UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

Case No. 8:20-cv-00325-MSS-MRM

v.

BRIAN DAVISON, et al.,

Defendants.
_____/

Non-Party Robert Joseph Armijo's Objection to Proposed Bar Order

Adriaen M. Morse Jr. (DC Bar # 483347)
Pro Hac Vice
SECIL Law PLLC
1701 Pennsylvania Ave., N.W., Suite 200
Washington, D.C. 20006
T: (202) 417-8232
M: (571) 314-5469
E: amorse@secillaw.com
Counsel for Robert Joseph Armijo

I. INTRODUCTION

Robert Armijo ("Armijo") respectfully submits this opposition and objection to the bar order proposed in the Joint Motion for Final Approval of Proposed Settlements (the "Joint Motion") filed by Burton Wiand (the "Receiver") and the Investor Plaintiffs (collectively, "Movants"). (Doc. No. 760.)[1] In particular, Armijo opposes the entry of an order that would permanently bar ("Bar Order") Armijo from prosecuting his pending California state-law claims against DLA Piper LLP (US) ("DLA"), Fox Rothschild LLP ("Fox Rothschild"), and Paul Wassgren ("Wassgren") (collectively, the "Lawyer Defendants").

Movants state that they have reached a proposed settlement of their claims against the Lawyer Defendants, pursuant to which the Lawyer Defendants would pay $44 million, ultimately to be distributed among the Investor Plaintiffs, but only if this court bars all other claims against the Lawyer Defendants, including Armijo's. There is no justification, in law or equity, for this Court to bar Armijo's claims against the Lawyer Defendants. Armijo's claims arise out of the negligent legal advice, false assurances, and misrepresentations the Lawyer Defendants made to Armijo to induce him to solicit investors for EquiAlt, causing him to suffer *millions* in damages, including lost business and investment opportunities; legal fees incurred in defending against actions brought by the Securities and Exchange

[1] Unless otherwise indicated, all docket number references are to this action (*SEC v. Davison*). This objection is filed pursuant to the Court's Order at Doc. No. 788.

Commission ("SEC"), investors, and the Receiver; irreparable harm to his reputation; and severe emotional distress. (**Exhibit A**, Declaration of Robert Armijo ("Armijo Decl."), ¶¶ 10-19.)

The requested Bar Order must be denied for the following reasons:

First, courts overseeing equity receiverships do not have equitable power to bar a third-party's claims against a non-receivership entity, because such relief "amounts to a remedy 'previously unknown to equity jurisprudence.'" *Digital Media Solutions, LLC v. South University of Ohio, LLC*, 59 F.4th 772, 774 (6th Cir. 2023) ("*Digital Media*") (quoting *Grupo Mexicano de Desarrolo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 332 (1999)).

Second, the Court cannot bar a non-settling party's *independent* claims against a settling defendant – i.e., claims for which the damages are not based on the non-settling party's liability to the plaintiff. *See AAL High Yield Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1311 (11th Cir. 2004); *TBG, Inc. v. Bendis*, 36 F.3d 916, 928 (10th Cir. 1994) ("No court has authorized barring claims with independent damages"). Armijo asserts *independent* claims against the Lawyer Defendants, because the damages Armijo seeks from the Lawyer Defendants are not based on Armijo's liability to Movants.

Third, entry of the Bar Order here would not be fair or equitable for the additional reasons that: 1) Armijo's claims against the Lawyer Defendants do not concern property of the receivership estate and are not derivative or duplicative

of Movants' claims against the Lawyer Defendants; 2) Movants have not provided any evidence as to the Lawyer Defendants' available assets, have not shown (or argued) that the proposed $44 million settlement would exhaust their available assets, and have not shown that the proposed $44 million settlement amount is proportionate to their liability; 3) Armijo will not receive *anything* from the Lawyer Defendants' proposed settlement with Movants; and 4) Armijo is likely to prevail on his claims against the Lawyer Defendants.

Finally, the cases Movants cite do not support entry of the Bar Order here. Accordingly, Armijo asks this Court to deny Movants' request for the Bar Order so that he may have his day in court.

II. BACKGROUND

A. *SEC v. Davison*

On February 11, 2020, the SEC filed this Action against EquiAlt, LLC ("EquiAlt"), its principals, Brian Davison and Barry Rybicki, and numerous related entities. (Doc. No. 1.) The SEC alleges that EquiAlt, Davison and Rybicki "conducted a scheme to defraud, raising more than $170 million . . . through fraudulent unregistered securities offerings." (Doc. No. 138, ¶ 1.) On February 14, 2020, on the SEC's motion, this Court appointed Burton Wiand as Receiver of EquiAlt, the EquiAlt Funds, and the Relief Defendants. (Doc. No. 11.) According to the Receiver's Twelfth Quarterly Status Report, the case balance on hand as of January 30, 2023, was $82,167,434.64. (Doc. No. 793 at 7.)

B. *Gleinn v. Wassgren* and *Wiand v. Wassgren*

On July 21, 2020, the Investor Plaintiffs filed a class action complaint against the Lawyer Defendants, M.D. Fla. Case No. 8:20-cv-01677 ("*Gleinn v. Wassgren*"). (Joint Motion, Ex. F, Doc. No. 760-6.) They assert that the Lawyer Defendants knowingly aided and abetted EquiAlt's scheme to defraud them. (*Id*. ¶ 2.)

On December 30, 2020, the Receiver filed a complaint against the Lawyer Defendants in Los Angeles County Superior Court, Case No. 20STCV49670 ("*Wiand v. Wassgren*"). (Doc. No. 760-7 at 131.)[2] The Receiver alleges that the Lawyer Defendants were "grossly negligent" or "knowingly aided, abetted and conspired with EquiAlt" in creating and perpetrating the "fraudulent and illegal investment scheme." (*Id*. at 133.)

C. *Armijo v. Wassgren*

On October 6, 2022, Armijo filed his complaint against the Lawyer Defendants in Los Angeles County Superior Court, Case No. 22STCV32793 ("*Armijo v. Wassgren*"). (Joint Motion, Ex. G, Doc. No. 760-7.) He asserts California state-law claims against the Lawyer Defendants for professional negligence, gross negligence, negligent misrepresentation, aiding and abetting fraud, equitable indemnity, tort of another, and unfair competition. (*Id*.) Armijo's claims against the Lawyer Defendants are based on misrepresentations and negligent legal

[2] Unless otherwise indicated, citations are to the blue ECF page numbers at the top of the page.

advice that the Lawyer Defendants made *to Armijo* to induce him to participate in the sales of the "EquiAlt Securities" by assuring him that EquiAlt's business and his participation therein were lawful. (Armijo Decl., ¶¶ 4-6.) The damages the Lawyer Defendants owe Armijo are not, and could not be, property of the Receivership Estate.

The Lawyer Defendants wrongfully removed *Armijo v. Wassgren* to the Central District of California, then filed motions to dismiss and to transfer venue to the Middle District of Florida. Armijo moved to remand. (*See* Armijo's Memorandum in Support of Remand, attached hereto as **Exhibit B**.) Those motions are stayed pending this court's disposition of the Joint Motion.

E. The Requested Bar Order

Movants ask the Court to bar Armijo from pursuing his claims against the Lawyer Defendants. (Doc. No. 760-4, ¶ 5(c).) They argue that the Bar Order is justified because the Lawyer Defendants and their insurers (allegedly) will not settle without it. (Doc. No. 760 at 21.) Of course, Movants do not address the blatant unfairness inherent in barring Armijo's fundamental right to prosecute his claims against the Lawyer Defendants without his consent and without adequate (or any) compensation to him.

