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, et al.,

Defendants.
_____/

RECEIVER'S NOTICE OF SUPPLEMENTAL AUTHORITY

In connection with the Receiver's Motion for Claims Determination (Doc. 781), the Receiver hereby gives notice of the following supplemental authority regarding claims filed by sales agent Robert Armijo and Joseph Financial, Inc. (collectively "Armijo") and the Receiver's arguments referenced in pages 21-29 of the Motion regarding those claims:

1. In *Wiand v. Family Tree Estate Planning, LLC, et al.*, Case No. 8:21-cv-361-SDM-AAS (M.D. Fla. March 24, 2023), the Court recently granted the Plaintiff Receiver's motion for summary judgment against Armijo on his fraudulent transfer claim, both under actual and constructive theories, finding:

a. "Wiand demonstrates as a matter of law that Rybicki and Davison operated EquiAlt and the EquiAlt funds as a Ponzi scheme." *See* Exhibit A at 7.

b. "Further, Armijo confirms his blind reliance on information from Rybicki, Davison, and EquiAlt's lawyers." *Id.* at 10.

c. "Armijo's 'due diligence' fails to comport with the requirement of good faith." *Id.*

d. "Armijo fails to demonstrate that his procuring new marks for the EquiAlt Ponzi scheme constitutes 'reasonably equivalent value' justifying more than a million dollars in commission." *Id.* at 11.

2. In *Securities and Exchange Commission v. Robert Joseph Armijo and Joseph Financial, Inc.*, Case No. 21-CV-1107 TWR (RBB)(S.D. Calif. Mar. 8, 2023), the Court granted the SEC's motion for summary judgment against Armijo, finding that:

a. "The SEC filed a Complaint . . . alleging violations of (1) Section 5(a) and 5(c) of the Securities Act of 1933 . . . and (2) Section 15(a)(1) of the Securities Exchange Act of 1934 . . . ." and "the Court **GRANTS** summary judgment in favor of Plaintiff and against Defendants on both Plaintiff's causes of action." *See* Exhibit B at 9 and 24.

b. "Defendants produce no evidence that non-accredited investors were ever provided with audited or certified financial statements as required under Regulation D." *Id.* at 14.

c. "[T]he Court concludes that Defendants have failed to carry their burden of establishing that there exist genuine issues of material fact regarding their claimed exemption from registration under Regulation D." *Id.*

d. "Rather than obtain independent counsel . . . or seek guidance from the SEC, . . .Defendants accepted – and profited from – Rybicki's and Wassgren's self-serving representations of compliance." *Id.* at 17.

e. "[B]ased on the totality of the circumstances, no reasonable jury could conclude that Defendants were not acting as brokers with regard to the sale of the EquiAlt Funds." *Id.* at 22.

Respectfully submitted,

/s/ Katherine C. Donlon
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 28, 2023, I electronically filed the foregoing with the Clerk of this Court by using the CM/ECF system, which will send notification of electronic filing to all counsel of record.

/s/ Katherine C. Donlon
Attorney

EXHIBIT A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BURTON WIAND, as receiver for EquiAlt LLC, et al.,

Plaintiff,

v. CASE NO. 8:21-cv-361-SDM-AAS

FAMILY TREE ESTATE PLANNING, LLC, et al.,

Defendants.
_____/

ORDER

Appointed receiver of several corporate participants in a Ponzi scheme, Burton Wiand sues, among others, Robert Joseph Armijo; Joseph Financial, Inc.; John Marques; Lifeline Innovation and Insurance Solutions, LLC (Lifeline); Patrick J. Runninger; and The Financial Group, LLC, and alleges that by selling certain unlicensed securities the defendants assisted the Ponzi scheme. Specifically, Wiand asserts claims under the Florida Uniform Fraudulent Transfer Act, Section 726.101, Florida Statutes, and requests the return of money that the Ponzi scheme operators transferred to each defendant. Wiand moves (Doc. 142) for summary judgment against Armijo and Joseph Financial, and Armijo and Joseph Financial respond (Doc. 199). Separately, Wiand moves (Doc. 159) for summary judgment against Marques, Lifeline, Runninger, and The Financial Group, but no response appears.

BACKGROUND[1]

I. The Ponzi Scheme

From 2011 through February 2020, Brian Davison and Barry Rybicki — operating through EquiAlt LLC — sold debentures of EquiAlt Fund, LLC; EquiAlt Fund II, LLC; EquiAlt Fund III, LLC; EA SIP, LLC; and EquiAlt Secured Income Portfolio REIT (collectively, the "EquiAlt Funds"). (Doc. 142 at 2) Through December 2019, Davison, Rybicki, and several sales agents collected more than $168 million across 1686 separate transactions. (Docs. 142 at 2; 142-3 at 5) EquiAlt represented to investors that each EquiAlt Fund would invest in real property between 90% and 95% of any money collected and that the investors would receive an annual return between 8% and 12%, which EquiAlt would pay monthly. (Docs. 142 at 4; 142-2 at 5; 142-3 at 27)

Unknown to the investors, each debenture was an unregistered security "sold in violation of Section 5 of the Securities Act . . . ." (Docs. 142 at 5; 142-3 at 6) And EquiAlt commissioned unlicensed sales agents to sell the unregistered securities. (Docs. 142 at 5; 142-3 at 6) Further, each EquiAlt Fund actually invested less than half the money. (Doc. 199-20 at 14) The investments failed to earn a return sufficient to pay the investors, and EquiAlt remained insolvent from its inception through December 2019. (Doc. 142-1 at 13) "[A]t least as early as April 2013," EquiAlt paid

[1] No genuine dispute exists about the following facts. But Armijo and Joseph Financial assert several broad objections to statements by Wiand and two of Wiand's experts. For the reasons discussed in Wiand's reply (Doc. 210 at 1–3) and because Wiand's statements "could be reduced to admissible evidence at trial or reduced to admissible form[,]" the objections are **OVERRULED**.

distributions to existing investors with money collected from new investors. (Docs. 142-1 at 14; 210-2 at 5)

II. Unlicensed Sales Agents

A. Armijo and Joseph Financial

In 2013, Dale Tenhulzen (another defendant in this action) introduced Armijo to EquiAlt. (Doc. 199 at 4) From 2013 until January 2016, Armijo and Tenhulzen hosted seminars to attract new clients and to sell EquiAlt debentures. (Doc. 199 at 4) After Armijo and Tenhulzen terminated their mutual business relation in January 2016, Armijo and Rybicki discussed Armijo's selling debentures on EquiAlt's behalf. (Doc. 199 at 5) Armijo explained that he lacked a Series 7 license, and Rybicki and Paul Wassgren, a lawyer advising EquiAlt, responded that Armijo's Series 65 license was sufficient to sell the debentures. (Doc. 199 at 5) But a Series 65 license permits no sale of securities. (Doc. 142 at 7)

Armijo sold EquiAlt debentures between January 2016 and February 2020. (Doc. 199 at 6) Armijo primarily sold debentures in EquiAlt Fund I but also sold debentures in EquiAlt Fund II and EquiAlt REIT. (Doc. 199 at 6) Armijo sold over $10 million of the unregistered securities, and EquiAlt paid Armijo $1,472,458.35 in commissions. (Doc. 142 at 6) At Armijo's direction, EquiAlt paid Armijo's commission to Joseph Financial, a corporation which Armijo owns and operates. (Docs. 142 at 6; 142-5 at 19)

B. Marques and Lifeline

Marques owns and operates Lifeline. *SEC v. Marques*, Doc. 21, No: 4:21-cv-9796-KAW (N.D. Cal.). In 2016, Marques, who holds no securities license, contracted with EquiAlt to solicit investors to purchase EquiAlt debentures. *Marques*, Doc. 21, No: 4:21-cv-9796-KAW. Marques sold $14,985,004 in EquiAlt debentures, and EquiAlt paid Marques and Lifeline $810,338 in commissions. (Doc. 159 at 8)

C. Runninger and The Financial Group

Runninger is the principal of The Financial Group, but neither Runninger nor The Financial Group were registered to sell securities. (Doc. 159 at 8) Runninger and The Financial Group sold $3,844,289 in EquiAlt debentures. EquiAlt paid Runninger and The Financial Group $271,134 in commissions. (Doc. 159 at 8)

III. The Litigation

In February 2020, the Securities and Exchange Commission sued, among others, Rybicki, Davison, and EquiAlt to stop the EquiAlt investment scheme. *SEC v. Davison*, Doc. 1, No: 8:20-cv-325-MSS-MRM (M.D. Fla.). In that action, a February 14, 2020 order appoints Burton Wiand as the receiver of EquiAlt and the EquiAlt Funds. *Davison*, Doc. 11, No: 8:20-cv-325-MSS-MRM. As the receiver, Wiand is empowered to investigate EquiAlt and to sue any person or entity against which the receivership might assert a claim. (Doc. 142 at 9–10) Under this receivership authority, Wiand in this action sues thirty-six persons and entities, each of which allegedly participated in the sale of EquiAlt debentures and received from Rybicki and Davison commissions collectively totaling $18,795,000.03. (Doc. 142 at 2) Wiand

has settled the claims against each defendant except Armijo, Joseph Financial, Marques, Lifeline, Runninger, and The Financial Group. (Doc. 224 at 2–3)

Wiand moves (Doc. 142) for summary judgment against Armijo and Joseph Financial on Count I of the amended complaint. Count I asserts a claim under the Florida Fraudulent Transfer Act, Section 726, Florida Statutes, and alleges that the Receivership should recover any commission or other transfer from EquiAlt to Armijo and Joseph Financial because any commission or transfer was fraudulent. (Doc. 81 at 34–35) Armijo and Joseph Financial respond (Doc. 199) and argue (1) that the EquiAlt scheme was not a Ponzi scheme as a matter of law; (2) that Armijo acted in good faith and received the commission for "a reasonably equivalent value;" (3) that Wiand fails to negate any fact supporting Armijo's and Joseph Financial's affirmative defenses; and (4) that federal, not state, law controls this action. Wiand replies. (Doc. 210) Armijo and Joseph Financial sur-reply. (Doc. 223)

Separately, Wiand moves (Doc. 159) for summary judgment on Count I against Marques, Lifeline, Runninger, and The Financial Group. The docket reveals no response by any defendant. Runninger and The Financial Group each default, and a clerk's default pends against each. (Docs. 111; 114) Marques and Lifeline each answer (Doc. 90), but neither files a paper after September 2022.

