UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. Case No.: 8:20-cv-325-MSS-MRM

BRIAN DAVISON, BARRY M. RYBICKI, EQUIALT LLC, EQUIALT FUND, LLC, EQUIALT FUND II, LLC, EQUIALT FUND III, LLC, EA SIP, LLC, 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, TB OLDEST HOUSE EST. 1842, LLC, STATE OF FLORIDA DBPR, DIVISION OF HOTELS AND RESTAURANTS, CHARLES FARANO and SCOTT STALLMO,

Defendants.
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**REPORT AND RECOMMENDATION**

Pending before the Court is the Investor Plaintiffs' Motion for Court Approval of Attorneys' Fees and Expenses (Doc. 761). The motion, which was filed

concurrently with the motion for preliminary approval of proposed settlements (Doc. 760), was referred to the Undersigned for a Report and Recommendation. For the reasons below, the Undersigned recommends that, if the presiding United States District Judge grants final approval of the proposed settlements, the presiding District Judge also find the Investor Plaintiff's counsel's ("Investor Counsel") attorney's fees and expenses reasonable. As a result, the Undersigned recommends that, in the event the presiding United States District Judge grants final approval of the proposed settlements, the Investor Plaintiffs' Motion for Court Approval of Attorneys' Fees and Expenses (Doc. 761) be **GRANTED**.[1]

## I. Background

Presently "[b]efore the Court for final approval are a series of settlements achieved through the combined and coordinated efforts of Investor Counsel and the Court-appointed receiver for EquiAlt, LLC ('EquiAlt'), Burton W. Wiand ('Receiver') and Special Counsel for the Receiver, Johnson Pope Bokor Ruppel & Burns, LLP ('Receiver Special Counsel')." (Doc. 761 at 2; *see* Doc. 760). As described by Investor Counsel, "[t]he centerpiece of those settlements is the agreement (the 'Lawyer Settlement Agreement') reached by the Investor Plaintiffs and the Receiver with attorney Paul Wassgren and the two law firms . . . providing

[1] If the presiding United States District Judge finds that final approval of the settlements is not appropriate, the Undersigned recommends that the motion *sub judice* (Doc. 761) be denied as moot, given that the relief sought is tied to the final approval of the settlement fund.

services to the EquiAlt, Fox Rothschild LLP, and DLA Piper LLP (US) (collectively, 'the Lawyer Defendants')." (Doc. 761 at 2).

Plaintiff, the Securities and Exchange Commission, commenced this action in February 2020 against EquiAlt and its owner, Brian Davison, and managing director, Barry Rybicki, alleging that they had "conducted a Ponzi scheme raising more than $170 million from over 1,100 investors nationwide, many of them elderly, through fraudulent unregistered securities offerings." (Doc. 1 at 1 ¶ 1). In addition, Plaintiff named several purported EquiAlt investment funds ("the EquiAlt Funds") as additional defendants. (*Id.* at 5-6).

Shortly after the commencement of this action, the Court entered an order appointing Burton W. Wiand as Receiver over EquiAlt. (Doc. 11). The Court's order directed the Receiver, in part, to "[t]ake immediate possession of all property, assets and estates of every kind" of the Receivership Estate. (*Id*. at 2-3). Subsequently, the Court issued an order allowing the Receiver to retain the Receiver Special Counsel "for the limited purpose of investigating and pursuing claims against law firms that provided services to EquiAlt and other Receivership entities." (Doc. 127).

Investor Counsel asserts that they began receiving inquiries from EquiAlt investors soon after the commencement of this action. (Doc. 761 at 4 (citing Doc. 761-1 at ¶ 11)). As a result, "Investor Counsel spoke with dozens of victims and began to investigate third parties who might be potentially liable to the investors, thereby providing significant sources of additional recovery." (*Id*.). Through that