F. No Evidence Has Been Provided as to the Lawyer Defendants' Available Insurance or Other Assets

Neither the Movants nor the Lawyer Defendants have provided any information as to the Lawyer Defendants' available assets. Although multiple insurers are providing coverage to the Lawyer Defendants for *Armijo v. Wassgren* (*see* **Exhibit C** and **Exhibit D** hereto), no evidence has been provided as to the limits of this available insurance or as to the Lawyer Defendants' financial condition (though, according to the American Lawyer, DLA's total revenue in 2021 was $3,471,437,000,[3] while Fox Rothschild's was $650,000,000[4]). Further, there is no evidence or even discussion as to how the Lawyer Defendants' proposed settlement contribution compares to its potential liability for Movants' claims.

III. ARGUMENT

A. The Requested Bar Order Is Impermissible Because Such a Remedy Was "Previously Unknown to Equity Jurisprudence"

A court overseeing an equity receivership does not have the authority to enjoin a non-settling third-party (e.g., Armijo) from pursuing claims against non-receivership parties (e.g., the Lawyer Defendants), because such a remedy was "previously unknown to equity jurisprudence." *Digital Media*, 59 F.4th at 774 (quoting *Grupo Mexicano*, 527 U.S. at 332).

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[3] *See* https://www.law.com/international-edition/law-firm-profile/?id=242&name=DLA-Piper.

[4] *See* https://www.law.com/international-edition/law-firm-profile/?id=109&name=Fox-Rothschild-LLP

In *Digital Media*, creditor Digital Media sought payment on overdue invoices from Dream Center, the owner of financially-distressed universities. *Id*. The court appointed a receiver who subsequently negotiated a settlement with Dream Center's insurer for $8.5 million, *contingent on* the court's entry of an order barring non-settling third parties from prosecuting claims against Dream Center and its parent, officers, directors, and insurer. *Id*. at 775. The district court issued the bar order over the objections of four students, but the Sixth Circuit reversed. *Id*.

The Sixth Circuit framed the issue as follows: "Did the district court have the power to enter the Bar Order that enjoined the Art Students' claims not just against the *receivership entities* (Dream Center and several affiliates…) but also against *third parties outside the receivership* (the Foundation and the directors and officers of Dream Center and the Foundation)?" *Id*. After surveying and analyzing the history of equity receiverships dating back to sixteenth century England, the Sixth Circuit concluded that "**[t]he district court had no such equitable power**." *Id.* (emphasis added). This is because the bar order issued by the district court in *Digital Media* "amounts to a remedy 'previously unknown to equity jurisprudence.'" *Id*. at 774 (quoting *Grupo Mexicano*, 527 U.S. at 332).

Issues of "equitable fairness" were not relevant to the Sixth Circuit's decision in *Digital Media*, because "policy arguments over whether a receivership should possess the 'formidable power' to extinguish a creditor's claims against non-debtors 'should be conducted and resolved where such issues belong in our

democracy: in the Congress.'" *Id*. at 790. "As the law stands today, however, traditional principles of equity still govern. And none of the Receiver's arguments permit that which the law forbids." *Id*. (internal quotes and citations omitted.)

This Court should follow the Sixth Circuit's well-reasoned opinion in *Digital Media* and hold that in the context of equity receiverships, the court lacks authority to bar a third-party's claims against non-receivership entities, because such a bar order would "amount[ ] to a remedy 'previously unknown to equity jurisprudence.'" *Id*. at 774 (quoting *Grupo Mexicano*, 527 U.S. at 332).

B. The Court Cannot Bar Armijo's Claims Against the Lawyer Defendants, Because They Are Independent of the Claims Movants Propose to Settle with the Lawyer Defendants

Armijo's claims against the Lawyer Defendants cannot be barred for the additional reason that they are *independent* claims – that is, the damages Armijo seeks from the Lawyer Defendants are not calculated based on Armijo's actual or potential liability to Movants. *See AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1311-1312 (11th Cir. 2004) ("*AAL*"). The Eleventh Circuit's opinions in *In re U.S. Oil and Gas Litigation*, 967 F.2d 489 (11th Cir. 1992) ("*U.S. Oil & Gas*") and *AAL* clarify this distinction between a non-settling party's claims against a settling defendant that are dependent on the non-settling party's liability to the plaintiff (e.g., claims for contribution), and "independent claims" that are *not* based on the non-settling party's liability to the plaintiff.

In *U.S. Oil & Gas*, the Federal Trade Commission brought an enforcement

action against several companies that sold advisory services to investors in oil and gas leases. 967 F.2d at 491. The court appointed a receiver, who then brought an action against other alleged participants in the scheme, including an insurer (Pinnacle) and an insurance broker (A & A). *Id*. The receiver settled with Pinnacle for $500,000 and with A & A for $8.5 million. *Id*. at 492. But A & A's agreement to pay $8.5 million was contingent upon the court barring Pinnacle's cross-claims against A & A for indemnity, breach of fiduciary duty, fraud, and negligence. *Id*. The district court issued the bar order, and the Eleventh Circuit affirmed. *Id*. The Eleventh Circuit emphasized that Pinnacle's cross-claims against A & A, including those for fraud and negligence, "were not, in fact, independent of Pinnacle's or A & A's liability to the plaintiffs," because Pinnacle only sought damages from A & A "to the extent that [Pinnacle] is liable to any of the plaintiffs herein." *Id*. at 496. Thus, Pinnacle's fraud and negligence claims were "nothing more than claims for contribution or indemnification with a slight change in wording." *Id*.

Unlike Pinnacle's cross-claims in *U.S. Oil & Gas*, Armijo's claims for damages against the Lawyer Defendants do not depend on "the extent that" Armijo is liable to Movants. Rather, Armijo is seeking damages independent of his liability to Movants, including for reputational harm, lost business opportunities, and severe emotional distress, among others. (Armijo Decl., ¶¶ 10-19.)

In *AAL*, the Eleventh Circuit emphasized that *U.S. Oil & Gas* had "expressly declined to address the issue of 'truly independent claims.'" *AAL*, 36 F.3d at 1312.

In *AAL*, the investors in a bankrupt corporation brought a class action against the corporation's officers, underwriter, and auditor. *Id*. at 1307. The officers settled with the investors, and the district court barred the auditor's and underwriter's claims against the officers. *Id*. at 1308. The auditor and underwriter argued on appeal that the court could not "bar[ ] truly independent claims (e.g., claims which are not based on the [underwriter's and auditor's] liability to the instant plaintiffs or claims based on damages completely separate from the instant damages) that [the auditor] and [underwriter] may have against the Officers." *Id*. at 1311. The Eleventh Circuit agreed, vacated the bar order, and remanded. *Id*. at 1312. It explained that the bar order was "exceedingly broad, and the district court made no findings of fact, and expressed no rationale or authority for barring . . . truly independent claims." *Id*.

The same reasoning applies here. Armijo's claims against the Lawyer Defendants are "truly independent," as the damages Armijo seeks from the Lawyer Defendants are not based on his liability to Movants. Further, Movants have not provided any evidence to enable this Court to make findings of fact.

