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.

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REPORT AND RECOMMENDATION

The SEC brought this action in February 2020 against Individual Defendants Brian Davison ("Davison") and Barry Rybicki ("Rybicki") and Corporate Defendants EquiAlt LLC; EquiAlt Fund, LLC; EquiAlt Fund II, LLC; EquiAlt Fund III, LLC; and EA SIP LLC (collectively, "Corporate Defendants") for violations of Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77e(a) and 77e(c); Section 17(a)(2) of the Securities Act, 15 U.S.C. § 77q(a); Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b); and Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5 regarding the alleged operation of a nationwide Ponzi scheme raising more than $170 million from 1,100 investors through fraudulent unregistered securities offerings (Doc. 1). The SEC further alleged that Relief Defendants 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; and TB Oldest House Est. 1842, LLC (collectively, "Relief Defendants") all received proceeds of the fraud without any legitimate entitlement to the money. Upon consideration of the Complaint (Doc. 1); the SEC's *ex parte* motion for temporary restraining order, asset freeze, and other injunctive relief (Doc. 4); and the SEC's *ex parte* motion to appoint a receiver (Doc. 6), the District Judge granted the request for a temporary restraining order, asset freeze, and other injunctive relief and appointed Burton W. Wiand ("Wiand" or the "Receiver") as the Receiver in this action over the Corporate Defendants and the Relief Defendants and each of their subsidiaries, successors, and assigns on February 14, 2020 (Docs. 10 & 11).[1]

A couple weeks later, the SEC submitted a Notice of Filing and Request for Entry of Proposed Agreed Order Extending and Modifying Asset Freeze, which indicated that the SEC, the parties, and the Receiver agreed to provide a carve out of the asset freeze for Rybicki's living expenses and attorney's fees (Doc. 30). After consideration, the District Judge granted the SEC's request and carved out $15,000

[1] Subsequently, the District Judge granted the Receiver's motion seeking to expand the Receivership to include EquiAlt Qualified Opportunity Zone Fund, LP ("QOZ"); EquiAlt QOZ Fund GP, LLC; EquiAlt Secured Income Portfolio REIT, Inc. ("REIT"); EquiAlt Holdings LLC (sponsor of the QOZ and REIT); EquiAlt Property Management LLC (property manager of the QOZ and REIT); and EquiAlt Capital Advisors, LLC (manager of day-to-day operations for the QOZ and REIT) (Doc. 184). EquiAlt Fund I, LLC was also later added (Doc. 284).

for Rybicki to use for his personal living expenses and $75,000 to apply "to attorneys' fees incurred or to be incurred on behalf of [] Rybicki" (Doc. 31). Shortly thereafter, Rybicki moved to further modify the asset freeze to cover his legal defense costs (Doc. 43). According to Rybicki, he engaged Sidley Austin ("Sidley") to represent him with payment of a $50,000 retainer prior to the SEC initiating this action. Due to the extensive efforts Sidley undertook relating to the issues in this action during the phase prior to the SEC's filing of the Complaint, Rybicki argued that Sidley earned the full amount of the retainer prior to the SEC's initial filing in this action and continued to undertake several steps on an urgent basis in pursuit of Rybicki's defense, given the emergency nature of the relief requested by the SEC and the extensive allegations asserted by the SEC against Rybicki.

Sidley therefore requested that an additional $100,000 be unfrozen to cover Rybicki's attorney's fees, but the SEC and the Receiver would only agree to allow $75,000, which the Court subsequently approved. According to Rybicki, however, between the filing of this action and the date of the District Judge's Order modifying the asset freeze to permit the extra $75,000, that entire amount (and more) had already been earned by Sidley. To reduce fees, especially given the fact that the attorneys at Sidley charged hourly rates for Washington, D.C. and New York, local counsel agreed to assume a greater role and Rybicki retained the services of a sole practitioner, who formerly worked as an SEC enforcement attorney. Both requested receipt of a $45,000 retainer to assume those new roles. Consequently,

Rybicki requested entry of an order unfreezing an additional $90,000 to pay for his legal fees (Doc. 43, at 6).

