

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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

CASE NO. 8:20-CV-325-T-35MRM

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 FOURTH UNOPPOSED MOTION TO APPROVE SALE
OF REAL PROPERTY VIA ONLINE AUCTION**

Burton W. Wiand, as Receiver (the “**Receiver**”) over the assets of the corporate and relief defendants,¹ moves the Court to approve the marketing

¹ The “**Receivership**,” “**Receivership Estate**,” or “**Receivership Entities**” includes the corporate defendants, the relief defendants, and the following entities: EquiAlt Qualified Opportunity Zone Fund, LP (“**QOZ**”); EquiAlt QOZ Fund GP, LLC; EquiAlt Secured Income Portfolio REIT, Inc. (“**REIT**”); EquiAlt Holdings LLC; EquiAlt Property Management LLC; and EquiAlt Capital Advisors, LLC (collectively, the “**REIT and QOZ Entities**”). *See* Doc 184 at 6-7. *See also*, Doc. 284 regarding EquiAlt Fund I, LLC.

and sale of certain real property, free and clear of any and all liens, encumbrances, and claims via online auction. As explained below and as evidenced by the Receiver's earlier online property auctions, the Receiver believes the proposed manner of sale is commercially reasonable and will result in a fair and equitable recovery for the Receivership Estate. The Receiver also moves for relief from the requirements of 28 U.S.C. §§ 2001 and 2002 in connection with the sales.

BACKGROUND

The Securities and Exchange Commission ("SEC") alleges that, prior to the appointment of the Receiver, Brian Davison and Barry Rybicki used the Receivership Entities to perpetrate a massive real estate Ponzi scheme that raised more than \$170 million from over 1,100 victim investors across the country.

At the request of the SEC, on February 14, 2020, the Court entered a temporary restraining order and asset freeze (Docs. 10 & 11). A preliminary injunction hearing was held on July 31, 2020. On August 17, 2020, the Court granted the SEC's request for entry of a preliminary injunction. The Receiver is directed to "administer and manage the business affairs, funds, assets, choses in action and any other property of the Corporate Defendants and Relief Defendants; marshal and safeguard all of the assets of the Corporate Defendants and Relief Defendants and take whatever actions are necessary

for the protection of investors” (Doc. 11 at p. 2). The Court specifically directed the Receiver to “[t]ake immediate possession of all property, assets and estates of every kind of the Corporate Defendants and Relief Defendants whatsoever and wheresoever located . . . and to administer such assets as is required in order to comply with the directions contained in this Order, and to hold all other assets pending further order of this Court” and to “[i]nitially recover, control and possess liquid assets, known real estate, LLC assets and high-end personal assets purchased with funds traceable from investor proceeds, and trusts if the Receiver deems appropriate.” Doc. 11 at p. 2-3 ¶¶ 2-3.

At the time of his appointment, the Receiver took possession of several hundred parcels of real property the Receivership Entities purchased with investor funds. The Receivership continues to incur expenses associated with owning these properties. Many of these properties are occupied by tenants but some are not.

Since the inception of the Receivership through the end of September 2022, the Receiver has sold with Court approval thirty-six properties through private sale. In addition to these private sales, the Receiver, on three occasions, sought and received the Court’s approval to market and sell through online auction properties in late August/early September 2021 (30 properties, December 2021 (25 properties), and May 2022 (77 properties).

Given the current housing market and the success of his auctions, the Receiver chose this format with the belief that it would be the most efficient way to sell multiple properties. The Court approved these earlier real property auctions in July (Doc. 349), December (Doc. 457), and May (Doc. 574). The Receiver's third motion was different in that it sought the Court's approval for the sale of 77 properties *seriatim* through a number of periodic auctions. The instant motion is similar to the Third Motion in that it seeks the Court's approval for the auction of 60 properties over a number of periodic auctions.

Prior to the start of each auction, the Receiver advertised and caused an article to be published in the Tampa Bay Times (online and print) in order to garner interest in the auction. The Receiver also listed the auction through the Multiple Listing Service ("MLS") and other online services such as Zillow. The publicity has proven very successful. By conducting these auctions on an almost monthly basis, the Receiver has built up a loyal following of potential buyers. With each auction, the Receiver is seeing more activity and more return bidders. Thus far, the Receivership auction site has over 850 registered users. These registrants will be contacted about each and every upcoming auction.