Other circuit courts have also rejected orders barring independent claims. In *Gerber v. MTC Electronic Technologies Co. Ltd.*, 329 F.3d 297 (2d Cir. 2003), non-settling defendants in a securities fraud action challenged a bar order as "too broad in that it extinguished 'independent' claims." *Id*. at 306. The Second Circuit agreed that a bar order could not extinguish independent claims – i.e., claims other than

those "where the harm to the non-settling defendants is based on their liability to the plaintiffs," because if the non-settling defendant "were to prove that it sustained independent reputational damages or losses relating to the cost of defense arising out of a breached contractual or fiduciary relationship with [the settling defendant], it has not been compensated for those losses by the judgment credit, and any such claims should not be extinguished." *Id*.

The Tenth Circuit has similarly explained that "[c]ourts that have allowed bar orders have only barred claims in which the damages are 'measured by' the defendant's liability to the plaintiff." *TBG, Inc.*, 36 F.3d at 928. "**No court has authorized barring claims with independent damages**." *Id*. (emphasis added). And the Ninth Circuit held, in the context of securities fraud class action settlements, that "bar orders may only bar claims for contribution and indemnity and claims where 'the injury is the non-settling defendant's liability to the plaintiff." *In re Heritage Bond Litigation*, 546 F.3d 667, 680 (9th Cir. 2008).

Accordingly, under the Eleventh Circuit's opinion in *AAL*, and consistent with the other circuit opinions cited above, this Court cannot bar Armijo's independent claims against the Lawyer Defendants.

C. The Eleventh Circuit Bankruptcy Cases Cited by Movants do Not Authorize Bar Orders Outside of Bankruptcy

The two Eleventh Circuit bankruptcy cases that Movants cite – *Matter of Munford, Inc.*, 97 F.3d 449 (11th Cir. 1996) ("*Munford*") and *In re Seaside Engineering*

& Surveying, Inc., 780 F.3d 1070 (11th Cir. 2015) ("*Seaside Engineering*") – do not support issuance of the Bar Order here, because those cases relied on a provision of the Bankruptcy Code, 11 U.S.C. § 105(a), for statutory authority to issue a bar order, and there is no equivalent statutory or equitable authority in the context of an equity receivership. *See Seaside Engineering*, 780 F.3d at 1077 ("[I]n *Munford*, we held that § 105(a) provided authority for the bankruptcy court to enter the bar order."). The federal circuits that allow bar orders in bankruptcy cases do so "because Congress's enactment of § 105(a) meant that a bankruptcy court was not confined to traditional equity jurisprudence and could rely on this statutory grant of power to justify the releases." *Digital Media*, 59 F.4th at 788. However, when administering receiverships, courts "are bound by historical practice" and "must limit [them]selves to traditional equity jurisprudence." *Digital Media*, 59 F.4th at 788.[5] And "historical principles of equity" do not authorize the issuance of bar orders. *Id*. at 774. Accordingly, *Munford* and *Seaside Engineering* do not support the issuance of the requested Bar Order here.

[5] This distinction between the authority to issue bar orders in bankruptcy cases versus the lack of authority in equity receivership cases explains why the Sixth Circuit permits bar orders in bankruptcy cases, *see In re Dow Corning Corp.*, 280 F.3d 648, 653 (6th Cir. 2002), but does not permit them in the context of equity receiverships. *Digital Media*, 59 F.4th at 774. Again, this is because "only statutory authority—not any inherent equitable authority—can give bankruptcy courts the power to permit non-debtor releases." *Id*. at 788.

D. Movants' Other Cases Are Inapposite

Movants have not cited a single case in which a court barred a client's claims against his lawyer for legal malpractice or misrepresentations. And none of the opinions Movants cite support entry of the requested Bar Order.

SEC v. DeYoung, 850 F.3d 1172 (10th Cir. 2017) is neither binding nor on point. In *DeYoung*, the SEC sued APS, a third-party administrator of IRA accounts, and APS's president, DeYoung, who allegedly stole $24 million from the IRA Accounts. *DeYoung*, 850 F.3d at 1175. The district court appointed a receiver, who settled with the custodian of the IRA accounts, First Utah. *Id*. Per the settlement, First Utah would contribute $2 million and its insurer, Everest, would contribute $3 million, contingent upon a bar order enjoining the IRA account owners from prosecuting claims against First Utah and Everest. *Id*. at 1177. Three of the 5,500 IRA account owners objected, but the district court granted the bar order, and the Tenth Circuit affirmed. *Id*.

Several key differences distinguish *DeYoung* from this case. First, in *DeYoung*, the court "made extensive findings regarding First Utah's financial status." *DeYoung*, 850 F.3d at 1184. The court found that First Utah had "limited capital," and that "***all of the funds realistically available from First Utah are being paid to the Receiver and devoted to the claims***." *Id*. at 1177 (emphasis added). Here, in contrast, Movants have not proffered *any* evidence as to the Lawyer Defendants' financial condition or available insurance.

Second, in *DeYoung*, the three IRA account owners who opposed the bar order would receive some consideration from the settlement, as "[t]he settlement proceeds were to be distributed to the IRA account owners on a pro rata basis." *Id.* at 1178. Here, in contrast, Armijo will not receive any consideration from the Movants' proposed settlement with the Lawyer Defendants.

Third, in *DeYoung*, the IRA account owners' claims against First Utah "closely parallel[ed]" the receiver's claims against First Utah, as they were "all from the same loss, from the same entities, relating to the same conduct, and arising out of the same transactions and occurrences by the same actors." *Id*. at 1179. But here, Armijo's claims against the Lawyer Defendants are completely distinct from Movants' claims and concern damages suffered by Armijo alone.

Movants also cite *SEC v. Kaleta*, 530 F. App'x 360, 362 (5th Cir. June 19, 2013). But the Fifth Circuit has emphasized that "*Kaleta* is an unpublished, non-precedential decision of this court" and cannot be read too broadly to "invest[ ] the Receiver with unbridled discretion to terminate the third-party claims against a settling party that are unconnected to the *res* establishing jurisdiction." *SEC v. Stanford International Bank, Ltd.*, 926 F.3d 830, 843 (5th Cir. 2019).

In *Gordon v. Dadante*, 336 F. App'x 540, 542 (6th Cir. 2009), which movants cite, the court's authority to issue a bar order was not a basis for the appeal, so the Sixth Circuit did not address the issue. But the Sixth Circuit *did* address the issue in *Digital Media* and concluded that "the district court lacked the authority to issue

the bar order" because "that type of non-debtor relief amounts to a remedy previously unknown to equity jurisprudence." *Digital Media*, 59 F.4th at 774.

SEC v. Wencke, 622 F.2d 1363 (9th Cir. 1980) is inapposite because it concerned the court's authority "to stay or enjoin nonparties from taking action against the entities in receivership," *id*. at 1369, and the Lawyer Defendants are not "entities in receivership."

Finally, *SEC v. Alleca*, 1:12-cv-03261-ELR, 2021 WL 4843987 (N.D. Ga. Sept. 9, 2021), is not good law, as it was recently vacated and remanded by the Eleventh Circuit. *See SEC v. Alleca*, No. 21-13486, 2022 WL 16631325, at *1 (11th Cir. Nov. 2, 2022).

E. The Requested Bar Order is Not "Fair and Equitable"

As stated above, this Court should not even reach the question of whether the requested Bar Order is "fair and equitable," because traditional principles of equity govern and do not permit the court to bar a third-party's claims against a nonreceivership entity. *Digital Media*, 927 F.3d at 842. But if the court does reach the issue, the Bar Order is **not** "fair and equitable," as shown below.