An August 25, 2022 order (Doc. 151) (1) permits the withdrawal of counsel for Marques, (2) updates the service address for Marques, and (3) explains that, absent retention of substitute counsel, the action proceeds against Marques *pro se*. No substitute counsel appears. Similarly, a September 21, 2022 order (Doc. 167) (1) permits

the withdrawal of counsel for Lifeline (2) explains that Lifeline — a limited liability company — must appear through counsel, (3) directs Lifeline to secure substitute counsel no later than October 21, 2022, and (4) permits an additional fourteen days within which Lifeline's new counsel might respond to the motion (Doc. 159) for summary judgment. Again, no substitute counsel appears. Because Marques and Lifeline evidence no intent to litigate this action and because no response to the summary judgment motion appears, the motion (Doc. 159) for summary judgment is treated as unopposed under Local Rule 3.01(c).

DISCUSSION

I. Fraudulent Transfer

Against each remaining defendant, Wiand asserts a fraudulent transfer claim under Sections 726.105 and 726.106, Florida Statutes. This statute permits a creditor to recover any money that a debtor fraudulently transfers. Under *Wiand v. Lee*, 753 F.3d 1194, 1203 (11th Cir. 2014), and *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995), any entity in a receivership is a creditor of any insider who in breach of a fiduciary duty transfers the entity's money. Thus, Wiand alleges that EquiAlt's debtors — Rybicki, Davison, and the other EquiAlt insiders — fraudulently paid commissions to Armijo, Marques, Runninger, and several others. Sections 726.105 and 106 define three fraudulent transfer theories, one for actual fraudulent transfer and two

for constructive fraudulent transfer. Wiand asserts a claim under each fraudulent transfer theory.

A. Actual Fraudulent Transfer

Under Section 726.105(1)(a), Florida Statutes, Wiand asserts a claim for actual fraudulent transfer. That is, Wiand claims that "with actual intent to hinder, delay, or defraud creditors" Davison and Rybicki paid commissions to several persons — including the remaining defendants — who assisted in the sale of the EquiAlt debentures. (Doc. 81 ¶ 129) And under *Wiand v. Lee*, 753 F.3d 1194, 1201 (11th Cir. 2014), "proof that a transfer was made in furtherance of a Ponzi scheme establishes actual intent to defraud under [Section] 726.105(1)(a) . . . ." But under Section 726.109(1), Florida Statutes, a transfer is not voidable as fraudulent if the transferee "took in good faith and for a reasonably equivalent value . . . ." *Wiand v. Waxenberg*, 611 F. Supp. 2d 1299, 1319 (M.D. Fla. 2009) (Whittemore, J.).

Waxenberg, 611 F. Supp. 2d at 1312 (M.D. Fla. 2009) (Whittemore, J.), and *Wiand v. Morgan*, 919 F. Supp. 2d 1342, 1355 (M.D. Fla. 2012) (Pizzo, Mag. J.), explain that to prove the existence of a Ponzi scheme a receiver must establish four elements: (1) investors deposited money in the alleged scheme; (2) the entities in the receivership conducted "little or no legitimate business operations as represented to investors;" (3) the entities in the receivership generated little or no profit or earnings; and (4) the alleged scheme paid existing investors with money from new investors. By establishing each element, Wiand demonstrates as a matter of law that Rybicki and Davison operated EquiAlt and the EquiAlt funds as a Ponzi scheme.

EquiAlt represented to investors that EquiAlt would invest between 90% and 95% of any money from the investors and that the investors would receive an annual return of eight to twelve percent. (Docs. 142 at 4; 142-2 at 5; 142-3 at 27) But EquiAlt invested at most half of the investors' money and generated a return that was insufficient to pay the investors. (Docs. 142-1 at 13; 199-20 at 14) Thus, EquiAlt never conducted business in the manner represented to the investors and generated no profit or earnings.

Because each EquiAlt Fund invested some of the money in real property and because some of the investments generated a positive return, Armijo and Joseph Financial argue (Doc. 199 at 13) that EquiAlt conducted legitimate business and thus is not a Ponzi scheme. But this argument ignores EquiAlt's representations to the investors. As *SEC v. Quiros*, 2016 WL 11578637 at *13 (S.D. Fla. 2016) (Gayles, J.) (quoting *SEC v. Helms*, 2015 WL 1040443 at *8 (W.D. Tex. 2015)), notes "[t]he likelihood that [the defendant] conducted some legitimate business operations does not counteract the existence of a Ponzi scheme . . . ." EquiAlt's investing a fraction of the money as promised negates no part of Wiand's claim that EquiAlt operated a Ponzi scheme.

Similarly, although some of the properties in an EquiAlt Fund appreciated, this appreciation failed to generate a return sufficient to pay the investors, much less turn a profit for EquiAlt. The record demonstrates that "the monthly aggregate revenues from [the EquiAlt Funds] were insufficient to pay the monthly aggregate returns to investors, from inception through December 2019, without exception." (Doc. 142-1 at 13) Thus, EquiAlt's business operations generated no profit.

Finally and importantly, EquiAlt paid existing investors with money from new investors. (Doc. 142-1 at 14) In her report, Wiand's accounting expert, Maria Yip, explains (1) that EquiAlt Fund I, EquiAlt Fund II, and EA SIP each paid old investors with money from new investors and (2) that EquiAlt Fund I "made distributions to investors using new investors' funds at least as early as December 2016[.]" (Doc. 142-1 at 14) Yip supplements[2] (Doc. 210-2 at 5) her report with evidence that EquiAlt Fund I and EquiAlt Fund II paid distributions to existing investors with money from new investors "at least as early as April 2013 and July 2013, respectively."[3]

Thus, in accord with *Waxenberg*, 611 F. Supp. 2d at 1312, and *Morgan*, 919 F. Supp. 2d at 1355, Wiand establishes that EquiAlt operated as a Ponzi scheme, and Armijo and Joseph Financial identify no genuine dispute of material fact on any element. Because the existence of a Ponzi scheme establishes the "actual intent to defraud under [Section] 726.105(1)(a)[,]" summary judgment on Wiand's actual fraudulent transfer claim is warranted.

Resisting this conclusion, Armijo and Joseph Financial assert (Doc. 199 at 17) under Section 726.109(1) that Armijo acted in good faith and provided reasonably

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[2] Because Wiand included the supplement in the reply but not the motion for summary judgment, an order (Doc. 215) permits Armijo and Joseph Financial to sur-reply. The sur-reply (Doc. 223) never discusses the supplement but raises new and meritless arguments.

[3] Armijo and Joseph Financial identify no evidence contradicting Yip's report. But, attempting to limit Wiand's potential recovery, Armijo and Joseph Financial frame (Doc. 199 at 15–16) Yip's report as finding that EquiAlt paid old investors with money received from new investors beginning in December 2016. Based on this misstatement of the report, Armijo and Joseph Financial conclude that any commission that Armijo received before December 2016 is not a fraudulent transfer. Of course, Yip never limited the time within which EquiAlt paid old investors with money from new investors, and the misstatement of the report creates no genuine issue of material fact.

equivalent value for each commission. Under *Waxenberg*, 611 F. Supp. 2d at 1319, and *United States v. Romano*, 757 F. Supp. 1331, 1338 (M.D. Fla. 1989) (Sharp, J.), "'good faith' is an affirmative defense" and "[t]he relevant question is whether the transferee had actual knowledge of the debtor's fraudulent purpose or 'had knowledge of such facts or circumstances as would have induced an ordinarily prudent person to make inquiry, and which inquiry, if made with reasonable diligence, would have led to the discovery of the [transferor's] fraudulent purpose.'" Also, in accord with *Cuthill v. Greenmark, LLC (In re World Vision Entm't, Inc.)*, 275 B.R. 641, 659 (Bankr. M.D. Fla. 2002) (Jennemann, Bankr. J.), "a transferee may not remain willfully ignorant of facts which would cause [the transferee] to be on notice of a debtor's fraudulent purpose[.]"

Armijo and Joseph Financial claim that Armijo conducted the "due diligence" that "one would expect as a financial advisor." (Doc. 199 at 6) But Armijo admits that he reviewed the financial statements for only EquiAlt REIT and performed only cursory Google searches of Rybicki and Davison. Further, Armijo confirms his blind reliance on information from Rybicki, Davison, and EquiAlt's lawyers. (Docs. 199 at 19; 199-1 at 6) Although Armijo's discussions with Rybicki, Davison, and the lawyers demonstrate some suspicion or caution about the legality of Armijo's selling debentures with only a Series 65 license, Armijo never demonstrates that he spoke with any independent person, much less counsel, about licensing, about the legality of the EquiAlt investments, or about the EquiAlt Funds. Rather, Armijo's "due diligence" comprises a basic online search and brief discussions with people working for

the Ponzi scheme. As *Cuthill*, 275 B.R. at 660, explains, "A broker cannot rely only on slick, marketing brochures or insurance coverage, refrain from asking hard questions about the legitimacy of the product, and then assume a proper investigation was completed." Thus, Armijo's "due diligence" fails to comport with the requirement of good faith.

Further, even if Armijo had exercised "due diligence," the record fails to demonstrate that Armijo provided "reasonably equivalent value" for each commission. Armijo suggests (Doc. 199 at 17) that Wiand "bears the burden of showing that a transfer was not for reasonably equivalent value." This is true for constructive fraudulent transfer, but Section 726.109(1) is an affirmative defense to actual fraudulent transfer. As explained in *Wiand v. Dewane*, 2011 WL 4460095 at *7 (M.D. Fla. 2011) (Pizzo, Mag. J.), *report and recommendation adopted*, 2011 WL 4459811 (M.D. Fla. 2011), "The Defendant bears the burden of proving [an] affirmative defense [under Section 726.109(1)]."