Due to the Receiver's marketing efforts and the current trends of the housing market, the Receiver's prior auctions have proven successful. Since the Third Motion was filed, the Receiver has held three auctions – June: 6 of 17 properties exceeded reserve;² July: 17 of 19 properties exceeded reserve; September: 19 of 25 properties exceeded reserve. A Sixth Auction has just been completed that resulted in the sale of 12 of 16 properties offered.

On the first five auctions, the total gross proceeds realized by the Receiver have exceeded the Broker Price Opinions ("BPO") by 13.5%. While the market in the area has seen a similar average (properties selling for 10-12% over value), the sellers in these traditional sales pay on average eight to ten percent for commissions and title costs, far in excess of the Receiver's costs. Using the auction format, the Receiver is able to offset commissions that are typically paid to the buyer and seller agents. He is able to do this by adding a buyer's premium of 5% of the winning bid amount. The Receiver then used that 5% to cover the costs of agents and title expenses.

In order to make these properties appeal to private buyers, the Receiver employed an innovative provision in the auction terms that allowed a winning bidder to use a window of 30 days to acquire financing. This window, while not a contingency on a purchaser's obligation to complete the

² The buyer of one of these properties chose to cancel the agreement with the Receiver, forfeiting her claim to the \$30,000 deposit.

transaction gave buyers an opportunity to utilize financing. The Receiver believes that this accommodation increased the pool of bidders and purchasers.

Given the results of these earlier auctions, the Receiver believes that this process will continue to provide him an efficient way to dispose of the real property assets while protecting the receivership through setting a proper reserve price. To avoid incurring additional unnecessary expenses and to recoup investor funds, the Receiver requests that the Court approve the marketing and sale of the sixty properties identified on the attached Exhibit 1 (collectively, the “**Properties**”), in the manner discussed more fully below. The Properties include primarily single-family homes and multiplex dwellings

Receiver’s Plans for Sale of the Properties

Like the Receiver’s recent auctions, he intends to auction the Properties in 15-20 property batches on at least a monthly basis in an online format similar to the earlier auctions. As with the last motion, the Receiver, by requesting approval for the sale of 60 properties, but conducting the auctions of 15-20 lots, is hoping to streamline the motion practice associated with the auction process so as to expedite the timely disposition of the Receivership’s real estate holdings. Further, the Court’s approval for the sale of the 60

properties provides the Receiver and his team flexibility in packaging each auction's properties as well as allowing for rollover of properties from one month's auction to another auction if its reserve price is not met. As anticipated, having these auctions run back to back has kept the auction registrants engaged. Participants in one auction will be provided with a list and link for the properties of the next auction so they can begin their review of those properties as well.

The Receiver has created a website for this purpose, www.receivership-auctions.com. Each Property will be listed as a separate "lot" in the auction. Each Property will have an initial bid amount and an undisclosed reserve that is customized for each particular Property. If a valid bid exceeds the reserve price, the highest bidder (auction purchaser) will enter into a Sale Procedures Agreement ("SPA") in the form attached as Exhibit 2. The terms and conditions of the auction require the successful bidder to purchase the property, the SPA establishes the procedures for the closing of the transaction. When each SPA is signed, the Receiver will request, through a brief motion, an Order from the Court instructing the Receiver to transfer the Property to the highest bidder via Receiver's deed as described in the SPA. These motions are simpler than the detailed motions the Receiver submits for private sales since the auction sales will have been previously approved

through the Court's review of this Motion. The motion will also include a proposed order in accordance with the Court's previous request.

As with these previous auctions, the Receiver has based the reserve pricing amounts on his review and evaluation of available public sources, third-party broker price opinions and recent transactions involving comparable properties. The Receiver also considered the opinions of his real estate professionals to determine a reasonable reserve amount for the Properties to ensure that they are not sold at prices that do not reflect or approach fair market value. As the auctions occur, if a particular property is not sold, the property will be placed in the next auction with a reduced reserve. Should the reduced reserve still not be met, the Receiver will evaluate the sale of the property and possibly put it in succeeding auction without reserve.