Upon review, in March 2020, the District Judge granted the motion in a limited capacity, explicitly indicating:

> The Court's release of funds was for the sole purpose of allowing Defendant Rybicki to cover his legal expenses in this action, not to permit his counsel to recover debts previously incurred before the freeze order. To have done so would have effectively elevated counsel's creditor status above all other creditors of the Defendant and the Defendant entities.
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> Any funds paid to counsel from the unfrozen assets may **only** be used toward legal fees incurred on or after February 14, 2020 – when the asset freeze was imposed in this lawsuit – not toward any legal fees previously incurred. Further, the unfrozen assets may only be used if counsel intends to represent Defendant Rybicki in this action. Any past due legal expenses that were incurred before the asset freeze must be dealt with in the normal course as with any other creditor. If counsel does not wish to undertake the representation of Defendant Rybicki going forward, they must return any money they received from the unfrozen assets to allow Defendant Rybicki to retain a different law firm.

(Doc. 48, at 1-2) (emphasis in original). Namely, the District Judge ordered that, to the extent that Rybicki sought the Court's assistance in directing the SEC and/or the Receiver to unfreeze and release the $75,000, the motion was granted (Doc. 48, at 2). In bold lettering, the District Judge made clear that the funds should only be used for Rybicki's defense on or after the date the asset freeze was imposed by Court Order, *i.e.*, February 14, 2020, and only at reasonable local rates, not to exceed $400 per hour for the most experienced counsel and $320 for a second lawyer (Doc. 48, at 2-3). The District Judge emphasized that the funds could only be used by counsel who intended to stay on for the defense of the case and explicitly stated that the

funds could not be used to defend Rybicki in a separate civil, putative class action case, nor to recoup fees for work performed prior to the asset freeze (Doc. 48, at 3). Going forward, the District Judge noted, counsel who intended to remain as counsel of record for Rybicki should provide a budget for the case and submit it to the Court for *in camera* review, after which a determination would be made as to whether Rybicki required additional funds and whether those funds should come from the frozen assets in this action (Doc. 48, at 3).

About a year later, in April 2021, Rybicki again moved for entry of a proposed order extending and modifying the asset freeze (Doc. 287). Rybicki argued that the District Judge's March 2020 Order provided for an average rate of $360 per hour, such that the $75,000 awarded would reimburse approximately 208 hours of legal work, which constituted only "a small number of hours considering that the amended complaint alleges three separate schemes to defraud investors over a nine-year period and involved the raising of $170 million dollars through four separate funds, each of which had multiple versions of offering materials" (Doc. 287, at 2). According to Rybicki's Counsel, he understood the March 2020 Order limiting rates to $400 and $320 per hour to mean that legal fees would not be limited to the $75,000 ordered unfrozen as no need would exist for limiting hourly rates and submission of an *in camera* budget if that were the case (Doc. 287, at 3). At the time of the April 2021 motion, Rybicki's Counsel indicated that he and his law firm logged 772 hours in the nearly 14 months spent working in this action, or approximately 55 hours per month, which Rybicki's Counsel argued constituted a

reasonable number of hours expended (Doc. 287, at 3). Given the amount of work performed, Rybicki's Counsel indicated that he and his law firm incurred at least $140,789 in legal fees for which they had not yet been compensated and for which he requested that the Court carve out funds from the asset freeze for reimbursement and provide a mechanism for seeking reasonable attorneys' fees for all future work performed (Doc. 287, at 4-5).

The District Judge referred the April 2021 motion to the undersigned for consideration in June 2021 (Doc. 329). Around that time, the SEC and Rybicki engaged in a settlement conference before the undersigned, which remained ongoing (*see* Doc. 341). Based on the ongoing settlement discussions between the SEC and Rybicki, the undersigned denied the April 2021 motion, without prejudice, in October 2021, indicating that the motion could be renewed, if necessary, following the conclusion of the settlement discussions (Doc. 430). The settlement discussions proved fruitful, resulting in the entry of a consent judgment against Rybicki on March 4, 2022, which included permanent injunctive relief; disgorgement, together with prejudgment interest, in the amount of $11,425,520; and a civil penalty in the amount of $1,000,000 (Doc. 528, Ex. A, at 1-6). In the consent judgment, Rybicki agreed to execute all documents and take any other necessary steps to effectuate the turnover of real property and other assets to satisfy the judgment and relinquished "all legal and equitable right, title and interest in the property and assets ("Funds"), and no part of the Funds shall be returned to him" (Doc. 528, Ex. A, at 9-10).