The Eleventh Circuit's analysis in *Munford* shows that the Bar Order Movants request is not "fair and equitable."[6] In *Munford*, a Chapter 11 debtor-in-

[6] As previously noted, *Munford* does not support finding that this court has authority to issue a bar order, because *Munford* was a bankruptcy case and relied on statutory authority, 11 U.S.C. § 105(a), to issue a bar order.

possession, Munford, Inc., brought an adversary proceeding against multiple defendants relating to an unsuccessful leveraged buyout (LBO). 97 F.3d at 452. Among the defendants was VRC, a valuation firm. *Id*. VRC had a $400,000 insurance policy and offered to settle for $350,000, reserving $50,000 for attorneys' fees. *Id*. VRC's settlement offer was contingent on the bankruptcy court's issuance of a bar order enjoining non-settling defendants "from pursuing contribution or indemnification claims against [VRC]." *Id*. Over the non-settling defendants' objections, the bankruptcy court issued the bar order, and the Eleventh Circuit affirmed. *Id*.

The material differences between *Munford* and this case illustrate why the proposed Bar Order is not "fair and equitable." First, in *Munford*, VRC's "only substantial asset" was its $400,000 insurance policy, *id*. at 452, and "the nonsettling defendants [did] not argue that VRC ha[d] the ability to pay more than the $350,000 it offered in settlement." *Id.* at p. 456. In contrast, Movants have not provided *any* evidence as to the Lawyer Defendants' available insurance or other assets. And, Armijo *does* contend that the Lawyer Defendants – including the third and 91st largest law firms in the world – have the ability to pay more than $44 million.[7] Indeed, the Investor Plaintiffs have also emphasized that the "Lawyer

[7] Armijo has not had the opportunity to obtain discovery from the Lawyer Defendants in *Armijo v. Wassgren*, because that action has been stayed pending this court's ruling on the Joint Motion. As discussed below, if the court does not deny the request for a Bar Order based on this opposition alone, then Armijo requests the opportunity to take discovery as to the Lawyer Defendants' assets and available insurance, and as to the Movants' Joint Prosecution Agreement,

Defendants do not have a limited fund from which damages can be recovered" and are "well-established law firms with significant resources." (Doc. No. 145 at 10.)

Second, in *Munford*, the bar order was limited to the non-settling defendants' claims against the settling defendant for "contribution and indemnification." *Id.* Here, as discussed in detail above, the proposed Bar Order would bar Armijo's *independent* claims, including claims for legal malpractice and negligent misrepresentation that have caused Armijo a variety of damages, including lost business, lost business opportunities, lost investment opportunities, reputational harm, and emotional distress. (Armijo Decl., ¶¶ 10-19.)

Third, in *Munford*, the court found that the non-settling defendants would be unlikely to prevail on their cross-claims because the solvency opinion on which they relied stated that it was limited in scope and only intended to be relied upon by the LBO lender. *Munford*, 97 F.3d at 456. Here, in contrast, Armijo is likely to prevail on his claims against the Lawyer Defendants. In fact, Movants admit that the Lawyer Defendants gave negligent legal advice to EquiAlt's "sales agents" that caused those "sales agents" to believe that their participation in the sales of the "EquiAlt Securities" was lawful. The Investor Plaintiffs allege that Wassgren "provide[d] legal advice to potential and existing sales agents, falsely assuring

in order to more fully respond to Movants' incorrect assertion that the Bar Order is fair and equitable.

them that EquiAlt complied with all applicable securities laws and that the unlicensed agents could lawfully sell the EquiAlt unregistered and unqualified securities." (Doc No. 760-6, ¶ 54.) The Receiver alleges that "Wassgren advised Rybicki, who was in charge of sales efforts, *as well as numerous selling agents*, that they were allowed to sell these investments without license or registration, in violation of securities laws." (Doc. No. 760-7 at 141, ¶ 57(G), emphasis added.) Further, one of the Receiver's designated experts, Philip Feigin, who worked for approximately a decade as Colorado Securities Commissioner and served as the President and Executive Director of the North American Securities Administration Association, testified in his deposition that, if the facts asserted by the Investor Plaintiffs in *Gleinn v. Wassgren* are true, and if he were still in office, he "would try prosecute Mr. Wassgren," "would have referred him for criminal prosecution," and "would have said that [Wassgren] aided and abetted a major ponzi scheme." (**Exhibit E**, Feigin Dep. Tr. 43:3-12.) Feigin further testified that "any attorney in [Wassgren's] position had to know better and would have known better and should have known better," and characterized as "reprehensible" Wassgren's "obfuscation of the number of unsophisticated, nonaccredited investors; the vague responses or guidance he gave to clients on a number of issues; and inserting himself and his law firm into the offering process." (*Id.*, 44:2-11.)

Any argument by Movants (or the Lawyer Defendants) that the Lawyer Defendants did not provide legal advice or owe a duty of care to Armijo is without

merit. EquiAlt directed its "sales agents," including Armijo, to speak with Wassgren when they had questions regarding the legal requirements for selling EquiAlt Securities. (Doc. No. 760-7 at 17, ¶ 52; Armijo Decl., ¶ 5.) EquiAlt's Managing Director, Rybicki, told Armijo that he could seek legal advice from Wassgren regarding anything having to do with the EquiAlt business and Armijo's dealings with EquiAlt. (Doc. No. 760-7 at 21, ¶ 68; Armijo Decl., ¶ 5.) Accordingly, Armijo did just that – he sought legal advice directly from Wassgren on multiple occasions, and Wassgren in turn provided Armijo with the requested legal advice, assuring Armijo that he had the requisite licensing to sell the EquiAlt Securities, that EquiAlt's operation was lawful, and that the manner in which Armijo was compensated was lawful. (Doc. No. 760-7, ¶¶ 70-78; Armijo Decl., ¶ 6.) The Lawyer Defendants provided Armijo multiple documents drafted by Wassgren that were riddled with misrepresentations, including a Selected Dealer Agreement that falsely assured Armijo his participation in the sales of the EquiAlt Securities was lawful and without risk. (Doc. No. 760-7, ¶ 76.) Under these facts and applicable California law, Wassgren's provision of legal advice to Armijo created an attorney-client relationship. *See Miller v. Metzinger*, 91 Cal.App.3d 31, 39 (1979). Further, even if the attorney-client relationship somehow did not exist between Armijo and the Lawyer Defendants (it did), the Lawyer Defendants would still be liable to Armijo as the intended beneficiary of their services. *See*, *e.g.*, *St. Paul Title Co. v. Meier*, 181 Cal.App.3d 948, 950 (1986).

In sum, the material differences between *Munford* and this case demonstrate that the requested Bar Order is not "fair and equitable."[8]

F. If the Court Does Not Reject the Requested Bar Order Based on This Opposition Alone, Then Armijo Must be Allowed to Obtain Discovery as to the Lawyer Defendants' Financial Circumstances and Movants' Joint Prosecution Agreement

In *AAL*, the Eleventh Circuit vacated the bar order and remanded for further proceedings, lamenting that "the district court made no findings of fact" to justify the bar order. *AAL*, 361 F.3d at 1312. Here, Movants have not provided any evidence that would enable the court to make findings of fact. Further, because *Armijo v. Wassgren* was stayed as a result of this Court's order granting preliminary approval (Doc. No. 787), Armijo has not been able to obtain any discovery from the Lawyer Defendants. Accordingly, if the Court does not deny the requested Bar Order based on this opposition alone, then Armijo requests leave to take discovery as to the Lawyer Defendants' financial circumstances, including as to their available insurance and other available assets, and as to the Joint Prosecution Agreement between the Receiver and Investor Plaintiffs, so that this Court can evaluate the fairness and equity of the requested Bar Order.