As stated above, the Receiver has publicized the sale of the Properties by listing them through MLS and Zillow and also publishing information regarding the properties on the Receiver's website, www.equialtreceivership.com. Upon the Court's approval of the auctions, the Receiver will run advertisements and social media campaigns similar to those placed for the earlier auctions.

The auctions are open for public participation at www.receivership-auctions.com and will be scheduled to begin twenty days after initial

publication. As each subsequent auction of a group of properties occurs, the Receiver will follow this procedure of broad advertising that will begin 20 days before the inception of each successive auction. Bidding will begin and remain open for ten calendar days after the inception of each auction. During this time, the Receiver will have the option to accept any bid or offer he deems appropriate and in the best interests of the Receivership Estate prior to the end of the ten-day period.

ARGUMENT

I. THE COURT HAS BROAD POWER OVER THIS RECEIVERSHIP

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 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).

II. AUCTIONING THESE PROPERTIES IS IN THE BEST INTEREST OF THE RECEIVERSHIP ESTATE

The Court should approve the Receiver's proposal of auctioning the Properties through a series of online auctions because it is in the best interest of the Receivership Estate. The Receiver has previously obtained Court approval for the private sale of individual parcels of real property. *See, e.g., Docs. 286, 314, 452-55, 460, 469, 537, 560, 574, 608, 699, 700.* The Receiver has also previously obtained Court approval to sell other properties via online

auction (Docs. 349, 457 and 574) as well as high-end vehicles via blind auction (Doc. 156) and via online auction (Doc. 210) as contemplated in this motion. Both methods have proven to be effective. To date, the Receiver has recovered almost \$59 million from the sale of real estate, over \$16 million from the first five court-approved auctions.³

The auction method avoids time and expenses associated with selling individual properties that are incurred by preparing detailed motions to approve the sale of individual parcels of real property. In general, for private sales as opposed to auctions, the Receiver obtains three opinions of value from disinterested sources. Attorneys for the Receiver also spend time and effort compiling relevant information and drafting the detailed motions. These detailed motions consume judicial resources as well because the Court must review each individual filing and rule on the motions. The online auction method described in this motion avoids or reduces all of these expenditures. Much of the day-to-day work for the online auctions is conducted by EquiAlt employees or employees of Better Life Realty, whose salaries are part of ongoing business operations or who are paid out commissions (2%) on the sales. At the same time, the reserve price and the

³ This figure is based on the net sale prices for the real property that has been sold, but it does not include the incidental closing expenses and commissions that accompany those sales. However, because the previously sold properties were unencumbered with significant liens or mortgages, the net figure is comparable to the gross amount recovered.

public auction format ensure that the properties are not sold at a price that would be inconsistent with the value of the properties. If the auction price for a particular property does not meet or exceed the reserve price, the auction will end without selling the property.⁴ The reserve price, the initial bid price, as well as the format of a well-advertised public auction will assure that the Receivership receives appropriate value for the assets being sold.

The Receiver's auction method is still subject to appropriate judicial oversight. As discussed above, the Receiver intends to auction each Property as an individual lot. If a valid bid exceeds the reserve price or the Receiver decides to accept a bid below that reserve, the Receiver will inform the Court of the auction sale of the property to the highest bidder and request authority to deliver a Receiver's deed free and clear of any liens or encumbrances thus assuring that the Court is apprised of each transaction.⁵

The Receiver's proposal provides the greatest marketing reach and ultimate net benefit to the Receivership by avoiding seller and professional auction fees. The Receiver has created www.receivership-auctions.com

⁴ In the last two auctions, if the reserve price was not met on a property, after the auction concluded, the Receiver's team continued to negotiate with interested parties and ultimately entered into contracts on several of those properties. Those private sales were then submitted to the Court for approval if the prices were below the selected reserve. As mentioned above, should a property not sell after multiple auctions, the Receiver may include a non-selling property in a successive auction without reserve.