And Armijo fails to demonstrate that his procuring new marks for the EquiAlt Ponzi scheme constitutes "reasonably equivalent value" justifying more than a million dollars in commissions. Armijo never received a license to sell securities and the EquiAlt debentures were never registered securities. Thus, Armijo's participation in

the sale of the debentures violated 15 U.S.C. §§ 77e(a), 78o(a)(1) and, under 15 U.S.C. § 78cc(b), Armijo's contract with EquiAlt was unenforceable. [4]

Citing several bankruptcy decisions, Armijo argues (Doc. 199 at 18) that despite his lacking a license the contract "might nonetheless support reasonably equivalent value[.]" But, Armijo fails to demonstrate that this exception applies to this action. *In re Financial Federated Title & Trust, Inc.*, 309 F.3d 1325, 1332 (11th Cir. 2002), requires a case-by-case evaluation of the circumstances of the transfer. But the circumstances surrounding these sales militate heavily against the conclusion that Armijo's conduct constituted a reasonably equivalent exchange. While unlicensed to sale securities, Armijo brokered the sale of unregistered securities that facilitated a Ponzi scheme. Indeed, as *Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006), persuasively notes, "It takes cheek to contend that in exchange for the payments he received, the [] Ponzi scheme benefitted from his efforts to extend the fraud by securing new investments." Thus, Armijo fails to demonstrate that he provided reasonably equivalent value.

In furtherance of a Ponzi scheme, Rybicki and Davison paid commissions from EquiAlt to Armijo, Marques, Runninger, and others who assisted in the sale of the fraudulent EquiAlt debentures. These transfers are fraudulent under Section

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[4] In the sur-reply (Doc. 223), Armijo and Joseph Financial argue (for the first time) that Armijo neither sold the debentures nor acted as a broker. Rather, Armijo argues that he merely "solicited potential investors and helped [the investors] prepare and submit offers" for the debentures. According to Armijo and Joseph financial, this conduct never violated 15 U.S.C. § 78o(a)(1) and thus the receipt of a commission was warranted. This distinction lacks any legal difference because the transfers remain fraudulent transfers under Section 105(1)(a) and because Armijo fails to demonstrate that he acted in good faith.

726.105(1)(a). Because Armijo fails to demonstrate the exercise of reasonable diligence and fails to prove that he provided reasonably equivalent value, Armijo's affirmative defense under Section 726.109(1) necessarily fails. Thus, summary judgment on Count I for Wiand and against Armijo and Joseph Financial is warranted. And because Marques, Lifeline, Runninger, and The Financial Group never oppose, summary judgment on Count I is warranted against them for the same reasons.

B. Constructive Fraudulent Transfer

Also, Wiand asserts a constructive fraudulent transfer claim under two theories. First, Wiand asserts a claim under Section 726.105(1)(b), Florida Statutes, under which a transfer is fraudulent if a debtor transfers money "[w]ithout receiving a reasonably equivalent value in exchange[,]" and if (1) the debtor's remaining assets "[are] unreasonably small in relation to the business" or (2) the debtor "[believes] that he or she [will] incur[] debts beyond his or her ability to pay as [the debts] bec[o]me due." Second, Wiand asserts a claim under Section 726.106(1), Florida Statutes, under which a transfer is fraudulent if the debtor transfers the money "without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor was insolvent at [the] time [of the transfer] . . . ."

For the reasons discussed in the preceding section, the assistance to the Ponzi scheme in the sale of unlicensed securities is not reasonably equivalent value. And the record demonstrates that EquiAlt was insolvent from inception. Thus, under either actual or constructive fraudulent transfer, summary judgment on Count I for

Wiand and against Armijo, Joseph Financial, Marques, Lifeline, Runninger, and The Financial Group is warranted.

II. Affirmative Defenses

Armijo and Joseph Financial assert seventeen affirmative defenses, each without merit. Essentially, Armijo and Joseph Financial argue (1) that Wiand asserts the fraudulent transfer claim after the applicable limitation; (2) that Wiand lacks standing; (3) that intervening acts caused any damage to the investors; and (4) that any recovery should be limited, set off, or otherwise reduced. (Doc. 199 at 21–28)

Wiand sues within the applicable limitation. Under Section 726.110, Florida Statutes, a plaintiff must assert a claim under the Florida Uniform Fraudulent Transfer Act "within 4 years after the transfer was made or the obligation was incurred." Wiand sued on February 13, 2021. Thus, Armijo and Joseph Financial conclude that the limitation precludes any damages accruing before February 14, 2017. But Section 726.110(1) permits a plaintiff to assert a claim for actual fraudulent transfer "within 1 year after the transfer . . . could reasonably have been discovered by the claimant." Under *Wiand v. Meeker*, 572 F. App'x 689, 692 (11th Cir. 2014), this one-year limitation begins when the receiver is appointed. Because Wiand became the receiver on February 14, 2020, Wiand challenges each actual fraudulent transfer within the applicable limitation.

Also, Wiand has standing, and any "intervening acts" are irrelevant. Under *Wiand v. Lee*, 753 F.3d 1194, 1202 (11th Cir. 2014) (citing *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995)), "[a] receiver of entities used to perpetrate a Ponzi scheme

does not have standing to sue on behalf of the defrauded investors but does have standing to sue on behalf of the corporations that were injured by the Ponzi scheme operator." *Lee*, 753 F.3d at 1203, explains that the entities in receivership are creditors of the Ponzi scheme operators who transferred money from the receivership entities. Thus, EquiAlt and the EquiAlt Funds are creditors of Rybicki and Davison, and Wiand has standing to assert on behalf of EquiAlt and the EquiAlt Funds a claim for fraudulent transfer. Because Wiand asserts claims on behalf of EquiAlt and the EquiAlt Funds, any intervening act that damages the investors is irrelevant to the receivership's fraudulent transfer claim.[5]

Also, though unclear, Armijo and Joseph Financial appear to argue that *Liu v. SEC*, 140 S. Ct. 1936 (2020), preempts Florida law and thus prevents Wiand from asserting any claim for fraudulent transfer. (Doc. 199 at 7–8) *Liu* holds that "a disgorgement award that does not exceed a wrongdoer's net profit and is awarded for victims is equitable relief permissible under [15 U.S.C.] § 78u(d)(5)." Nothing in *Liu* suggests, much less requires, that federal securities law preempts state fraudulent transfer law.

The remaining affirmative defenses each pertain to the damages that Wiand can recover from Armijo and Joseph Financial. In exchange for Armijo's services and under the agreement with Armijo, Davison and Rybicki paid $1,472,458.35 to

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[5] Armijo and Joseph Financial appear to argue that *Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1306 (11th Cir. 2020), strips a receiver of standing, but *Isaiah* expressly recognizes "that the receiver for the corporation has standing to sue the recipients of fraudulent transfers under the FUFTA."

Joseph Financial. This entire sum is fraudulently transferred money and thus is subject to recovery by Wiand.

Armijo and Joseph Financial argue that *SEC v. Elliott*, 953 F.2d 1560 (11th Cir. 1992), entitles each defendant to a set-off against any collection by Wiand. If the receivership owes a debt to a defendant, *Elliott*, 953 F.2d at 1571–72, permits the debt to set-off and thus decrease the money that the receiver can recover from the defendant. But, under *Elliott*, a set-off requires mutuality of debts or claims between the parties. Armijo suggests (Doc. 199 at 25) that Rybicki and EquiAlt's lawyer "fraudulently induced Armijo to sell the securities." But any claim that Armijo might have against Rybicki, EquiAlt's lawyer, or another insider of the Ponzi scheme is distinct from any claim against EquiAlt or the EquiAlt Funds, and Armijo never asserts that EquiAlt owes Armijo any debt independent from a claim against the insiders.

Also, Armijo and Joseph Financial argue that the SEC's action in the Southern District of California, *SEC v. Armijo*, No: 3:21-cv-1107-TWR-AHG (S.D. Cal.), limits any recovery in this action. Wiand concedes (Doc. 210 at 14) that Wiand and the SEC cannot each collect the same money for the same claim against Armijo and Joseph Financial. In the SEC's action against Armijo and Joseph Financial, the Southern District of California granted summary judgment in the SEC's favor but deferred ruling on available remedies. *Armijo*, Doc. 45, No: 3:21-cv-1107-TWR-AHG. Thus, no set-off to avoid a double recovery is available until the entry of judgment in either action.

III. Pre-judgment Interest

In accord with *Lee*, 753 F.3d at 1204, and *Wiand v. Dancing $, LLC*, 578 Fed. Appx. 938, 947 (11th Cir. 2014), Wiand requests pre-judgment interest against each remaining defendant. Under *Lee*, 753 F.3d at 1205, "Florida courts [] award[] pre-judgment interest on [fraudulent transfer] claims and on unjust enrichment claims as a matter of course." Further, the factors discussed in *Blasland, Bouck & Lee v. City of N. Miami*, 283 F.3d 1286, 1297–98 (11th Cir. 2002), militate in favor of awarding pre-judgment interest.

Opposing pre-judgment interest, Armijo and Joseph Financial argue (Doc. 199 at 29) that they "have suffered immensely as a result of their interactions with EquiAlt." This attempt to characterize himself as a victim of the Ponzi scheme fails because Armijo induced more than seventy people to invest in the EquiAlt Funds. (Doc. 199 at 6) Also, Armijo and Joseph Financial argue (Doc. 199 at 29) that Wiand "brought this action on the last possible day . . . ." Armijo and Joseph Financial presumably refer to the one-year savings clause for actual fraudulent transfer under Section 726.110, but failure to file in accord with the savings clause would reduce potential recovery only, not bar the action. By suing thirty-six defendants within a year of appointment as receiver, Wiand sues within the applicable limitation and maximizes the receivership's potential recovery. Thus, neither of Armijo's and Joseph Financial's arguments persuade.

CONCLUSION

For these reasons and others stated in the motions for summary judgment and in the reply (Doc. 210) in support of summary judgment against Armijo and Joseph Financial, each motion (Docs. 142; 159) for summary judgment is **GRANTED**. On the fraudulent transfer claim, summary judgment in favor of Wiand and against Armijo, Joseph Financial, Runninger, The Financial Group, Marques, and Lifeline is warranted. No later than **APRIL 20, 2023**, Wiand must report the status of this action and must propose a form of final judgment against each remaining defendant. In the report, Wiand must state (1) whether the receivership court has approved the settlements with the other defendants in this action; (2) the status of any SEC action against these defendants; and (3) the monetary amount of any judgment in favor of the SEC and against these defendants. The form of final judgment must calculate pre-judgment interest through **APRIL 21, 2023**.

