains and the value of the frozen assets”); *FTC v. IAB*

*Marketing*, 972 F. Supp. 2d 1307, 1313 (S.D. Fla. 2013) (denying defendants' motion to "unfreeze" funds for living expenses where "Defendants' monetary liability greatly exceeds the frozen funds"); *CFTC v. United Investors Group, Inc.*, 2005 WL 3747596, \*1 n.1 (S.D. Fla. June 9, 2005) (refusing to except living expenses and counsel fees from asset freeze), *aff'd on other grounds sub nom.*, *CFTC v. Levy*, 541 F.3d 1102 (11th Cir. 2008).

Here, Rybicki's assets were insufficient to satisfy the disgorgement award against him-by millions of dollars. While the Court has entered a Final Judgment stating that Rybicki shall pay the Commission disgorgement of \$10,943,540, *See Final Judgement Against Barry Rybicki at 5 (DE 528)*, Rybicki's total assets are worth less than \$5 million. Thus, Rybicki's assets are already insufficient to pay disgorgement and should not be further depleted to pay for his attorney's fees.

For context, the Receiver has stated that there are approximately \$150 Million in investor claims owed to investors in principal and interest payments. *See Receiver's Fourth Quarterly Status Report at 25 (DE 490)*. Although the Receiver has been diligently working to maximize the assets available to pay the claims owed to investors, the Receiver estimates that



the Receivership assets will not be sufficient to provide a full recovery for all investors and will fall short by millions of dollars.

**D. The Receiver's Fees Are Unrelated to Rybicki's Defense Fees and Should Not be Used as a Touchstone**

Lastly, Rybicki's attempt to compare his proposed fees to those incurred by the Receiver falls flat. The Receiver's role in this matter is 1) to marshal and distribute the assets of the Receivership Defendants *for the benefit of investors*, and 2) to run the business interest of Equialt and the Funds. The Receiver's undertakings have little bearing to Rybicki's efforts to defend his own wrongful actions. The Receiver is working to *recover* money for investors defrauded by Rybicki, while Rybicki seeks to *spend* money, that should be preserved for investors, to fund his defense.

It also cannot be overlooked that the Receiver has had to piece together Rybicki's years-long activities involving several entities, unlike Rybicki who knows full well what has transpired. In addition, the Receiver has not participated in the litigation aspects of this case and has not filed motions requiring responses by Rybicki. At no point has Rybicki directed efforts to trace funds, marshal assets, or to offer any assistance or facts to Receiver or the Commission. Instead, Rybicki took the Fifth Amendment during his deposition and has fought at every turn to avoid liability. Nor

has Rybicki offered to assist in the Commission and Receiver's efforts to claw back assets from third-parties who received investor funds from the Receivership entities. Thus, the Receiver's fees incurred in this matter are completely unanalogous to those incurred by Rybicki, and should not be used as a touchstone by which to measure defense counsel's fees.

**CONCLUSION**

In sum, the SEC and the Receiver seek to keep Rybicki's assets that he has agreed to turn over to the Receiver as part of settlement, so that they will be available for return to investors. Accordingly, the SEC requests that the Court deny Rybicki's Renewed Motion for Attorney's Fees other than as described above.

Dated: March 18, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 18, 2022, I electronically filed the foregoing Response with the Clerk of the Court using CM/ECF, which will send a notice of such filing to all counsel of record.