⁵ A preliminary review of the Properties indicates that no such major encumbrances apply to them. A normal real estate closing process will assure the Properties are free of encumbrances.

expressly for the purpose of liquidating the Properties and other Receivership items in the future. Reserve pricing and the public auction format will protect the Receivership and the investors, and ensure that the Properties are sold at or near their maximum fair market value. Further, the sale of the Properties will avoid incurring the unnecessary carrying, insurance costs, and normal commissions involved with using outside auction houses. Given the scale of the Receivership, these savings can be substantial. About half of the properties are either currently or soon to be vacant.. The remaining properties are occupied and will likely be marketed as investment properties with current tenants. To the extent leases come due during the span of time to auction these properties, the Receiver would not renew the lease and would turn over the property to sell as unoccupied. Finally, as described below in Section III, the Receiver's plan to auction the Properties substantially complies with the relevant statutes.

III. THE REQUIREMENTS OF 28 U.S.C. §§ 2001(a) and 2002

Real property sold by a federal court receiver should be done in compliance with 28 U.S.C. § 2001(a) ("**Section 2001(a)**") and 28 U.S.C. § 2002 ("**Section 2002**"). Section 2001(a) reads as follows:

Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. **Such sale**

shall be upon such terms and conditions as the court directs. Property in the possession of a receiver or receivers appointed by one or more district courts shall be sold at public sale in the district wherein any such receiver was first appointed, at the courthouse of the county, parish, or city situated therein in which the greater part of the property in such district is located, or on the premises or some parcel thereof located in such county, parish, or city, as such court directs, unless the court orders the sale of the property or one or more parcels thereof in one or more ancillary districts.

28 U.S.C. § 2001(a) (emphasis added). Section 2002 reads in relevant part as follows:

A public sale of realty or interest therein under any order, judgment or decree of any court of the United States shall not be made without notice published once a week for at least four weeks prior to the sale in at least one newspaper regularly issued and of general circulation in the county, state, or judicial district of the United States wherein the realty is situated.

28 U.S.C. § 2002. Sections 2001(a) and 2002 impose relatively onerous and costly procedures, including an in-person auction at the courthouse (or other property as the Court directs), and publication of the auction in a newspaper once per week, four weeks before the auction occurs.

The Court has the discretion to waive strict compliance. Pursuant to Section 2001(a), the auctions shall occur “as the court directs” and “[s]uch sale shall be upon such terms and conditions as the court directs.” 28 U.S.C. § 2001(a). Additionally, 28 U.S.C. § 2004 (“**Section 2004**”) addresses the sale of personal property and indicates that personal property “shall be sold in accordance with section 2001 of this title, **unless the court orders otherwise**” 28 U.S.C. § 2004 (emphasis added). Here, using the discretion afforded by

Sections 2001(a) and 2004, the Court should “order otherwise” in this instance with regard to the notice publication in a newspaper for four consecutive weeks.

Instead of strictly complying with repetitive newspaper advertisements, the Receiver has substantially complied by publicizing the auction using several methods described above, including newspaper advertising, listing the Properties on MLS, on www.zillow.com and on www.equialtreceivership.com. These methods of publication have proven effective in the earlier auctions. It provides far wider notice of the auction than the advertising method described in the applicable statutes. The Court should waive strict compliance with Section 2002 and find that the Receiver has satisfied his duty under this provision. Section 2002 has not been amended since 1949. The Receiver’s auction method provides all of the protection that would be provided by an auction on the courthouse steps and, through modern technology, provides vastly greater notice of the auctions and participation by interested buyers.

The Receiver has used these methods and by doing so has accomplished the purpose of Section 2002. For obvious reasons, Section 2002 also omits reference to using the internet for conducting the auctions. The Court should exercise its considerable broad equitable powers to accommodate these circumstances, and allow the auction to proceed as planned. The Receiver’s

suggested sale procedures assure an open and well publicized auction and further ensures that the Properties are sold at or near their maximum value by offering them for sale in an online public auction format that includes a minimum bid and reserve price.