ORDERED in Tampa, Florida, on March 24, 2023.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

EXHIBIT B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. ROBERT JOSEPH ARMIJO, and JOSEPH FINANCIAL, INC., Defendants.	Case No.: 21-CV-1107 TWR (RBB) **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT** (ECF Nos. 24, 26)

Presently before the Court are the cross-motions for summary judgment (the "Motions") filed by Plaintiff the Securities and Exchange Commission ("SEC") ("Pl.'s MSJ," ECF No. 24) and Defendants Robert Joseph Armijo and Joseph Financial, Inc. ("JFI") ("Defs.' MSJ," ECF No. 26). The Motions are fully briefed, (*see* ECF Nos. 34–35, 38–40), and the Court held a hearing on February 23, 2023. (*See* ECF No. 44.) Having carefully considered the Parties' arguments, the record, and the applicable law, the Court **GRANTS** Plaintiff's Motion and **DENIES** Defendants' Motion, as follows.

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BACKGROUND

I. Undisputed Material Facts

The Parties have agreed to the following undisputed material facts:

A. The Underlying Securities

"In 2011, Brian Davison . . . formed EquiAlt, LLC ("EquiAlt"), in Nevada, to be used as a manager of real estate investment funds ("Fund Manager")." (*See* ECF No. 39 ("Jt. Stmt.") ¶ 3.) "EquiAlt retained securities counsel, Paul Wassgren . . . , and his firms, Fox Rothschild LLP and then DLA Piper LLP, to form legal entities to be used as real estate investment funds and to raise capital for the funds through offerings of securities." (*Id.* ¶ 4; *see also id.* ¶ 26.) "Wassgren remained counsel to EquiAlt and the Funds through 2020, and was counsel at all times that Defendants acted as agents for the Fund Manager and Funds." (*Id.* ¶ 5.)

"From 2011 to 2019, EquiAlt formed at least four real estate investment funds (collectively, "Funds"): (1) EquiAlt Fund, LLC ("Fund I"); (2) EquiAlt Fund II, LLC ("Fund II"); (3) EquiAlt Fund III ("Fund III"); and (4) EA SIP, LLC ("EA SIP Fund")[.]"[1] (*Id.* ¶ 6; *see also id.* ¶ 10.) "Each Fund issued its own securities," (*id.* ¶ 7), in the form of "debentures . . . providing a fixed annual return of 8% to 12%." (*See id.* ¶ 9.) "None of the Funds' securities were ever listed or traded on any exchange facility, such as a national securities exchange or an over-the-counter market." (*Id.* ¶ 8.) Further, "[t]he EquiAlt Funds were not registered with the SEC at any time during the period from February 1, 2016[,] to February 22, 2020." (*Id.* ¶ 16.)

"EquiAlt hired Wassgren and members of his various law firms, to draft, among other documents, a Private Placement Memorandum ("PPM") and Prospective Purchaser Questionnaire ("PPQ") for each Fund's offering (individually, "Fund Offering;" collectively, "Fund Offerings")." (*Id.* ¶ 11.) "The PPQ defined 'accredited investor' and instructed potential investors to identify whether they were 'accredited' under such

[1] "Defendants did not engage in any activities on behalf of Fund III." (Jt. Stmt. ¶ 21.)

definition and sign and date the document." (*Id.* ¶ 12.) "Each PPM contained information about the particular Fund Offering[] but did not include financial statements for the Fund." (*Id.* ¶ 13.) "Each PPM for each Fund stated in capital letters 'THE SECURITIES HAVE NOT BEEN REGISTERED WITH NOR APPROVED OR DISAPPROVED BY THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION. . . . THIS OFFERING HAS NOT BEEN APPROVED OR DISAPPROVED UNDER APPLICABLE STATE SECURITIES LAWS.'" (*Id.* ¶ 14.) "The fact that the Funds' securities had not been registered with the SEC was reiterated in the Prospective Purchaser Questionnaire which stated that 'the offering of the Securities has not been and will not be registered under the Securities Act of 1933, as amended, or state securities laws[] . . . .'" (*Id.* ¶ 15.)

"EquiAlt, with Wassgren's assistance, filed Forms D, entitled 'Notice of Exempt Offering of Securities,' with the SEC for each Fund." (*Id.* ¶ 17.) "The Form Ds certified that, 'if the issuer is claiming a Regulation D exemption for the offering, the issuer is not disqualified from relying on Rule 504 or Rule 506 for one of the reasons stated in Rule 504(b)(3) or Rule 506(d).'" (*Id.*)

"Fund I filed a Form D on July 19, 2011, signed by Davison as Fund I's CEO, claiming an exemption from registration under Rule 506 for a $50 million offering of debt and tenant-in-common type securities." (*Id.* ¶ 19; *see also id.* ¶ 18.) "This Form D[] listed 0 non-accredited investors at the time of filing." (*Id.* ¶ 19.) "Fund I filed an amended Form D on June 28, 2013, which modified the type of securities offered to reflect only debt-type securities[;] stated that the first sale of securities had occurred on January 11, 2011[;] and indicated that the offering had been sold to 31 non-accredited investors out of a total of 60 investors at the time of filing." (*Id.*) "Fund I filed an amended Form D on August 13, 2019, which specified Rule 506(b) as the relevant exemption from registration . . . and indicated that the offering had been sold to 31 non-accredited investors out of a total of 1,089 investors at the time of filing." (*Id.*)

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"Fund II filed a Form D on April 4, 2016, signed by Davison as Fund II's CEO, claiming an exemption from registration under Rule 506(b) for a $20 million offering of debt-type securities." (*Id.* ¶ 20; *see also id.* ¶ 18.) "This Form D stated that the first sale of securities had taken place on May 2, 2013, and indicated that the offering had been sold to 10 non-accredited investors out of a total of 88 investors at the time of filing." (*Id.* ¶ 20.) "The Form D indicated that solicitations pursuant to the offering and sales compensation would occur in Arizona, California, Colorado, Massachusetts, Nevada[,] and Utah." (*Id.*) "Fund II filed an amended Form D on April 28, 2016, which de-selected any specific states for sales compensation." (*Id.*) "Fund II filed an amended Form D on September 1, 2017, which indicated that the offering had been sold to 10 non-accredited investors out of a total of 209 investors at the time of filing." (*Id.*)

"EA SIP Fund filed a Form D with the SEC on August 8, 2016,[2] signed by Davison as EA SIP Fund's CEO, claiming an exemption from registration under Rule 506(b) for a $25 million offering of debt-type securities." (*Id.* ¶ 22; *see also id.* ¶ 18.) "This Form D listed 0 non-accredited investors at the time of filing." (*Id.* ¶ 22.) "EA SIP Fund did not file additional Forms D." (*Id.*)

B. Recruitment of Defendants

Defendant JFI is a California corporation located in San Diego, California, that is owned and controlled by Defendant Robert Joseph Armijo. (*See* Jt. Stmt. ¶ 2.) At all relevant times, neither Defendant was associated with a registered broker-dealer or registered as broker-dealer with the SEC, the Financial Industry Regulatory Authority ("FINRA"), or any state securities regulatory authority. (*See id.* ¶ 1.)

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[2] Paragraph 18 of the Parties' Joint Statement indicates that the Form D for the EA SIP Fund was filed on August 8, 2016, while paragraph 22 indicates that it was filed on August 8, 2018. A review of the Form D filed with the SEC establishes that it was filed in 2016. *See* EA SIP LLC, Notice of Exempt Offering of Securities (Form D) (Aug. 8, 2016), *available at* https://www.sec.gov/Archives/edgar/data/0001680954/000168095416000001/xslFormDX01/primary_doc.xml.

"Barry Rybicki . . . was EquiAlt's Managing Director and supervised the agents who marketed the Funds to prospective purchasers." (*Id.* ¶ 23.) "Rybicki operated a company called BR Support Services, LLC ("BR Support")." (*Id.*)

"On or about January 19, 2016, Rybicki recruited Defendants to solicit investors to make offers to buy Fund debentures." (*Id.* ¶ 24.) "Armijo spoke to Rybicki during a lengthy telephone conversation, lasting more than an hour." (*Id.*) "During that conversation, Armijo specifically asked Rybicki what licenses he would need to participate as an offering agent for the Funds." (*Id.*)

"Rybicki . . . represented to Defendants that, for compensation, Defendants would do the following, which they did do:" (1) "[c]ommunicate with, solicit, and encourage potential investors to prepare, sign, and submit offers to purchase a Funds' debenture or security[;]" (2) "[d]iscuss the backgrounds of the principal(s) associated with the Fund Managers with potential investors[;]" (3) "[i]nform investors about the possible merits and economic, market, and business risks related to the Funds' stated operations and operational model[;]" (4) "[l]isten to potential investors' representations about their investment objectives, net worth, portfolio, income needs, risk tolerance, and time horizon[;]" (5) "[p]rovide potential investors with the Funds' prepared marketing materials and offering materials, including the PPM and PPQ[;]" and (6) "[a]ssist potential investors complete and submit the Offer-to-Buy materials, including the PPQ, in order to purchase a Fund's securities." (*See id.* ¶ 27.) "Rybicki also represented to Defendants that compensation for agent services:" (1) "[w]ould be paid if the Fund accepted the solicited, potential investor's offer to buy the Funds' securities and the investor paid for such securities;" (2) "[c]ompensation would be paid from a Fund Manager marketing account and not from an investor's securities purchase money;" (3) "[a]ny compensation paid to Defendants would be paid through Rybicki's company, BR Support[;]" and" (4) "[i]n an amount equal to 10% of the purchase amounts attributable to the investors whose offers Defendants had solicited." (*Id.* ¶ 41.)