[8] *SEC v. Quiros*, 966 F.3d 1195 (2020), cited by Movants, did not turn on whether the bar order was "fair and equitable." Rather, in *Quiros*, the Eleventh Circuit *reversed* a bar order because the bar order was not essential to the settlement at issue. *Id*. at 1197. Accordingly, *Quiros* did not address whether the bar order in that case was "fair and equitable."

IV. CONCLUSION

For the foregoing reasons, Armijo respectfully requests that the Court deny Movants' motion for entry of the Bar Order. If the Court for any reason is not inclined to deny the request based on this opposition, then Armijo requests leave to take discovery as to the Lawyer Defendants' financial condition and the Joint Prosecution Agreement between the Receiver and Investor Plaintiffs.

Dated: January 19, 2023

Respectfully submitted,

/s/ Adriaen M. Morse Jr.
Adriaen M. Morse Jr. (DC Bar # 483347)
Pro Hac Vice
SECIL Law PLLC
1701 Pennsylvania Ave., N.W., Suite 200
Washington, D.C. 20006
T: (202) 417-8232
M: (571) 314-5469
E: amorse@secillaw.com
Counsel for Robert Joseph Armijo

CERTIFICATE OF SERVICE

I hereby certify that, on March 31, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system and that copies were sent, via U.S. Mail and email, to the following:

Burton W. Wiand
Law Office of Burton W. Wiand, P.A.
114 Turner Street
Clearwater, FL 33756
Burt@BurtonWWiandPA.com

Guy M. Burns
Johnson, Pope, Bokor, Ruppell & Burns, LLP
401 East Jackson Street, Suite 3100
Tampa, FL 33601
guyb@jpfirm.com

Katherine C. Donlon
Johnson, Cassidy, Newlon & DeCort
2802 N. Howard Avenue
Tampa, FL 33607
kdonlon@jclaw.com

John K. Villa
Williams & Connolly LLP
680 Maine Avenue, SW
Washington, DC 20024
jvilla@wc.com

Stephen C. Richman
Gunster, Yoakley & Stewart, P.A.
777 South Flagler Drive, Suite 500 East
West Palm Beach, FL 33401
srichman@gunster.com

Simon A. Gaugush
Carlton Fields
Corporate Center Three
at International Plaza
4221 W. Boy Scout Boulevard, Suite 1000
Tampa, FL 33607
sgaugush@carltonfields.com

Howard M. Bushman
The Moskowitz Law Firm, PLLC
2 Alhambra Plaza, Suite 601
Coral Gables, FL 33134
howard@moskowitz-law.com

Andrew S. Friedman
Bonnett, Fairbourn, Friedman & Balint, P.C.
7301 N. 16th Street, Suite 102
Phoenix, AZ 85020
afriedman@bffb.com

/s/ *Adriaen M. Morse Jr.*
Adriaen M. Morse Jr.

EXHIBIT A

DECLARATION OF ROBERT J. ARMIJO

I, Robert J. Armijo, declare:

1. I have personal knowledge of the facts contained in this declaration. If called to testify as a witness, I could and would testify competently to the facts stated herein.

2. I make this declaration in support of my opposition to the Joint Motion of Receiver and Investor Plaintiffs (collectively, "Movants") for Entry of Bar Orders (the "Joint Motion"). In particular, I oppose Movants' request for issuance of a bar order that would enjoin me from prosecuting my pending California state-law claims against Paul R. Wassgren, DLA Piper LLP (US) ("DLA"), and Fox Rothschild LLP ("Fox Rothschild") (collectively, the "Lawyer Defendants").

3. Attached to the Joint Motion as Exhibit G is the Complaint that was filed on my behalf, on October 6, 2022, against the Lawyer Defendants in Los Angeles County Superior Court, Case No. 22STCV32793.

4. Between 2012 and 2021, I was an Investment Advisor Representative licensed by the State of California, with a Series 65 license. I was recruited to introduce investors to EquiAlt, LLC and various EquiAlt Funds. EquiAlt's Managing Director, Barry Rybicki ("Rybicki"), assured me that, based on advice given by EquiAlt's attorney, Wassgren, I could lawfully participate in the sale of EquiAlt Securities with a Series 65 license and did not need a Series 7 license.

Rybicki also assured me that the compensation I would receive relating to sales of the EquiAlt Securities had been designed by Wassgren and that Wassgren had represented that such compensation was lawful.

5. Rybicki told me that Wassgren was "our attorney" and invited me to contact Wassgren directly to discuss any questions I had regarding EquiAlt's business. Rybicki told me that Wassgren was engaged by EquiAlt as counsel for everyone involved in selling the EquiAlt Securities. He told me I could seek legal advice from Wassgren regarding anything having to do with the EquiAlt business or my dealings with EquiAlt.

6. I spoke with Wassgren by phone on multiple occasions. I told him that I did not have a Series 7 license but only had a Series 65 license. I also told him how I was being compensated relating to sales of the EquiAlt Securities. Wassgren assured me that my Series 65 license was sufficient and that I did not need a Series 7 license. He also assured me that there were no issues with how I was being compensated in relation to sales of the EquiAlt Securities. Lastly, Wassgren assured me on each occasions that EquiAlt was doing things by the book, that the business was growing, doing well financially, and, most importantly, was in full compliance.

7. I understand that, in February 2020, the Securities and Exchange Commission ("SEC") filed this action against EquiAlt, its principals, and a number of related defendants.

8. The SEC subsequently filed a civil action against me on June 14, 2021 in the Southern District of California, *SEC v. Armijo, et al.* (S.D. Cal. Case No. 3:21-cv-01107). In addition, the receiver, Burton Wiand, filed an action against me, among others, in the Middle District of Florida, *Wiand v. Family Tree Estate Planning, LLC et al.* (M.D. Fla. Case No. 8:21-cv-00361). EquiAlt investors also filed two separate actions against me, among others, also in this court: *O'Neal et al. v. Joseph Financial, Inc. et al.* (M.D. Fla. 8:22-cv-00939); and *Rubinstein et al. v. EquiAlt, LLC, et al.* (M.D. Fla. 8:20-cv-00448).

9. None of these actions would have been filed against me but for the Lawyer Defendants' false advice and assurances to me that my participation in the sale of EquiAlt Securities was lawful and without risk.

10. As a result of the Lawyer Defendants' misconduct, I have suffered myriad damages that continue to increase. I have attempted to summarize below some of the most significant damages that the Lawyer Defendants have caused me. However, this list is by no means exhaustive.

11. I have incurred hundreds of thousands in legals fees and costs in defending against the above-referenced lawsuits. I have also dedicated many hours of my own time to the defense of these lawsuits – time that I otherwise could have spent on my work and earning income.

12. Potential employees, personal relationships, and clients have passed on meeting with me after they've done Google searches and found that there is an SEC action against me.

13. Chase canceled my credit cards and deposit account without notice and has refused to do any further business with me as a result of everything related to EquiAlt.

14. TD Ameritrade closed my investment accounts without notice and has also refused to do any further business with me as a result of everything related to EquiAlt.

15. I have been denied accounts at numerous brokerage firms, including Interactive Brokers LLC and Wilson Davis Co., and have been denied investment opportunities, including with Forge Global and Joseph Stone Capital, as a result of everything related to EquiAlt.

16. The greatest harm has been to my reputation. Anyone who Googles my name immediately sees that the SEC filed an action against me. The damage to my professional reputation is irreparable. I have lost numerous existing clients and many prospective clients who Google my name, see that there is an SEC action against me, and presume (wrongly) that I am untrustworthy. The damage to my reputation in the investment advising industry was so immediate and severe that my Series 65 licensure became valueless.