The waivers requested by the Receiver routinely occur in enforcement actions and receiverships, including those in this district. *See F.T.C. et al. v. E.M. Systems & Services, LLC et al.*, Case No. 8:15-cv-1417-T-23EAJ, Order (M.D. Fla. March 4, 2016) (finding good cause to excuse receiver from judicial sale procedures of 28 U.S.C. § 2001); *S.E.C. v. A. Nadel et. al.*, Case No. 8:09-cv-00087-RAL-TBM, Order (M.D. Fla. Aug. 13, 2013) (authorizing receiver to sell automobile and deviate from appraisal and publication requirements under 28 U.S.C. § 2001); *S.E.C. v. Kirkland*, 2008 WL 4264532, *2 (M.D. Fla. 2008) (approving sale of personal property without appraisals or publication where costs of compliance would significantly offset sale proceeds). Therefore, the Receiver requests that these additional procedures under 28 USC § 2001 be waived.

CONCLUSION

For the foregoing reasons, the Receiver moves the Court for entry of an order granting the Receiver the authority to sell the Properties via periodic online auctions and approve the publication methods as specified herein.

LOCAL RULE 3.01(G) CERTIFICATION

Counsel for the Receiver has conferred with counsel for the SEC who does not object to the relief sought herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 22, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/ Katherine C. Donlon

EXHIBIT 1

	Address	City
1	1204 NW 26th St	Winter Haven
2	13682 Orange Sunset Dr	Tampa
3	1623 NW 3rd St	Winter Haven
4	207 Pear Ave	Lakeland
5	2509 W Union St	Tampa
6	3406 Ave X NW	Winter Haven
7	5337 Pasadena Dr	New Port Richey
8	5820 N Church Ave Unit 135	Tampa
9	830 Brentwood Dr	Lake Wales
10	9315 Crabtree Lane	Port Richey
11	3649 Haines Rd N	St. Pete
12	1201 37th St S	St Pete
13	1281 Sylvia Ave	Spring Hill
14	1318 Chebon Ct #F	Apopka
15	1611 Cedar Dr	Plant City
16	1930 Conway Rd	Orlando
17	2154 Bouyer St	Lake Wales
18	2501 Harn Blvd #H33	Clearwater
19	2501 Harn Blvd #H34	Clearwater
20	310 78th Ave	St Pete
21	320 Eron Way #6	Winter Garden
22	314 Pine Street	Davenport
23	3222 South Ave	Bartow
24	10287 Fordham St	Spring Hill
25	4584 Lighthouse Cir #75	Orlando
26	509 MLK Blvd NE	Winter Haven
27	5403 Pasadena Dr	New Port Richey
28	602 Lyman St	Ocoee
29	6329 Maisie Rd	Zephyrhills
30	7167 E Bank Dr	Tampa
31	3829 Darlington Rd	Holiday
32	614 Oregon Ave	Lakeland
33	17973 Villa Creek Dr	Tampa
34	3125 Strawberry Lane	Lakeland
35	322 Oak Rose Lane #101	Tampa
36	3714 38th Ave N	St .Pete
37	4050 Marie Dr	Lakeland
38	4209 Winding Moss Trail #104	Tampa
39	455 Alt 19S #231	Palm Harbor
40	5602 Pinnacle Heights Cr-102	Tampa
41	5610 Pinnacle Heights Cir-101	Tampa
42	6439 Cypressdale Dr #102	Riverview
43	7095 Holiday Dr	Spring Hill
44	7511 Pitch Pine Cir #A	Tampa
45	809 W Saunders St	Plant City
46	750 19th Ave S	Tampa
47	4233 Darlington Rd	Holiday
48	386 Copperfield Rd	Spring Hill
49	27254 Roper Rd	Brooksville
50	2016 Dartmouth Dr	Holiday
51	1701 Atlas Lane	Holiday
52	10014 Cherry Creek Lane	Port Richey
53	7606 Nacido Ct	Tampa
54	7613 Pasa Dobles Ct	Tampa
55	7236 San Carlos Dr	Port Richey
56	7205 Kingston Dr	Tampa
57	5125 Palm Springs Blvd #15101	Tampa
58	508 38th Ave N	Tampa
59	11540 77th Ter #202	Seminole
60	1050 Starkey Rd #608	Largo