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Rybicki made several additional representations to Defendants, including (1) "EquiAlt, as Fund Manager, had retained Wassgren as legal counsel for the Funds;" (2) "Wassgren had prepared materials, including the PPMs and PPQs, to be presented to potential investors; and" (3) "EquiAlt would pay Wassgren for legal advice Defendants solicited relative to the Fund Offerings, including the propriety of offering Fund Securities with the licenses held by Armijo—a Series 65 investment adviser license, but not a Series 7 broker license." (*Id.* ¶ 25.) As a result, "Defendants did not obtain independent advice on whether it was legal for them to be involved in the sale of EquiAlt debentures without any additional license." (*See id.* ¶ 26.) "Rybicki confirmed that Wassgren was 'our lawyer' for Armijo to talk to about all things EquiAlt and compliance." (*Id.*)

"On or about July 5, 2017, Rybicki provided Armijo with Wassgren's contact information so that Armijo could contact him." (*Id.* ¶ 29.) "On or about the same day, Armijo had a telephone conversation with Wassgren and Defendants relied on Wassgren's advice." (*Id.*) "On November 21, 2017, Armijo raised with Rybicki in a text message the question of whether he needed a Series 7 license to become involved in soliciting offers of an EquiAlt REIT, which was then being introduced by EquiAlt." (*Id.* ¶ 28.) "Rybicki responded in a November 21, 2017 text message, that Armijo did not need a Series 7 license: 'Series 65 is good to go!'" (*Id.*) "Rybicki made the same representation to Armijo on March 7, 2019." (*Id.*) "On or about May 14, 2019, Armijo again spoke by telephone with Wassgren, with Rybicki's permission, and Armijo again relied on Wassgren's advice." (*Id.* ¶ 30.)

C. Defendants' Sales of the EquiAlt Funds

"Beginning in 2016 and continuing until February 2020, Defendants offered the EquiAlt Funds investments to more than 50 investors in California and other states." (Jt. Stmt. ¶ 33.) "Defendants admit that they participated in the sale of unregistered EquiAlt securities." (*Id.* ¶ 45.)

"Rybicki, on behalf of the Fund Manager, provided Defendants with all documents needed for a potential investor to submit an 'offer-to-buy' a Fund's securities ("Offering

Materials")." (*Id.* ¶ 37.) "The Funds' Offering Materials included the PPM and PPQ, which Defendants received from the Funds." (*Id.* ¶ 38.) "Defendants had potential investors complete and sign the PPQ that defined 'accredited investor' and instructed them to identify whether they were 'accredited' or 'unaccredited' under such definition." (*Id.* ¶ 39.) "Defendants did not perform a background check or review the truthfulness of potential investors' assertions that they were 'accredited' under the PPQ's definition." (*Id.* ¶ 40.) "Defendants were not provided with audited balance sheets or financial statements of EquiAlt," (*see* ¶ 31), and "Armijo did not provide any audited balance sheets or financial statements of EquiAlt to the investors in the EquiAlt Funds." (*Id.* ¶ 32.) "Although the Offering Materials had standardized terms, Defendants on one or more occasions requested that the Fund offer a higher-than-standard interest rate." (*Id.* ¶ 35.)

"EquiAlt paid Joseph Financial transaction-based compensation ranging from 6–12% of the amount invested in the EquiAlt Funds by investors solicited by Defendants." (*Id.* ¶ 42.) "In the time period between [February 5, 2016,] and [June 26, 2017], Defendants sold approximately $6,082,937 of the EquiAlt Funds to their clients and received about $679,697 in Commission from these sales." (*Id.* ¶ 44.) "From 2016 to 2020, Defendants solicited their clients to invest more than $10 million in the EquiAlt Funds." (*Id.* ¶ 34.) "In total, Defendants earned at least $1,086,825 in transaction-based compensation as the agreed upon percentage of the total amount of offers-to-buy Fund securities that Defendants assisted potential investors to submit and that the Funds accepted, resulting in contracts of sale and subsequent sales of Fund securities." (*Id.* ¶ 43.)

"Defendants had no authority to do any of the following and did not do any of the following:" (1) "[a]ccept an offer to buy a Funds securities on behalf of the Fund Manager or the Fund;" (2) "[e]nter into any contract of sale or other contract with a potential investor;" (3) "[d]eposit a potential investor's proffered payment to purchase a Fund's security;" or (4) "issue a Fund's security or title or transfer title to any such security." (*Id.* ¶ 36.)

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D. The SEC's Investigation and Ensuing Litigation

"The SEC investigated EquiAlt and the Funds and, on February 11, 2020, it filed a complaint against Davison and Rybicki ("Insiders") and the Funds in the U.S. District Court for the Middle District of Florida ("2020 Fraud Complaint")."[3] (Jt. Stmt. ¶ 46.) "The 2020 Fraud Complaint alleged violations of the anti-fraud provisions and certain registration provisions of the federal securities laws." (*Id.*) "The Complaint describes the Insiders' misappropriation or misuse of some portion of sales proceeds obtained in the Funds' Offerings and revenues generated from the Funds' real estate operations ("Misappropriations"), which it characterized as a 'massive Ponzi scheme' and alleged that no exemption from registration of the Funds' securities existed ("Exemption Disqualifications")." (*Id.*) "The Fund Manager and the Funds used a portion of sales proceeds obtained in the Funds' Offerings and revenues generated from the Funds' real estate operations to purchase, maintain, administer and dispose of real estate assets and to compensate its agents." (*Id.* ¶ 47.)

"Upon the SEC's filing of the 2020 Fraud Complaint, the public learned of the alleged Misappropriations and Exemption Disqualifications." (*Id.* ¶ 48.) "Defendants learned of the alleged Misappropriations and Exemption Disqualifications upon Plaintiff's filing of its 2020 Fraud Complaint." (*Id.* ¶ 49.)

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[3] The Court additionally takes judicial notice of the following facts: The 2020 Fraud Complaint was filed in *SEC v. Davison, et al.*, No. 8:20-cv-325-T-35AEP (M.D. Fla. filed Feb. 11, 2020) (the "2020 Fraud Action"). The district court appointed Burton W. Wiand as receiver on February 14, 2020. *See* 2020 Fraud Action, ECF No. 11. The receiver filed a "clawback" action, *Wiand v. Family Tree Estate Planning, LLC, et al.*, No. 8:21-cv-361-SDM-AAS (M.D. Fla. filed Feb. 13, 2021) (the "2021 Receiver Action"), seeking to recover from, among others, Defendants, monies transferred by the Insiders as commissions or other fees pursuant to Florida's Uniform Fraudulent Transfer Act ("FUFTA"), Fla. Stat. § 726, or, alternatively, unjust enrichment. *See* 2021 Receiver Action, ECF No. 1; *see also id.* ¶¶ 22–23; (ECF No. 26-17 ("Wright Decl. Ex. I") (2021 Receiver Action first amended complaint)). The receiver filed for summary judgment against Defendants in the 2021 Receiver Action on August 3, 2022. *See* 2021 Receiver Action, ECF No. 142. As of the date of this Order, that motion is still pending before the Honorable Steven D. Merryday.

II. Relevant Procedural History

The SEC filed a Complaint for Injunctive and Other Relief and Demand for Jury Trial against Defendants on June 14, 2021, alleging violations of (1) Section 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77e(a) and 77e(c); and (2) Section 15(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78o(a)(1). (*See generally* ECF No. 1 ("Compl.").) Defendants answered on September 3, 2021. (*See generally* ECF No. 7.) After completing discovery, (*see* ECF No. 23), the Parties filed the instant Motions on October 19, 2022. (*See generally* ECF Nos. 24, 26.)

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, a party may move for summary judgment as to a claim or defense or part of a claim or defense. Fed. R. Civ. P. 56(a). Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Although materiality is determined by substantive law, "[o]nly disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* When considering the evidence presented by the parties, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

The initial burden of establishing the absence of a genuine issue of material fact falls on the moving party. *Celotex*, 477 U.S. at 323. The moving party may meet this burden by "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* "When the party moving for summary judgment would bear the burden of proof at trial, 'it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.'"

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C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000) (quoting *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992)).

Once the moving party satisfies this initial burden, the nonmoving party must identify specific facts showing that there is a genuine dispute for trial. *Celotex*, 477 U.S. at 324. This requires "more than simply show[ing] that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, to survive summary judgment, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts'" that would allow a reasonable fact finder to return a verdict for the nonmoving party. *Celotex*, 477 U.S. at 324; *see also Anderson*, 477 U.S. at 248. Accordingly, the nonmoving party cannot oppose a properly supported summary judgment motion by "rest[ing] upon mere allegations or denials of his pleading." *Anderson*, 477 U.S. at 256.

Where, as here, the Parties have filed cross-motions, the court considers the motions "separately, giving the nonmoving party in each instance the benefit of all reasonable inferences." *See SEC v. Feng*, 935 F.3d 721, 728 (9th Cir. 2019).

ANALYSIS

Through the instant Motions, Plaintiff and Defendants each seek summary adjudication in their favor as to both of Plaintiff's claims. (*See* Pl.'s MSJ at 1–2; Defs.' MSJ at 1–2; *see also* ECF No. 24-1 ("Pl.'s Mem.") at 13; ECF No. 26-1 ("Defs.' Mem.") at 1.) Alternatively, Defendants seek denial of Plaintiff's entitlement to injunctive relief, disgorgement, and civil penalties as a matter of law, (*see* Defs.' Mem. at 1), or a stay or dismissal of this action under the first-to-file rule. (*See id.*)

I. Sections 5(a) and (c) of the Securities Act

Plaintiff alleges that Defendants violated Sections 5(a) and 5(c) of the Securities Act, (*see* Compl. ¶¶ 25–27), which "make it unlawful to offer or sell a security in interstate commerce if a registration statement has not been filed as to that security, unless the

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transaction qualifies for an exemption from registration."[4] *SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1255 (9th Cir. 2013) (quoting *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1085 (9th Cir. 2010)). "To establish a prima facie case for violation of Section 5, the SEC must show that (1) no registration statement was in effect as to the securities; (2) the defendant directly or indirectly sold or offered to sell securities; and (3) the sale or offer was made through interstate commerce." *Id.* (citing *SEC v. Phan*, 500 F.3d 895, 902 (9th Cir. 2007); *SEC v. Calvo*, 378 F.3d 1211, 1214 (11th Cir. 2004) (per curiam)). "Once the SEC introduces evidence that a defendant has violated the registration provisions, the defendant then has the burden of proof in showing entitlement to an exemption." *Id.* (quoting *SEC v. Murphy*, 626 F.2d 633, 641 (9th Cir. 1980)).