process, Investor Counsel discovered "evidence that attorney Paul Wassgren, a partner at the Fox Rothschild law firm and, later, a partner at the DLA Piper law firm, had knowingly provided substantial assistance to EquiAlt in its illegal sale of unregistered securities using unlicensed sales agents and the underlying scheme to defraud investors." (*Id.*). To protect their interests, the Investor Plaintiffs filed an initial class action in this Court on February 26, 2020. *See Steven J. Rubenstein et al. v. EquiAlt, Inc.*, Case No. 8:20-cv-00448-WFG-TGW. That case, however, was voluntarily dismissed without prejudice based on expressed concerns from the Receiver regarding potential disruption to the Receiver's efforts to recover against certain EquiAlt managers and sales agents. (Doc. 761 at 5). Therefore, in July 2020, "Investor Counsel, on behalf of a group of individual investors, commenced a new putative class action against the Lawyer Defendants only, asserting direct claims against the attorneys that Investor Plaintiffs alone had standing to pursue." (*Id.*); *see Richard Gleinn and Phyllis Gleinn et al. v. Paul Wassgren et al.*, Case No. 8:20-cv-01677-MSS-CPT ("Investors' Lawyer Action"). In September 2020, the Receiver filed an action against the Lawyer Defendants, first in federal court and then voluntarily refiled in California Superior Court. (Doc. 761 at 6).

The Receiver and the Investor Plaintiffs entered into a joint prosecution agreement ("JPA") "under which they agreed to pool their efforts and resources and otherwise work cooperatively to pursue recoveries against the Lawyer Defendants." (*Id.* at 6 (citing Doc. 761-1 at ¶ 17). As part of the JPA, "the Investor Plaintiffs and the Receiver specifically agreed that any recoveries in their coordinated actions

against the Lawyer Defendants would be distributed to the victimized EquiAlt investors through the Receivership Claims Process." (*Id.* (citing Doc. 761-1 at ¶ 18)). Further, the Receiver and the Investor Plaintiffs "agreed that, in the event that a global settlement was reached that did not allocate settlement proceeds separately between the Receivership Lawyer Action and the Investors' Lawyer Action, the settlement proceeds w[ould] be allocated equally between the Receivership Lawyer's Action and the Investors' Lawyer Action (i.e., 50% to each Action)." (*Id.* at 6-7).

Beyond their claims against the Lawyer Defendants, "the Investor Plaintiffs secured tolling agreements with several of the key EquiAlt sales agents and had threatened claims against others (collectively, the 'Sales Agent Defendants')." (*Id.* at 7). Meanwhile, the Receiver commenced an action in February 2021 naming numerous sales agents and affiliated entities as defendants. (*Id.* (citing Doc. 761-1 at ¶ 20); *see Burton W. Wiand v. Family Tree Estate Planning, LLC et al.*, Case No. 8:21-cv-00361-SDM-AAS (hereafter, "Receiver's Sales Agent Action").

Eventually, the Investor Plaintiffs, the Lawyer Defendants, the Receiver, and the Receiver's Special Counsel participated in a global mediation. (Doc. 761 at 10 (citing Doc. 761-1 at ¶ 29)). While they did not initially settle, after months of continued negotiations, they "entered into a Memorandum of Understanding setting forth the principal terms of the Lawyer Settlement Agreement." (*Id.* (citing Doc. 761-1 at ¶ 30)). As part of the settlement, the Investor Plaintiffs and the Receiver had to secure "the procurement of releases from former EquiAlt managers Davison and Rybicki and additional releases from more than 30 sales agents and their affiliates."

(*Id.* at 11 (citing Doc. 761-1 at ¶¶ 31-32)). Ultimately, after many hours spent working on finalizing the settlement agreement, "Investor Counsel were successful in obtaining releases from Rybicki, Davison, and nearly all of the sales agents thereby satisfying the conditions necessary to finalize the $44 million settlement with the Lawyer Defendants and present it to the Court for preliminary and final approval." (*Id.* at 12 (citing Doc. 761-1 at ¶¶ 34-35)).

Consistent with the concurrently filed joint motion of the Receiver and the Investor Plaintiffs for preliminary approval of the proposed settlement, Investor Plaintiffs filed the motion *sub judice*, seeking $5,500,000.00 in attorney's fees and $268,607.79 in expenses. (Doc. 761).

## II. Legal Standards

"[A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Arkin v. Pressman, Inc.*, 38 F.4th 1001, 1008 (11th Cir. 2022) (citation omitted). "The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "Recognizing the purpose and importance of these awards, [Eleventh Circuit] precedent maintains that common benefit fees—grounded in the courts' equity power—need not satisfy rigid eligibility requirements." *Amorin v. Taishan Gypsum Co., Ltd.*, 861 F. App'x 730, 734 (11th Cir. 2021). Although common fund fees are

most commonly associated with class settlements, the same principles apply to non-class common fund settlements. *See id*.