17. The pending lawsuits against me have caused me severe emotional distress, embarrassment, and personal hardship. The anxiety and distress have caused me to suffer heart issues, including atrial fibrillation, to seek psychiatric aid, and to require medication.

18. I have been denied leases to rent apartments because of everything related to EquiAlt. The most recent denial to rent an apartment occurred just last month, in February 2023, which shows that the wrongful actions of Wassgren and the Lawyer Defendants continue to haunt me years later.

19. The past few years have been a nightmare. My professional reputation is tarnished beyond repair, my personal relationships have suffered, and I am faced with the constant anxiety that anyone can Google my name, see that there is an SEC action against me, and assume that I did something nefarious or criminal. The damages I have suffered are attributable to the bad legal advice that the Lawyer Defendants gave me, the misrepresentations they made to me, and their false assurances that there was no legal risk in my involvement with EquiAlt.

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20. The harm the Lawyer Defendants have caused me is overwhelming. My claims against them are valid. All I ask of this Court is that I be permitted to prosecute my claims against the Lawyer Defendants and have them addressed on the merits – to have my day in court. I urge the court to deny the request for a Bar Order that would prevent me from prosecuting my claims against the Lawyer Defendants.

I declare under penalty of perjury under the laws of the State of Florida that the foregoing is true and correct.

Signed this 30th day of March, 2023.

Robert J. Armijo

EXHIBIT B

Dan L. Stanford (SBN 067658)
dan@stanfordandassociates.com
STANFORD AND ASSOCIATES
101 West Broadway, Suite 810
San Diego, CA 92101
Telephone: (619) 695-0655

Kevin V. DeSantis, Esq. (SBN 137963)
kdesantis@ddwklaw.com
James A. McFaul, Esq. (SBN 248670)
jmcfaul@ddwklaw.com
David D. Cardone, Esq. (SBN 254954)
dcardone@ddwklaw.com
DUNN DESANTIS WALT & KENDRICK, LLP
750 B Street, Suite 2620
San Diego, CA 92101
Telephone: (619) 573-4488

Attorneys for Plaintiff Robert Joseph Armijo

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT JOSEPH ARMIJO, an individual,

Plaintiff,

vs.

PAUL R. WASSGREN, an individual; DLA PIPER LLP (US); FOX ROTHSCHILD LLP; and DOES 1 through 50, inclusive,

Defendants.

CASE NO. 2:22-cv-08851-AB (PVCx)

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO REMAND

Judge: Hon. André Birotte Jr.
Hearing Date: February 3, 2023
Hearing Time: 10:00 a.m.
Place: Courtroom 7B

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I.

INTRODUCTION

Robert Joseph Armijo ("Plaintiff") respectfully submits this memorandum of points and authorities in support of his Motion to Remand this action (the "Action") to Los Angeles County Superior Court, on the basis that the United States District Court for the Central District of California (this "Court") lacks subject matter jurisdiction. 28 U.S.C. § 1447(c).

This Action arises out of grossly negligent legal advice and misrepresentations that defendants Paul R. Wassgren ("Wassgren"), DLA Piper LLP (US) ("DLA"), and Fox Rothschild LLP ("Fox Rothschild") (collectively, "Defendants") made to Plaintiffs regarding the business and operations of Defendants' client, EquiAlt LLC ("EquiAlt"), a real estate investment firm that the Securities Exchange Commission ("SEC") has accused of operating a Ponzi scheme and committing numerous securities violations.[1]

As detailed below, this Action is related to another malpractice action, *Wiand v. Wassgren*, *et al.*, Case No. 2:20-cv-08849-AB-PVC, which was filed against Defendants in this Court by a liquidating receiver appointed in the SEC's enforcement action against EquiAlt. In *Wiand v. Wassgren*, Defendants, the Receiver, and this Court all agreed that there were no grounds for federal jurisdiction over the Receiver's claims against Defendants, and the action was dismissed so that the Receiver could pursue his claims against Defendants in Los Angeles County Superior Court. (Request for Judicial Notice ("RFJN"), Ex. 4.) That raises the obvious question: If Defendants acknowledged – and this Court found – that the Court lacked subject matter jurisdiction over the Receiver's malpractice claims against Defendants arising from Defendants' representation of EquiAlt, how could the Court have subject matter jurisdiction in *this* Action?

[1] *See SEC v. Davison, et al.*, M.D. Fla. Case No. 8:20-cv-00325, Doc. No. 1.

At all times relevant to this Action, Plaintiff was a California-licensed Investment Advisor Representative with a Series 65 license. He was recruited by EquiAlt, with Defendants' assistance, to solicit investors for EquiAlt's various real-estate investment funds (the "EquiAlt Funds").[2] Defendants were intimately involved in structuring EquiAlt's business and the EquiAlt Funds. Defendants also provided legal advice and representations to *Plaintiff* regarding EquiAlt's business. Indeed, EquiAlt characterized Defendants as attorneys for everyone working under the EquiAlt umbrella, including Plaintiff. Defendants assured Plaintiff that EquiAlt was fully compliant with applicable laws (including securities laws), that Plaintiff could lawfully solicit investors for the EquiAlt Funds, and that the compensation Plaintiff received was lawful. At no time did Defendants ever advise Plaintiff of legal risks or concerns that may arise from his participation in sales on behalf of EquiAlt.

After the SEC filed its complaint against the EquiAlt defendants in February 2020, the Middle District of Florida placed the EquiAlt Funds and related EquiAlt entities into a liquidating receivership under Burton Wiand (the "Receiver"). Thereafter, lawsuits were filed against Plaintiff by the SEC, the Receiver, and EquiAlt's investors (including both individual and putative class actions). As a result, Plaintiff has suffered millions in damages, including attorneys' fees for defense of the lawsuits filed against him, loss of clients and investment opportunities, destruction of his personal relationships and reputation, and physical and mental harm. These damages were all proximately caused by the negligent and/or grossly negligent legal advice and misrepresentations Defendants made to Plaintiff.

Plaintiff filed his Complaint against Defendants in Los Angeles County Superior Court. He asserts purely state-law causes of action, for 1) professional

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[2] The "EquiAlt Funds" include EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund, III, LLC, EA SIP, LLC, EquiAlt Qualified Opportunity Zone Fund, LLP, and EquiAlt Secured Income Portfolio REIT.

negligence / gross negligence, 2) negligent misrepresentation, 3) aiding and abetting fraud, 4) equitable indemnity, 5) tort of another, and 6) unfair competition. (Doc. No. 6-1, Compl.[3]) Defendants removed the Action to this Court on December 7, 2022, on the asserted basis that this Court has federal question jurisdiction under 28 U.S.C. § 1331. (Doc. No. 6, Notice of Removal, p. 7.) Defendants do not contend that Plaintiff's claims are created by federal law. Instead, they contend that Plaintiff's state-law claims "arise under" federal law because Plaintiff's claims purportedly "implicate significant federal issues."

Defendants are mistaken. The parties agree that the applicable test is the United States Supreme Court's four-element test (the "*Grable* test") set forth in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 314 ("*Grable*") and further explicated in *Gunn v. Minton*, 568 U.S. 251, 258 ("*Gunn*"). Namely, federal jurisdiction will lie over a state law claim only in the "special and small category" of cases where "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258. As detailed below, these elements are not met here. This Court therefore lacks subject-matter jurisdiction over Plaintiff's claims, just as this Court lacked subject-matter jurisdiction over the Receiver's claims against Defendants in *Wiand v. Wassgren*. Thus, this Action must be remanded to Los Angeles County Superior Court.