Although it is undisputed that the EquiAlt Funds were not registered with the SEC during the relevant period, (*see, e.g.*, Jt. Stmt. ¶¶ 16, 45), Defendants contend that the EquiAlt Funds were exempt from registration under Rule 506(b) of Regulation D, 17 C.F.R. § 230.506(b), (*see* Defs.' Mem. at 7–8; Defs.' Opp'n at 5–9), and that "[t]he

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[4] Specifically, in relevant part, Section 5 provides:

> (a) Sale . . . of Unregistered Securities
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> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
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> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise[.]
>
> . . .
>
> (c) Necessity of Filing Registration Statement
>
> It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security . . . .

15 U.S.C. §§ 77e(a)(1), (c).

litigation algorithm of a Section 5 claim [*i.e.*,] the set of judicial rules created to prosecute or defend a Section 5 Claim," (*see* Defs.' Mem. at 12–13), violates the Due Process Clause, (*see id.* at 12–20), and Equal Protection.[5] (*See id.* at 20.)

A. Regulation D

Defendants contend that the EquiAlt Funds were exempt from registration under Rule 506(b) of Regulation D. (*See* Defs.' Mem. at 7–8; Defs.' Opp'n at 5–9.) "Section 4(2) of the Securities Act, 15 U.S.C. § 77d(2), exempts from registration 'transactions by an issuer not involving any public offering.'" *Platforms Wireless*, 617 F.3d at 1090. "SEC-promulgated Regulation D creates a safe harbor within this exemption by defining certain transactions as non-public offerings." *Id.* at 1091 (citing *McGonigle v. Combs*, 968 F.2d 810, 825 n.19 (9th Cir. 1992); Revision of Certain Exemptions, Securities Act Release No. 6389, 24 S.E.C. Docket 1166 (March 8, 1982)). "Under Rule 506(b), securities are exempt from registration if they are private offerings." *SEC v. Schooler*, 905 F.3d 1107, 1114 n.3

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[5] Defendants also originally contended that they were not "sellers" under the Securities Act, (*see* Defs.' Mem. at 11–12 & n.16; ECF No. 34 ("Defs.' Opp'n") at 3–5), but defense counsel conceded at oral argument that Defendants were sellers within the ambit of Section 5. In any event, Plaintiff has established as a matter of law that Defendants were "sellers" of securities within the meaning of the Securities Act. This is because "liability under Section 5 is not limited to the person or entity who ultimately passes title to the security." *See CMKM Diamonds*, 729 F.3d at 1255 (citing *Murphy*, 626 F.2d at 649). "Instead, courts have established the concept of 'participant' liability to bring within the confines of § 5 persons other than sellers who are responsible for the distribution of unregistered securities." *Id.* (quoting *Murphy*, 626 F.2d at 649). "With respect to Section 5, a defendant's 'role in the transaction must be a significant one before liability will attach.'" *Id.* (quoting *Murphy*, 626 F.2d at 648). "Defendants play a significant role when they are both a necessary participant and substantial factor in the sales transaction." *Id.* (internal quotation marks omitted) (quoting *Phan,* 500 F.3d at 906). As the Supreme Court has long recognized, "[t]he solicitation of a buyer is perhaps the most critical stage of the selling transaction." *See Pinter*, 486 U.S. at 646. Here, it is undisputed that Defendants "[c]ommunicate[d] with, solicit[ed], and encourage[d] potential investors to prepare, sign, and submit offers to purchase a Funds' debenture or security." (*See* Jt. Stmt. ¶ 27(A).) Had Defendants not conceded the issue, summary judgment in favor of Plaintiff would nonetheless be proper. *See, e.g.*, *Schaffer Fam. Invs. LLC v. Sonnier*, No. 2:13-CV-05814-SVWJEM, 2016 WL 6917269, at *9 (C.D. Cal. July 5, 2016) (granting summary judgment in favor of the plaintiffs on Section 5 claim where the defendant induced them to make purchases of securities from a third party); *SEC v. Thomas*, No. 2:19-CV-01515-APGVCF, 2021 WL 5826279, at *6 (D. Nev. Aug. 24, 2021), *appeal dismissed sub nom. SEC v. Ostertag*, No. 21-17014, 2022 WL 1792574 (9th Cir. Mar. 21, 2022) (granting summary judgment in favor of SEC where the defendants "carried out various sales activities on behalf of the entities they signed on with," including "communicat[ing] marketing materials to investors" in exchange for commissions).

(9th Cir. 2018) (citing 15 U.S.C. § 77d(2)). "A security qualifies as a private offering if there are fewer than 35 non-accredited investors of securities in the offering, and each non-accredited investor has 'such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment.'"[6] *Id.* (quoting 17 C.F.R. § 230.506(b)(2)). "If the issuer sells securities under § 230.506(b) to any purchaser that is not an accredited investor, the issuer shall furnish . . . [f]inancial statement information."[7] *See* 17 C.F.R. §§ 230.502(b)(1), (2)(i)(B).

Here, EquiAlt sold Fund I securities to 31 non-accredited investors, (*see* Jt. Stmt. ¶ 19), and Fund II securities to ten. (*See id.* ¶ 20.) Indeed, Defendants personally sold securities to non-accredited investors.[8] (*See, e.g.*, ECF No. 24-9 ("Kadell Decl.") ¶¶ 3–4; ECF No. 24-10 ("Tarillion Decl.") ¶¶ 4–5; ECF No. 24-11 ("Murphy Decl.") ¶¶ 4–8.) Although these non-accredited investors were required to receive financial statement information, *see* 17 C.F.R. §§ 230.502(b)(1), (2)(i)(B), EquiAlt's PPMs did not include

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[6] For purposes of Regulation D, "[a]ccredited investor shall mean . . . [a]ny natural person whose individual net worth, or joint net worth with that person's spouse or spousal equivalent, exceeds $1,000,000," excluding that person's primary residence, or "who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse or spousal equivalent in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year." 17 C.F.R. §§ 230.501(a)(5), (6).

[7] Defendants contend that Rule 506 requires only the issuer—here, EquiAlt—to establish that it qualifies for exemption from the registration requirement. Not only do Defendants fail to cite any authority supporting their position, but the SEC has made clear that non-issuers "who claim[] an exemption from registration, similar to that of the issuer, ha[ve] the burden of proving the exemption applies." *See In re Glaza*, SEC Release No. 293 (July 21, 2005) (citing *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953)).

[8] Defendants contended at oral argument that there exist disputed factual issues, such as whether unaccredited investors falsely represented to Defendants that they were accredited. Not only have Defendants made judicial admissions to the contrary, (*see* ECF No. 24-13 ("Ex. 11") (Defendants Joseph Financial, Inc., Joseph Financial Investment Advisors, LLC, and Robert Joseph Armijo's Answer to the Complaint and Demand for Jury Trial ¶ 28, *O'Neal v. Joseph Financial, Inc.*, No. 8:22-cv-939-MSS-JSS (M.D. Fla. filed July 6, 2022), ECF No. 31 ("Defendant Armijo admits that he knew that some investors with whom he was involved in the sale of EquiAlt securities were unaccredited.")), but it is unclear to the Court how such facts are material. *See, e.g.*, *SEC v. Loomis*, 969 F. Supp. 2d 1226, 1240 (E.D. Cal. 2013) (granting summary judgment in favor of the SEC where the defendant "provided no probative evidence to support the contention that he reasonably believed that . . . investors were accredited, an essential element for establishing the applicability of Rule 506").

financial statements, (*see* Jt. Stmt. ¶ 13), and Defendants never provided audited balance sheets of financial statements to investors in the EquiAlt Funds. (*See id.* ¶ 32.) In short, Defendants produce no evidence that non-accredited investors were ever provided with audited or certified financial statements as required under Regulation D.

Defendants also argue that their noncompliance with Rule 506(b) is "insignificant" under Rule 508(a),[9] (*see* Defs.' Opp'n at 5–9; ECF No. 40 ("Defs.' Reply") at 6–10), which provides, in relevant part:

> A failure to comply with a term, condition or requirement of . . . [Rule 506] will not result in the loss of the exemption . . . , if the person relying on the exemption shows:
>
> (1) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity; and
>
> (2) The failure to comply was insignificant with respect to the offering as a whole, provided that any failure to comply with paragraph (c) of § 230.502, paragraph (b)(2) of § 230.504 and paragraph (b)(2)(i) of § 230.506 shall be deemed to be significant to the offering as a whole; and
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> (3) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of . . . [Rule 506].

17 C.F.R. § 230.508(a). Rule 508(a), however, is facially unavailable to Defendants here. Not only is Rule 508(a) not available where, as here, it is the SEC who is bringing this action under Section 20 of the Securities Act, *see* 17 C.F.R. § 230.508(b) ("Where an

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[9] To the extent Defendants contend that Plaintiff's evidence is inadequate, (*see* Defs.' Mem. at 8 ("The claim that unaccredited investors of the Fund Offerings received no financial statements . . . fails to identify the specific investors, number of total unaccredited investors, Fund security(ies) purchased, timing of the purchase(s), or offering agent(s) who were involved.")), it is *Defendants* who bear "the burden of proof in showing entitlement to an exemption." *See SEC v. Murphy*, 626 F.2d 633, 641 (9th Cir. 1980) ("*Murphy I*") (collecting cases); *see also, e.g.*, *SEC v. Schooler*, No. 3:12-CV-2164-GPC-JMA, 2015 WL 2344866, at *1 (S.D. Cal. May 14, 2015) (*sua sponte* amending prior summary judgment order on the grounds that the SEC was not required to negate the defendants' affirmative defense to a registration violation (citing *Celotex*, 477 U.S. at 323)), *aff'd in relevant part by Schooler*, 905 F.3d 1007.

exemption is established only through reliance upon paragraph (a) of this section, the failure to comply shall nonetheless be actionable by the Commission under section 20 of the Act."); (*see also* Compl. ¶ 6), but Rule 508(a)(2) does not encompass the failure to provide the requisite disclosures to non-accredited investors pursuant to Rule 502(b). Instead, Rule 508(a)(2) is expressly limited to failures to comply with "paragraph (c) of § 230.502, paragraph (b)(2) of § 230.504 and paragraph (b)(2)(i) of § 230.506."[10] *See* 17 C.F.R. § 230.508(a)(2). Accordingly, the Court concludes that Defendants have failed to carry their burden of establishing that there exist genuine issues of material fact regarding their claimed exemption from registration under Regulation D.