In the Eleventh Circuit, "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991). "There is no hard and fast rule mandating a certain percentage of a common fund which may be awarded as a fee because the amount of any fee must be determined upon the facts of each case." *Id*. However, "the majority of fees in these cases are reasonable where they fall between 20-25% of the claims." *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011). In fact, the Eleventh Circuit has recognized that "awards of up to 25% of the common fund are presumptively reasonable in this circuit." *Arkin*, 38 F.4th at 1005 n.3.

When the requested fee exceeds 25%, the Eleventh Circuit mandates that district courts consider the factors set out in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974). *See Faught*, 668 F.3d at 1242-43. These factors include:

> (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and the length of the professional relationship with the client; and (12) awards in similar cases.

*See Camden I*, 946 F.2d at 772 n.3 (citing *Johnson,* 488 F.2d at 717-19).

Importantly, "in the Eleventh Circuit, 'the lodestar approach should not be imposed through the back door via a 'cross-check.'" *Wilson v. EverBank*, No. 14-cv-22264, 2016 WL 457011, at *13 (S.D. Fla. Feb. 3, 2016) (quoting *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1362 (S.D. Fla. 2011)). "The Eleventh Circuit made clear in *Camden I* that [a] percentage of the fund is the exclusive method for awarding fees in common fund [cases]." *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1362. "Thus, courts in this Circuit regularly award fees based on a percentage of the recovery, without discussing lodestar at all." *Belin v. Health Ins. Innovations, Inc.*, No. 19-cv-61430, 2022 WL 1126006, at *1 (S.D. Fla. Mar. 10, 2022), *report and recommendation adopted*, 2022 WL 1125788 (S.D. Fla. Apr. 15, 2022) (citation and internal quotation marks omitted).[2]

## III. Analysis

Here, Investor Counsel seek $5,500,000.00 in attorney's fees and $268,607.79 in expenses. (Doc. 761 at 16, 25). To determine whether the request is reasonable, the Undersigned first considers what percentage of the common fund the amount of fees constitutes before considering the *Johnson* factors.

[2] The Undersigned is unaware of any objection to the settlement agreement on the basis of the amount of attorney's fees. Nevertheless, even if such an objection were timely or untimely filed, the Undersigned's analysis would not change because the objection would be directed at the settlement itself, the fairness and reasonableness of which is not before the Undersigned. As a result, the Undersigned considers the requested fee award without consideration of any potential objections.

### A. Common Fund Analysis

Although Investor Counsel requests $5,500,000 in fees, the "JPA contemplates that [only] 50% of the total common settlement fund created by the coordinated assertion of claims through the Investor[s' Lawyer] Action and the Receiver's Lawyer Action is to be allocated to the Investors Actions." (Doc. 761-1 at 14 ¶ 36). Further, "the Investor Plaintiffs and the Receiver have agreed that $22 million of the $44 million total common fund is allocable to the efforts of Investor Counsel in the Investors' Lawyer Action." (*Id.*). Therefore, the requested fees constitute only 25% of the settlement total at issue.[3] An attorney's fee request that amounts to 25% percent of the common fund total is presumptively reasonable. *Arkin*, 38 F.4th at 1005 n.3. Accordingly, the Court may award these fees without further consideration. *See Faught*, 668 F.3d at 1242 ("Where the requested fee *exceeds* 25%, the court is instructed to apply the twelve *Johnson* factors.") (emphasis added). The Undersigned therefore recommends that attorney's fees be awarded at 25% of the common fund in the amount of $5,500,000.

In addition to attorney's fees, Investor Counsel seek reimbursement of expenses in the amount of $268,607.79. (Doc. 761 at 25). "[C]ourts normally grant expense requests in common fund cases as a matter of course." *Hanley v. Tampa Bay Sports and Entertainment LLC*, No. 8:19-cv-00550-CEH-CPT, 2020 WL 2517766, at *6 (M.D. Fla. Apr. 23, 2020) (citation omitted). Upon review, the Undersigned finds

[3] If the Court considered $44 million to be the total, the percentage would be 12.5%.

that the expenses were necessarily incurred in furtherance of the relevant litigation. (Doc. 761-1 at ¶¶ 51-2; *id.* at 83); *see In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2015 WL 12641970, at *18 (S.D. Fla. May 22, 2015) (awarding costs and expenses from common fund after determining that they "were necessarily incurred in furtherance of the litigation"). Moreover, the expenses constitute roughly 1.2% of the total recovery amount,[4] which is consistent with expense awards in other common fund cases. *See, e.g.*, *Hanley*, 2020 WL 2517766, at *6 ("[T]he costs and expenses equated to approximately 1.2% of the settlement fund and is considered in line with normal expenditure amounts as a percentage of the total recovery."). Therefore, the Undersigned recommends that Investor Counsel be awarded $268,607.79 in expenses.