II.

BACKGROUND

A. Plaintiff's Complaint

1. Plaintiff

At all times relevant to this Action, Plaintiff was a California resident. (Doc.

[3] All references to "Doc. Nos." throughout this memorandum are to Doc. Nos. in this Action, unless otherwise indicated.

No. 6-1, Compl., ¶ 12.) Between 2012 and 2021, Plaintiff was an Investment Advisor Representative, licensed by the State of California, with a Series 65 license. (*Id.*) Plaintiff was the managing member and sole owner of Joseph Financial Investment Advisors, LLC ("JFI"). Between May 2016 and 2021, JFI was a Registered Investment Advisor in the State of California, and Plaintiff was JFI's Investment Advisor Representative. (*Id.*)

2. EquiAlt and the EquiAlt Funds

EquiAlt is a private real estate investment company, headquartered in Tampa, Florida, that was formed in 2011 by CEO Brian Davison and Managing Director Barry Rybicki. (*Id.*, ¶ 24.) Between approximately 2011 and 2020, EquiAlt formed, managed, and solicited investments for the EquiAlt Funds. (*Id.*, ¶¶ 28, 34 – 35.) EquiAlt told investors that moneys invested in the EquiAlt Funds would be used to purchase, renovate, rent and/or sell residential properties located in distressed markets throughout the United States. (*Id.*, ¶¶ 25, 27.) EquiAlt and the EquiAlt Funds issued and sold unregistered securities they styled – with the advice and assistance of Defendants – as fixed-interested debentures ("EquiAlt Securities"). (*Id.*, ¶ 25.)

3. Defendants

Wassgren was a partner at Fox Rothschild in its Los Angeles office from July 2010 through May 2017, then at DLA in its Los Angeles Office from May 2017 through November 2020. (*Id.*, ¶¶ 16, 17.) While working at Fox Rothschild and DLA, Wassgren held himself out and was represented to be a transactional lawyer specializing in corporate, securities, and real estate matters. (*Id.*, ¶ 18.)

Wassgren was legal counsel to EquiAlt and was intimately involved in the creation, structuring, and operation of EquiAlt and the EquiAlt Funds since their inception. (*Id.*, ¶ 33.) During the time periods that Wassgren was employed by Fox Rothschild and DLA, those firms also represented EquiAlt. The legal work that forms the basis of this action, and the misrepresentations made by Defendants,

occurred while Wassgren was working for Fox Rothschild and DLA in their respective Los Angeles offices. (*Id*., ¶¶ 16, 17.) Defendants' legal work for EquiAlt and the EquiAlt Funds included: forming the EquiAlt Funds and preparing documentation relating to same (*id*. ¶ 34); drafting and revising private placement memoranda ("PPMs") and other marketing materials and offering documents for the EquiAlt Securities (*id*., ¶ 37); advising EquiAlt on regulatory compliance (*id*.); participating in the sales of EquiAlt Securities by receiving and approving questionnaires and subscription documents from investors before they were issued EquiAlt Securities (*id.*); and acting as counsel for everyone involved in selling the EquiAlt Securities, including Plaintiff (*id*., ¶ 68).

4. Defendants' Advice and Misrepresentations to Plaintiff

Plaintiff was one of approximately 19 sales agents recruited to sell EquiAlt Securities with the assistance and assurances of Wassgren. (*Id*., ¶ 62.) On multiple occasions, directly through communications between Plaintiff and Wassgren and indirectly through communications between Plaintiff and Rybicki (who communicated Wassgren's representations to Plaintiff), Defendants represented to Plaintiff that: 1) Plaintiff could lawfully sell the EquiAlt Securities with a Series 65 license and without a Series 7 license (*Id*., ¶¶ 66, 70, 74, 75, 76, 77, 78, 83); 2) the compensation Plaintiff received relating to sales of EquiAlt Securities was lawful (*id*., ¶ 70); 3) EquiAlt and the EquiAlt Funds were compliant will applicable laws, including applicable securities laws and regulations (*id*., ¶¶ 46, 54, 56, 66, 82); and 4) information and representations contained within the EquiAlt PPMs and other marketing and offering materials was accurate and not misleading (*id.*, ¶ 43).

Wassgren never told Plaintiff that he should get his own counsel, never told Plaintiff that Wassgren was not providing him legal advice, and never told Plaintiff that Wassgren did not represent Plaintiff. (*Id*., ¶ 73.) Wassgren never informed Plaintiff that there was risk that the SEC or other governing bodies may assert that Plaintiff required a Series 7 license to participate in the sale of EquiAlt Securities or

that there was a potential that the SEC could see Plaintiff's participation as unlawful. (*Id.*, ¶ 80.) At no time did Wassgren explain to Plaintiff the legal differences between a finder, broker-dealer, and registered representative in reference to the sale of securities. (*Id.*)

5. Plaintiff's Damages

On February 11, 2020, the SEC filed its action against the EquiAlt defendants, *SEC v. Davison* (M.D. Fla. Case No. 8:20-cv-00835). The SEC alleges that the EquiAlt defendants operated a Ponzi scheme and sold unregistered securities in violation of the Securities Act and the Exchange Act. (Compl., ¶ 30.)[4] Immediately after the SEC filed its enforcement action, EquiAlt and the EquiAlt Funds were placed into a liquidating receivership, and the Receiver was appointed by the Court for the various EquiAlt parties. (Compl., ¶ 29.)[5]

None of the EquiAlt parties' wrongdoings, or Defendants' wrongful participation in furtherance of same, were known to Plaintiff prior to the SEC, Receiver, or EquiAlt's investors pursuing claims. (Compl., ¶ 32.) After the SEC filed its enforcement action against EquiAlt, lawsuits were filed against Plaintiff by the SEC, EquiAlt investors, and the Receiver, all relating to the sale of the EquiAlt Securities. Defendants' negligence and misrepresentations (including omissions) to Plaintiff were substantial factors in causing: (a) investors to bring individual and class actions against Plaintiff; (b) an investigation and pending litigation by the SEC against Plaintiff, including a request for civil penalties and disgorgement; (c) the Receiver to pursue claims against Plaintiff; (d) the destruction of Plaintiff's reputation among his clients in the insurance and financial advising industry; (e) Plaintiff incurring significant attorneys' fees and time to respond to the foregoing matters; (f) Plaintiff being forced to leave the financial advising industry; (g) Plaintiff losing investment opportunities due to financial institutions closing Plaintiff's

[4] *See also SEC v. Davison*, M.D. Fla. Case No. 8:20-cv-00325, Doc. No. 1.
[5] *See also SEC v. Davison*, M.D. Fla. Case No. 8:20-cv-00325, Doc. No. 11.

investment accounts and various financial institutions refusing to do business with Plaintiff; and (h) Plaintiff suffering serious emotional distress and serious physical harm, including heart problems and depression. (*Id.*, ¶ 85.)

6. Plaintiff's Claims Against Defendants

Plaintiff filed his Complaint against Defendants in Los Angeles County Superior Court on October 6, 2022. (Doc. No. 6-1.) He asserts the following six causes of action, all of which are created by California state law: 1) professional negligence / gross negligence, 2) negligent misrepresentation, 3) aiding and abetting fraud, 4) equitable indemnity, 5) tort of another, and 6) violation of unfair competition law.