C. Constitutional Challenges

Finally, Defendants contend that the "litigation algorithm" of a Section 5 claim—which "includes a set of inflexible rules, including: (1) the SEC's *prima facie* rule; (2) the automatic-violation rule; (3) the burden-shifting rule; (4) the narrow-construction-of-exemption rule; and (5) the all-or-nothing exemption-qualification rule," (*see* Defs.' Mem. at 13), violates the Due Process Clause, (*see id.* at 12–20), and Equal Protection. (*See id.* at 20.)

1. Due Process Clause

According to Defendants, "[t]he Due Process Clause's fair notice requirement generally requires only that the government make the requirements of the law public 'and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.'" (*See* Defs.' Mem. at 12 (quoting *Fed. Express Corp. v. Dep't of Commerce*, 39 F.4th 756, 773 (D.C. Cir. 2022))). "The terms of a law may be sufficiently familiar, but notice is irrelevant if one's 'compliance' is simply a function, not of one's otherwise lawful

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[10] Only paragraph (c) of § 230.502, which addresses the "offer or s[ale of] the securities by any form of general solicitation or general advertising," *see* 17 C.F.R. § 230.502(c), and paragraph (b)(2)(i) of § 230.506, which provides the 35-unaccredited-purchaser-per-90-calendar-days limit, *see* 17 C.F.R. § 230.506(b)(2)(i), are relevant to Defendants' Rule 506 defense. Paragraph (b)(2) of § 230.504 is relevant to sales of securities whose aggregate offering price does not exceed $10,000,000, *see* 17 C.F.R. § 230.504(b)(2), which Defendants do not invoke here.

conduct, but of a separate party's independent action that renders otherwise lawful conduct unlawful, particularly when those actions are completely outside of the defendant's knowledge and control, as in this case." (*Id.*)

"The degree of vagueness the Due Process Clause will tolerate 'depends in part on the nature of the enactment.'" *Kashem v. Barr*, 941 F.3d 358, 370 (9th Cir. 2019) (quoting *Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982)). "Relevant factors include whether the challenged provision involves only economic regulation, imposes civil rather than criminal penalties, contains a scienter requirement and threatens constitutionally protected rights." *Id.* (citing *Hoffman Ests.*, 455 U.S. at 498–99; *Hanlester Network v. Shalala*, 51 F.3d 1390, 1398 (9th Cir. 1995)). "Where economic regulation is involved, vagueness is less of a concern because 'the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.'" *Cal. Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 571 (9th Cir. 2018) (quoting *United States v. Doremus*, 888 F.2d 630, 634–35 (9th Cir. 1989) (quoting *Hoffman Ests.*, 455 U.S. at 498)). "The [Supreme] Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Hoffman Ests.*, 455 U.S. at 498–99.

"Whether a provision is vague for lack of fair notice is an objective inquiry." *Kashem*, 941 F.3d at 371 (citing *United States v. Williams*, 553 U.S. 285, 304–05 (2008); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). In evaluating vagueness, the court "ask[s] whether the law gives 'a person of ordinary intelligence fair notice of what is prohibited[.]'" *See id.* (quoting *Williams*, 553 U.S. at 304). In an as-applied challenge, such as here, (*see, e.g.*, Defs.' Mem. at 19–20), "the question for the court to determine . . . is whether defendant had notice that his or her particular conduct could be a violation of the statute." *Oracle USA, Inc. v. Rimini St., Inc.*, 191 F. Supp. 3d 1134, 1148 (D. Nev. 2016) (citing *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012)).

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As Plaintiff notes, (*see* Pl.'s Opp'n at 9), the undisputed facts reveal that Defendants had such notice here. Indeed, Defendants explicitly discussed with Rybicki and Wassgren the registration requirements and Regulation D. (*See, e.g.*, ECF No. 26-2 ("Armijo Decl.") ¶ 19 ("It was my understanding that Wassgren . . . prepared and filed all paperwork necessary for Regulation D exemption[.]"); *id.* ¶ 23 ("I was . . . vigilant in my compliance with the Regulation D requirement that there be no more than 35 unaccredited investors."); *id.* ¶ 24 (2018 call with Rybicki regarding unaccredited investor limit).) Rather than obtain independent counsel, (*see* Jt. Stmt. ¶ 26; Armijo Decl. ¶ 12), or seek guidance from the SEC, *see, e.g.*, 17 C.F.R. § 200.81, Defendants accepted—and profited from—Rybicki's and Wassgren's self-serving representations of compliance. As Plaintiff notes, (*see* Pl.'s Opp'n at 9 (citing *Murphy I*, 626 F.2d at 649)), "[b]oth the language of Section 5, and its application to non-issuers who are necessary participants in the sale of securities, are clear and unambiguous, and have been well-established securities law for more than 30 years." Accordingly, the Court concludes that Section 5, as applied to Defendants, does not violate the Due Process Clause.

2. Equal Protection

Defendants contend that the Section 5 claim litigation algorithm also violates Equal Protection because, "[i]f the SEC is granted the relief it seeks, it will receive the same relief as it would if it had been required to prove a scienter-based antifraud violation." (*See* Defs.' Mem. at 20.) According to Defendants, "[i]mposing the same consequences for two claims, one in which Defendants are absolutely liable and another for which the SEC would have the difficult evidentiary burden of proving scienter, lacks any rational basis and violates equal protection." (*See id.*)

The Court assumes that Defendants are invoking the Fifth Amendment. (*See* Defs.' Mem. at 20; *see also* Pl.'s Opp'n at 10 (noting that Defendants' invocation of equal protection is "(presumably of the U.S. Constitution)".) "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 (1975)

(alteration in original) (quoting *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); citing *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)). Accordingly, the Supreme "Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *See id.* (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973)). "Generally, legislation is presumed to pass constitutional muster and will be sustained if the classification drawn by the statute or ordinance is rationally related to a legitimate state interest." *Nunez ex rel. Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–40 (1985)). "If the classification disadvantages a 'suspect class' or impinges a 'fundamental right,' the ordinance is subject to strict scrutiny." *Id.* (citing *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982)).

Here, Defendants do not object to being treated differently than a similarly situated class, but rather appear to object to being treated similarly to what they see as a differently situated class—those who commit fraudulent securities violations. This is the inverse of an Equal Protection claim. In any event, as Plaintiff notes, (*see* Pl.'s Opp'n at 11), Defendants would not be subject to the "same consequences" for their strict-liability offenses as those who commit scienter-based violations. *See* 15 U.S.C. §§ 77t(d)(2), 78u(d)(3)(B) (outlining "tiers" of increasing penalties based on whether the offense "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons"). Finally, even if Defendants were being treated differently than those who truly are similarly situated, Defendants have failed "to negative every conceivable basis which might support it." *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). The Court therefore concludes that Defendants have failed to establish that the litigation algorithm for Section 5 claims violates Equal Protection.

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D. Conclusion

For the above reasons, the Court **GRANTS** Plaintiff's Motion and **DENIES** Defendants' Motion as to Plaintiff's first cause of action for the sale of unregistered securities in violation of Sections 5(a) and 5(c) of the Securities Act.

II. Section 15(a)(1) of the Exchange Act

Plaintiff also alleges that Defendants violated Section 15(a)(1) of the Exchange Act because they induced securities transactions without being registered as brokers with the SEC.[11] (*See* Compl. ¶¶ 29–30.) Although it is undisputed that Defendants were not registered as brokers during the relevant time, (*see* Jt. Stmt. ¶ 1), Defendants contend that they are not "engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(4)(A); (*see also* Defs.' Mem. at 20–22; Defs.' Opp'n at 9–12). Specifically, while Defendants do not contest that they are "engaged in the business," Defendants contend that they did not "effect[] transactions in securities" because they were merely "go-betweens," (*see* Defs.' Opp'n at 10–11), and that they did not do so "for the account of others" because they "had no access to or control over any purchaser or issuer accounts." (*See id.* at 11–12.) Defendants also challenge the applicability of the Exchange Act to their conduct because, "[g]enerally, the Securities Act concerns primary markets and the Exchange Act secondary markets," and "[t]his action is about the EquiAlt Funds' offerings in a primary market." (*See* Defs.' Mem. at 21.)

Courts have addressed—and foreclosed—the very arguments that Defendants raise here. First, regarding Defendants' argument that the Exchange Act—and, consequently, the broker registration requirement—applies only to transactions on the "secondary

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[11] In relevant part, Section 15(a)(1) provides:

> It shall be unlawful for any broker or dealer . . . to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security . . . unless such broker or dealer is registered in accordance with subsection (b) of this section.

15 U.S.C. § 78o(a)(1)

markets," (*see id.* at 21), the Ninth Circuit rejected that argument in *Feng*. *See* 935 F.3d at 733. In *Feng*, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the SEC on its Section 15(a)(1) claim against an immigration attorney who solicited investments in certain pooled investments, known as "regional centers," regulated by the U.S. Citizenship and Immigration Services under the U.S. Immigrant Investor Program, or "EB-5 program," which provides legal permanent residency to foreign nationals who invest in U.S.-based projects. *See id.* at 725–28. In short, the immigration attorney argued that he was only "involve[d in] negotiations between issuers and investors," *see id.* at 732, while the broker registration "requirement should apply only to individuals who trade securities on an exchange and not to those involved in transactions between private parties." *See id.* at 733. Relying on *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976),[12] the Ninth Circuit concluded that the Exchange Act was intended to protect private party investors who purchased securities from private party issuers through an intermediary such as the attorney defendant. *See Feng*, 935 F.3d at 733.