**B. *Johnson* Factors**

Although the Court may end its inquiry based on the presumptive reasonableness of the requested fee percentage, the Undersigned briefly analyzes the *Johnson* factors below in the interest of a thorough review and to benefit the presiding United States District Judge and the parties, in the event that the District Judge disagrees with the Undersigned's findings and recommendations above. The Undersigned considers the relevant factors below, combining those factors for which the analysis is substantially similar.

[4] The Undersigned calculated this percentage by dividing the requested expenses ($268,607.79) by $22 million. The percentage would be approximately 0.6% if the expenses were divided by the total $44 million.

### 1. Nature of Contingency Fees and the Burden and Economics of Prosecuting the Litigation

The inherent risk of a contingency fee arrangement is an important factor in determining the reasonableness of a fee award. *See Ressler v. Jacobson*, 149 F.R.D. 651, 653 (M.D. Fla. 1992). Here, Investor Counsel assumed major risks in undertaking this representation because there was no guarantee of recovering any fees or costs. As Investor Counsel assert, they "have received no compensation during this litigation, while on the other hand incurring significant expenses to litigating on behalf of the victimized investors – none of whom would have been recovered had the Investors' Lawyer Action not been ably prosecuted." (Doc. 761 at 22 (citing Doc. 761-1 at ¶ 46)). In fact, even after negotiating the settlement, "Investor Counsel continued to bear the risk that they would be unable to obtain releases . . . from Rybicki, Davison, and the Sales Agent Defendants." (*Id*. at 22 (citing Doc. 761-1 at ¶ 47)). Further, Investor Counsel secured at their own expense forensic accounting experts to assist with calculating damages. (Doc. 761 at ¶¶ 28, 52). Finally, the Investor Plaintiffs faced multiple motions to dismiss, in which the Lawyer Defendants put forth complex legal and factual bases for dismissal. (*Id.* at ¶ 26). This is all to say that recovery in this case was far from certain. Thus, the Undersigned finds that the risks borne by Investor Counsel in light of the contingency fee arraignment support the reasonableness of the fee requested.

### 2. Requested Fee Award Reflects the Market Rate in Other Complex, Contingent Litigation

The request is also within the realm of reasonableness when considered against other attorney's fee awards in similar litigation. *See, e.g.*, *In re Rayonier Inc. Secs. Litig.*, No. 3:14-cv-1395-J-32JBT, 2017 WL 4542852, at *3 (M.D. Fla. Oct. 5, 2017) (awarding 30% of common fund in fees in securities class litigation); *Gevaerts v. TD Bank*, No. 11:14-cv-20744-RLR, 2015 WL 6751061, at *11 (S.D. Fla. Nov. 5, 2015) (finding class counsel entitled to an award of 30% in a life settlement Ponzi scheme case); *Secs. & Exch. Comm'n v. Stanford Int'l Bank*, Nos. 3:09-cv-0298-N, 3:13-CV-0477-N-BG, 2019 WL 289370 (N.D. Tex. Jan. 18, 2019) (approving 25% contingency fee in non-class settlement case in which "the settlement is structured as a settlement with the Receiver and the [Official Stanford Investors] Committee"). Thus, the Undersigned finds that this factor supports the reasonableness of the requested fee award.

### 3. The Novelty and Difficulty of the Issues

Courts have long recognized that the novelty and difficulty of the issues in a case are to be considered in determining a fee award. *See Johnson*, 488 F.2d at 717-18. Here, as Investor Counsel notes, "the Investor Plaintiffs' claims against the Lawyer Defendants were complex, novel, and inherently risky." (Doc. 761 at 19). For instance, the Investor Plaintiffs' brough aiding and abetting claims "which required proof of actual knowledge of the primary violations and substantial assistance." (Doc. 761 at ¶ 41). Further, "the Investor Plaintiffs' claims under the

state securities laws of Arizona, Colorado, Nevada, and California are each based on that state's unique regulatory framework." (*Id.* at ¶ 42). The Lawyer Defendants also raised substantial legal defenses, including that certain claims were preempted by federal statutes. (*Id.*). These issues point to and underscore the overall complexity and novelty of the numerous claims at issue. Investor Counsel needed to be prepared to litigate and overcome these novel and complex issues to be compensated for their work. Thus, the Undersigned finds this factor also supports the reasonableness of the requested fee award.