By the instant motion – submitted a few days after entry of the consent judgment against him – Rybicki renews his request to modify the asset freeze to allow for payment of attorney's fees (Doc. 532). Namely, Rybicki's Counsel indicates that he negotiated the terms of the consent judgment with the SEC and the terms of the assignment of the Funds with the Receiver and continues to work with the Receiver to coordinate the turnover of the Funds (Doc. 532, at 2-3). Rybicki's Counsel asserts that he and his firm incurred an additional $67,507.07 in legal fees since the filing of the April 2021 motion to modify the asset freeze, which does not include several unbilled hours assisting with the resolution of the turnover of the Funds and other services (Doc. 532, at 3). As a result, Rybicki's Counsel now requests entry of an order carving out $208,296.07 in attorneys' fees to compensate him and his firm for 21 months of work performed through the conclusion of the settlement discussions and indicates that he will seek no further attorneys' fees even though additional work will likely be required to facilitate the turnover of the Funds to the Receiver for the benefit of the investors (Doc. 532, at 3).

Initially, the SEC opposed Rybicki's request (Doc. 538). Following hearings before the undersigned and based on representations made during those hearings and in submissions made *in camera*, as well as subsequent conferrals between the parties, the SEC no longer opposes the payment of $75,000 to Rybicki for attorneys' fees relating to efforts made in conjunction with the settlement conference (*see* Docs. 548, 564, 567, 575). Notwithstanding, the Receiver, who responded in opposition to the initial request for the carve out of the $208,296.07 for Rybicki's attorneys' fees

(Doc. 539), continues to oppose an award of *any* amount of money to pay for Rybicki's attorneys' fees (Doc. 566) and that the Court may lack the authority at this point to modify the asset freeze or the judgment entered against Rybicki.[2]

As an initial matter, the Court maintains discretion to modify an asset freeze under the appropriate circumstances. *See, e.g., Sec. & Exch. Comm'n v. Founding Partners Cap. Mgmt.*, Case No. 2:09-cv-229-FtM-29SPC, 2009 WL 10669238, at *4 (M.D. Fla. May 7, 2009). ("Defendant Gunlicks requests that the Court modify the freeze order as to his personal assets to exempt payment related to the preservation of assets, living expenses, and attorneys' fees. The Court has discretion to modify the freeze order under the appropriate circumstances, but defendant has provided no factual basis that would allow the Court to make a reasoned decision as to whether any modification should be made, or the amounts that should be exempted. In the absence of such a factual basis, the Court declines to modify the freeze order. Defendant may file another motion if its factual support is adequately demonstrated."); *S.E.C. v. Duclaud Gonzalez de Castilla*, 170 F. Supp. 2d 427, 430 (S.D.N.Y. 2001) ("Neither J. Duclaud nor Guerrero has demonstrated the need for this Court to amend its order of May 10 for purposes of meeting limited expenses, and Guerrero has not justified such an amendment for purposes of pursuing his CIDISA investment project. However, as indicated in the May 10, 2001 opinion …

[2] Notably, while the Receiver objects to awarding any money to Rybicki's Counsel, the Receiver has sought and received, on behalf of himself and his Retained Personnel, more than $2.7 million in disbursements (Doc. 572, Ex. 1), with requests for nearly $750,000 in disbursements currently pending in this action (Docs. 510 & 572).