Second, as for Defendants' argument that they had no control over others' accounts, (*see* Defs.' Opp'n at 11–12), the Ninth Circuit has noted that "the caselaw . . . does not impose such a requirement as a prerequisite for finding that someone is a broker." *See Feng*, 935 F.3d at 732 n.7 (citing *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1339–40 (M.D. Fla. 2011); *SEC v. M & A W., Inc.*, No. C-01-3376 VRW, 2005 WL 1514101, at *9 (N.D. Cal. June 20, 2005)). Indeed, as the Ninth Circuit recently explained in *SEC v. Murphy*, 50 F.4th 832 (9th Cir. 2022) ("*Murphy II*"), "account" in this context has to do with risk; in other words, "if someone acts 'on the account of *others*,' another person assumes the risk for the actions." *See id.* at 843 (emphasis in original). Such is the case here, where it

[12] Specifically, the Ninth Circuit reasoned that "[i]t is well established . . . that '[t]he 1934 [Exchange] Act was intended principally to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges *and in over-the-counter markets*.'" *See Feng*, 935 F.3d at 733 (third and fourth alterations and emphasis in original) (quoting *Ernst & Ernst*, 425 U.S. at 195). Defendants argued for the first time at oral argument that they were not participants in over-the-counter markets. *Feng*, however, appears to be dispositive of the issue.

was the investors Defendants solicited, rather than Defendants themselves, who bore the risk of their investments in the EquiAlt Funds.

Finally, Defendants contend that they were mere "go-betweens" in transactions between the issuer and purchasers. (*See* Defs.' Opp'n at 10–11.) But that is precisely the role that brokers play: "They serve[] as salespeople and go-betweens for the buyers and sellers of securities." *See SEC v. Forester*, No. CV-209813-DMGAFMX, 2022 WL 1600046, at *2 (C.D. Cal. Feb. 23, 2022) (entering default judgment against defendants whose "served as . . . go-betweens[,] . . . earned commissions[,] . . . were not employees of the securities issuer, . . . [and] negotiated with buyers on behalf of sellers"); *see also Feng*, 935 F.3d at 733; *Broker*, Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/broker (defining broker as "one who acts as an intermediary" and, in the legal context, as "an agent who negotiates contracts of sale (as of real estate or securities) . . . between the parties for a fee or commission"). Accordingly, none of Defendants' arguments foreclose concluding that they were brokers as defined by the Securities Act.

"[I]n evaluating whether someone is a 'broker,' the SEC and courts . . . have generally employed a 'totality-of-the-circumstances approach,' relying on the non-exclusive *Hansen* factors" articulated in *SEC v. Hansen*, No. 83 CIV. 3692, 1984 WL 2413 (S.D.N.Y. Apr. 6, 1984)." *See Murphy II*, 50 F.4th at 843 (citing *Feng*, 935 F.3d at 731–32). Under the non-exclusive *Hansen* factors, the court examines whether the defendant:

> (1) is an employee of the issuer of the security; (2) received transaction-based income such as commissions rather than a salary; (3) sells or sold securities from other issuers; (4) was involved in negotiations between issuers and investors; (5) advertised for clients; (6) gave advice or made valuations regarding the investment; (7) was an active finder of investors; and (8) regularly participates in securities transactions.

See id. at 840–41 (quoting *Feng*, 935 F.3d at 732); *see also id.* at 843. Application of the *Hansen* factors is not required to establish liability, *see Murphy II*, 50 F.4th at 842–46 (holding that defendant was a broker based on "the statutory text" without "rely[ing] on the *Hansen* factors"), although "the presence of even a few is enough" to do so. *See SEC*

v. River N. Equity LLC, 415 F. Supp. 3d 853, 860 (N.D. Ill. 2019) (citing *SEC v. Benger*, 697 F. Supp. 2d 932, 945 (N.D. Ill. 2010)). "The most important factor in determining whether an individual or entity is a broker is the regularity of participation in securities transactions at key points in the chain of distribution." *SEC v. RMR Asset Mgmt. Co.*, No. 18-CV-1895-AJB-LL, 2020 WL 4747750 (S.D. Cal. Aug. 17, 2020) (internal quotation marks omitted) (quoting *SEC v. Holcom*, No. 12-cv-1623, 2015 WL 11233426, at *4 (S.D. Cal. Jan. 8, 2012)), *aff'd sub nom. Murphy II*, 50 F.4th 832 (9th Cir. 2022).

Defendants failed to address the *Hansen* factors in their briefing, (*see generally* Defs.' Mem.; Defs.' Opp'n; Defs.' Reply), but they conceded at oral argument that at least four of the factors favor concluding that they acted as brokers. As Plaintiff notes, (*see* Pl.'s Mem. at 12–13; Pl.'s Opp'n at 12–13; Pl.'s Reply at 9–10), and Defendants conceded, Defendants received transaction-based commissions, negotiated higher interest rates on behalf of individual clients, gave advice regarding the merits of investment in the EquiAlt Funds, and were active finders of investors for EquiAlt. Arguably, the eighth factor—regular participation in securities transactions—also weighs in favor of finding that Defendants were brokers, as Defendants solicited more than fifty clients to invest more than $10 million in the EquiAlt funds over a four-year period. (*See* Jt. Stmt. ¶¶ 33–34.) Although Defendants did not sell securities from other issuers, (*see* ECF No. 24-8 ("Ex. 6") at 34:4–20), or advertise for clients, (*see id.* at 50:25–51:18), based on the totality of the circumstances, no reasonable jury could conclude that Defendants were not acting as brokers with regard to the sale of the EquiAlt Funds. Accordingly, the Court **GRANTS** Plaintiff's Motion and **DENIES** Defendants' Motion as to Plaintiff's second cause of action for failure to register as brokers under Section 15(a)(1) of the Exchange Act.

III. Remedies

In the alternative, "[i]f one or both of Plaintiff's claims survive, Defendants submit that the relief the SEC seeks for such claims should be denied as a matter of law." (*See* Defs.' Mem. at 22.) Plaintiff responds that "no request for a specific disgorgement or civil penalty is currently before this Court," meaning "there is no reason for the Court to consider

at this stage the academic issue of what remedies are appropriate or which violations may be penalized." (*See* Pl.'s Opp'n at 13.) The Court agrees with Plaintiff and therefore **DENIES WITHOUT PREJUDICE** Defendants' Motion to the extent it seeks summary adjudication of the availability of disgorgement, civil penalties, and injunctive relief. *See, e.g.*, *SEC v. Keener*, 580 F. Supp. 3d 1272, 1292 (S.D. Fla. 2022) ("Defendant's remaining challenges regarding Plaintiff's ability to obtain disgorgement or injunctive relief are denied as premature and shall be addressed at the remedies phase of the proceedings.").

IV. First-to-File Rule

Finally, Defendants contend that this case should be stayed or dismissed under the first-to-file rule pending adjudication of the 2021 Receiver Action. (*See* Defs.' Mem. at 27–28.) As Defendants note, (*see id.* at 28), "[t]he first-to-file rule is a generally recognized doctrine of federal comity that permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district." *Walker v. Progressive Cas. Ins. Co.*, No. C03-656R, 2003 WL 21056704, at *2 (W.D. Wash. May 9, 2003) (citing *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94–95 (9th Cir. 1982)). "Exact parallelism between the two actions need not exist; it is enough if the parties and issues in the two actions are 'substantially similar.'" *Id.* (citing *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989)).

Plaintiff counters that "the first-to-file rule does not apply here" because "the two actions do not involve substantially [similar] parties or substantially similar claims." (*See* Pl.'s Opp'n at 14.) Although Defendants are parties to both this action and the 2021 Receiver Action, (*compare* Compl., *with* Wright Decl. Ex. I), the actions are brought by different plaintiffs. As Plaintiff notes, "[t]he SEC's action against Defendants arises out of the SEC's unique role as a securities regulator charged with enforcing the federal securities laws." (*See* Pl.'s Opp'n at 14; *see also generally* Compl.) "In contrast, the Receiver's action is brought on behalf the private Receivership entities, (the EquiAlt Funds and the EquiAlt REIT), as part of his Court appointed powers to institute legal proceedings for the benefit of the Receivership." (*See* Pl.'s Opp'n at 14–15; *see also generally* Wright

Decl. Ex. I.) The Court simply cannot conclude that the receiver stands in a substantially similar role to the SEC given the SEC sued the Receivership entities in the 2020 Fraud Action. (*See* Pl.'s Opp'n at 15.)

Further, the issues presented in this case and the 2021 Receiver Action are not substantially similar. The issues presented here pertain to whether Defendants violated the federal securities laws, (*see* Pl.'s Opp'n at 15; *see also generally* Compl.), whereas the 2021 Receiver Action asks whether the transfers of commissions to Defendants were unjust enrichment or were fraudulent such that they can be recovered by the receiver pursuant to Florida Statute section 726. (*See* Pl.'s Opp'n at 15; *see also generally* Wright Decl. Ex. I.) "Because these issues are distinct, the requirement of identity of the issues is not met, and the first-to-file rule is inapplicable." *See Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 769 (9th Cir. 1997).

Accordingly, the Court concludes that the first-to-file rule does not apply here and therefore **DENIES** Defendants' Motion to the extent it seeks stay or dismissal on that basis. In any event, as Plaintiff notes, (*see* Pl.'s Opp'n at 16), "whichever case proceeds to judgment first, that judgment would be applied as a setoff to the recovery in the second suit to judgment," negating Defendants' stated concern of "double recovery." (*See* Defs.' Mem. at 28.)

CONCLUSION

In light of the foregoing, the Court **GRANTS** Plaintiff's Motion for Summary Judgment (ECF No. 24) and **DENIES** Defendants' Motion for Summary Judgment (ECF No. 26). Specifically, the Court **GRANTS** summary judgment in favor of Plaintiff and against Defendants on both Plaintiff's causes of action, **DENIES WITHOUT PREJUDICE** Defendants' Motion to the extent it contends that Plaintiff is not entitled to

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certain remedies as a matter of law, and **DENIES** Defendants' Motion to the extent it seeks a stay or dismissal of this action under the first-to-file rule.

IT IS SO ORDERED.

Dated: March 8, 2023

Honorable Todd W. Robinson
United States District Judge