**4. The Skill, Experience, and Reputation of Investor Counsel**

When evaluating a requested fee award, courts also consider the experience, reputation, and ability of both counsel seeking to recover fees and opposing counsel. *Gibbs v. Centerplate, Inc.*, No. 8:17-cv-02187-EAK-JSS, 2018 WL 6983498, at *8 (M.D. Fla. Dec. 28, 2019), *report and recommendation adopted*, 2019 WL 1093441 (M.D. Fla. Jan. 7, 2019). The filings attached to the Joint Declaration show that Investor Counsel have substantial experience in complex securities litigation actions. (*See* Doc. 761-1 at 23-81). Further, "Investor Counsel faced formidable and sophisticated opposition from two nationally prominent and sophisticated law firms, each represented by highly experience[d] defense counsel." (Doc. 761-1 at ¶ 49). Thus, the Undersigned finds the skill, experience, and reputation of the representation supports the requested fee award.

**5. The Amount Involved and Results Obtained**

Considering the results obtained, the Undersigned finds the reasonableness of the requested fee award bolstered. Investor Counsel was able to work with all the other interested parties, resulting in an agreement for a $44 million settlement fund. (Doc. 761-1 at ¶ 38). As proffered by Investor Counsel, that "amount represents nearly one-third of the total principal losses suffered by the EquiAlt Investors." (Doc. 761 at 18). Based on Investor Counsel's "prior experience in similar Ponzi scheme cases involving lawyer defendants, [they] were acutely aware of the enormous risks associated with litigation by non-clients against lawyer defendants armed with numerous defenses and vast financial resources." (Doc. 761-1 at ¶ 38). Despite those risks, Investor Counsel were able to secure a large settlement among various interested parties and non-parties, which the Undersigned finds weighs in favor of finding the requested fee award reasonable.

**6. Time and Labor of Investor Counsel**

The Undersigned also finds that the time and labor spent by Investor Counsel weighs in favor of finding the requested fee award reasonable. Investor Counsel represent that they worked "over 9,000 hours in the prosecution of these complex claims entailing a very substantial risk of non-recovery." (Doc. 761 at 20 (citing Doc. 761-1 at ¶¶ 43, 45)). In fact, their efforts "required certain Investor Counsel to devote a substantial portion of [their] resources to prosecution of the Investors' Lawyers Action, including periods when [they] worked full time on the Investors' Lawyer Action and related cases." (*Id.* at ¶ 44). Based on these representations, the

Undersigned finds that litigating this action surely precluded Investor Counsel from engaging in other matters and cases they could have otherwise pursued. Considering the efforts made to both prosecute and settle the ongoing litigation, the Undersigned finds the fee award requested is reasonable.

In sum, the Undersigned finds counsel's requested fee award to be reasonable and recommends that, in the event the presiding United States District Judge approves the settlement, the District Judge award attorney's fees in the amount of $5,500,000.00 and expenses in the amount of $268,607.79. Alternatively, if the District Judge finds that final approval of the settlement is not appropriate, the Undersigned recommends that the motion *sub judice* (Doc. 761) be denied as moot.

## CONCLUSION

Accordingly, the Undersigned **RESPECTFULLY RECOMMENDS** that:

1. In the event the United States District Judge approves the Lawyer Settlement Agreement, Investor Plaintiffs' Motion for Court Approval of Attorneys' Fees and Expenses (Doc. 761) be **GRANTED**.
2. Alternatively, if the presiding United States District Judge finds that final approval of the settlement is not appropriate, Investor Plaintiffs' Motion for Court Approval of Attorneys' Fees and Expenses (Doc. 761) be denied as moot.

**RESPECTFULLY RECOMMENDED** in Tampa, Florida on March 8, 2023.

Mac R. McCoy
United States Magistrate Judge

**NOTICE TO PARTIES**

A party has fourteen days from the date the party is served a copy of this Report and Recommendation to file written objections to the Report and Recommendation's factual findings and legal conclusions. 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. A party wishing to respond to an objection may do so in writing fourteen days from the date the party is served a copy of the objection. To expedite resolution, the parties may also file a joint notice waiving the fourteen-day objection period.

Copies furnished to:

Counsel of Record
Unrepresented Parties