the inference upon which the freeze was granted may not be supported by the necessary quantum of proof, and motions for summary judgment have been made, yet just argued. Both J. Duclaud and Banrise have incurred substantial expenses as a consequence of this action. Under these circumstances, it is appropriate to modify the freeze as to both J. Duclaud and Banrise to permit the payment of legal fees and disbursements."); *S.E.C. v. Schiffer*, No. 97 Civ. 5853(RO), 1998 WL 307375, at *7 (S.D.N.Y. June 11, 1998) ("Accordingly, given Schiffer's conduct in this area, I have no alternative but to assume all of Schiffer's accounts and funds are of a suspect nature. Thus, not only do I continue the asset freeze order, I also limit the release of funds authorized under the order to meet Schiffer's living expenses to those necessary to maintain assets subject to ultimate liquidation and disgorgement, and to attorneys' fees only as substantiated by this court's careful monitoring. As to the exact amount of funds to be released hereafter, the parties are to submit orders accordingly.") (internal footnote omitted). Given the procedural history of this action and this particular issue, as detailed above, the circumstances presented here warrant a modification of either the asset freeze or the consent judgment entered against Rybicki to allow an award of attorneys' fees for the efforts made in conjunction with the settlement conference. The undersigned thus recommends that an award of funds be authorized to reimburse Rybicki for attorneys' fees.

Having determined authority and entitlement, the focus then turns to the reasonableness of the requested fees. To that end, the undersigned appreciates and has thoroughly considered the positions of Rybicki's Counsel, the SEC, and the

Receiver, including the proposition that the lack of any opposition by the SEC to Rybicki's revised request for an award of $75,000 bears great weight in determining the reasonableness of the fees to be awarded by the Court. *See S.E.C. v. Byers*, 590 F. Supp. 2d 637, 644 (S.D.N.Y. 2008) (citation omitted) (stating that, in a securities receivership, the SEC's opposition or acquiescence to the fee application will be afforded great weight); *see F.T.C. v. Direct Benefits Grp., LLC*, No. 6:11-cv-1186-Orl-28TBS, 2013 WL 6408379, at *4 (M.D. Fla. Dec. 6, 2013) ("Finally, the prosecuting agency's acquiescence to the requested fees militates strongly in favor of approving them."). Although Rybicki and the SEC agree upon an award of $75,000, and the Receiver argues that no award is warranted, the undersigned recommends that an award of $50,000, or a one-third reduction, be authorized. Without the assistance of Rybicki's Counsel throughout the settlement process, the Receiver would have incurred significant expenses and depleted the Receivership assets in pursuing the claims against Rybicki. Rybicki's Counsel's efforts in reaching the settlement and obtaining a consent judgment therefore furthered the Receiver's goals and provided a benefit to the defrauded investors. From review of the spreadsheets provided by Rybicki's Counsel, however, the amount of time expended by Rybicki's Counsel and the total amount of attorneys' fees sought appear excessive.[3] Based on the undersigned's own experience, including with respect to the settlement conference conducted in this action, a one-third reduction is appropriate, such that an award of

[3] Rybicki's Counsel provided the spreadsheets *in camera* pursuant to the District Judge's Order (Doc. 48)

$50,000 to Rybicki for attorneys' fees should be authorized. Accordingly, for the foregoing reasons, it is hereby

RECOMMENDED:

1. Rybicki's Motion to Modify Asset Freeze (Doc. 532) be GRANTED IN PART AND DENIED IN PART, to the extent that an authorization of $50,000 be approved to pay for Rybicki's attorneys' fees.[4]

IT IS SO REPORTED in Tampa, Florida, this 31st day of May, 2022.

ANTHONY E. PORCELLI
United States Magistrate Judge

[4] Whether the District Judge deems a modification of the asset freeze or an amended judgment as the proper procedural mechanism for awarding the $50,000 is a matter solely within her discretion.

NOTICE TO PARTIES

A party has fourteen days from the date they are served a copy of this report to file written objections to this report's proposed findings and recommendations or to seek an extension of the fourteen-day deadline to file written objections. 28 U.S.C. § 636(b)(1)(C). A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. See 11th Cir. R. 3-1; 28 U.S.C. § 636(b)(1). **Should the parties wish to expedite the resolution of this matter, they may promptly file a joint notice of no objection.**

cc: Hon. Mary S. Scriven
Counsel of Record