B. Defendants' Notice of Removal and Subsequent Filings in this Court

On December 7, 2022, Defendants filed their Notice of Removal. (Doc. No. 6.) The Action was originally assigned to United States District Judge John F. Walter, but was subsequently reassigned to United States District Judge André Birotte Jr. because it is related to *Wiand v. Wassgren*, Case No. 2:20-cv-08849 AB(PVCx), refenced above and discussed further below. (Doc. No. 29.)

On December 16, 2022, Defendants filed a Motion to Transfer this Action to the Middle District of Florida. (Doc. No. 35.) That motion is presently set for hearing on January 27, 2023. DLA and Fox Rothschild also filed pending Motions to Dismiss, both set for hearing on February 3, 2023. (Doc. Nos. 38, 40.) As argued below, Plaintiff's Motion to Remand should be adjudicated prior to Defendants' Motion to Transfer Venue and Motions to Dismiss.

C. *Wiand v. Wassgren* (C.D. Cal. Case No. 2:20-cv-08849)

As indicated above, this Action is the second malpractice lawsuit filed in the Central District of California against Defendants relating to their representation of EquiAlt and the EquiAlt Funds. On September 28, 2020, the Receiver filed a complaint in this Court against the same Defendants for 1) breach of fiduciary duty,

2) negligence / gross negligence / professional malpractice, 3) common law aiding and abetting of fraud, and 4) common law aiding and abetting of breach of fiduciary duty. (RFJN, Ex. 1.) The Receiver alleged that Defendants made misrepresentations of material fact and omitted facts in the PPMs and other offering documents, and participated in a "pattern and practice of selling investment securities in violation of applicable securities laws and regulations." (*Id.*, ¶¶ 57, 69, 72.) The Receiver further alleged that: the EquiAlt "investments were sold without either state or federal securities registration" (*id.*, ¶ 57(B)); "none of the Funds qualified for a Reg D exemption or any other exemption from registration" (*id.*); "Wassgren regularly was in contact with the selling agents for The Funds" and "[n]one of these selling agents were registered or licensed to sell securities and could not legally engage in the transactions of selling these securities to investors" (*id.*, ¶ 57(F)); and "Wassgren advised Rybicki, who was in charge of sales efforts, as well as numerous selling agents, that they were allowed to sell these investments without license or registration, in violation of securities laws." (*Id.*, ¶ 57(G).)

After the Receiver filed his complaint in this Court, he correctly determined that this Court lacked subject-matter jurisdiction. He then filed a complaint against Defendants in Los Angeles County Superior Court and asked this Court to dismiss his federal complaint without prejudice, stating that his claims against Defendants "are state law claims and do not raise any federal cause of action." (RFJN, Ex. 3, at p. 2.)

Defendants *agreed* that this Court lacked subject matter jurisdiction over the Receiver's complaint but argued that, instead of allowing the Receiver to proceed in Los Angeles County Superior Court, this Court should transfer the Receiver's action against them to the Middle District of Florida, where *SEC v. Davison* is pending. In their memorandum in support of the Motion to Transfer, Defendants stated:

> This is a legal malpractice case in which a receiver . . . has sued Defendants for allegedly giving the Investment Funds negligent legal

advice, breaching fiduciary duties, and aiding and abetting fraud. **This Court, however, does not have subject matter jurisdiction to hear this dispute because there is no diversity jurisdiction and the Receiver asserts no claims arising under federal law**.

(RFJN, Ex. 2, at p. 6, emphasis added.)

On February 24, 2021, this Court granted the Receiver's motion to dismiss and denied the Defendants' motion to transfer to the Middle District of Florida. (RFJN, Ex. 4.) The Court reasoned in part as follows:

> Having considered the interests of justice in light of the parties' arguments, the Court will dismiss this action so that the Receiver may pursue his claims in his ongoing Superior Court action. **This action involves claims under California law, many California witnesses (and some neighboring state witnesses), legal work performed in this state, and hundreds of California investors (but only 32 Florida investors**). Because of the connection between the claims and the state of California, the Receiver wishes to pursue his claims in California. The Receiver filed this action in federal court mistakenly believing subject matter jurisdiction existed, but once he realized this Court lacked subject matter jurisdiction, he promptly filed an identical action in state court and sought dismissal of this case. In short, the Receiver simply seeks to correct an error to secure venue in his preferred state.
>
> Defendants argue that this case should be transferred to Florida because that is where the SEC Enforcement Action is pending, and because Florida may permit them certain defenses there not available in California. However, the Receiver always had the option to file his case in Superior Court, and Defendants can seek a transfer to the Florida Court only because the Receiver mistakenly filed this action in this federal Court. Had the Receiver originally filed this case in Superior Court, Defendants would have no occasion to make their transfer argument. The Receiver's easily-corrected mistake should not thwart his forum preference. Defendants' preference for a Florida venue is not sufficient to warrant an interests-of-justice transfer under § 1631. Defendants contend that litigating this case in Superior Court would overburden them or thwart judicial economy, but such arguments are better made to the appointing court in the context of the SEC Enforcement Action.

(*Id*. at p. 3.)

After this Court denied Defendants' request to transfer *Wiand v. Wassgren* to the Middle District of Florida, Defendants took one final shot by filing a motion in *SEC v. Davison*, asking the Middle District of Florida to *compel* the Receiver to dismiss his claims against Defendants in California and instead bring those claims in the Middle District of Florida. United States District Judge Scriven denied the motion. (RFJN, Ex. 5.)

In sum, in *Wiand v. Wassgren*, the Receiver filed a complaint in *this* Court against Defendants. Subsequently, the Receiver, Defendants, and this Court all agreed that there was no federal question jurisdiction over the Receiver's purely state-law claims, and the Court dismissed the Receiver's complaint without prejudice so that he could continue to pursue the claims in Los Angeles County Superior Court. Thus, Defendants' assertion in *this* Action that the Court has federal question jurisdiction over Plaintiff's claims is irreconcilable with Defendants' prior assertion (with which the Receiver and this Court agreed) that the Court *lacked* subject matter jurisdiction because "the Receiver asserts no claims arising under federal law." (RFJN, Ex. 2, at p. 6.)

III.

THE ACTION MUST BE REMANDED TO LOS ANGELES COUNTY SUPERIOR COURT BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION

A. Legal Standards for Removal and Remand

"Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute." *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (citations and quotation marks omitted). A defendant may remove an action from state court to federal court if the plaintiff could have originally filed the action in federal court. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); 28 U.S.C. § 1441(a). An action must be remanded to state court "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28

U.S.C. § 1447(c).

A removing defendant bears the burden of establishing that removal is proper. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) ("The strong presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper.") Moreover, the removal statute is strictly construed against removal. *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009). If there is any doubt regarding the existence of subject matter jurisdiction, the court must resolve those doubts in favor of remanding the action to state court. *See Gaus*, 980 F.2d at 566 ("Federal Jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.") Courts resolve all ambiguities "in favor of remand to state court." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009).

B. This Court Lacks Subject Matter Jurisdiction

1. Federal Question Jurisdiction

Defendants assert that the Court has subject matter jurisdiction of this Action under 28 U.S.C. § 1331, which provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." There are two ways a case can "arise under" federal law. *Gunn*, 568 U.S. at 251. "Most directly, a case arises under federal law when federal law creates the cause of action asserted." *Id.* "Such cases 'account[ ] for the vast bulk of suits that arise under federal law.'" *Vieira v. Mentor Worldwide, LLC*, No. 2:18-cv-06502-AB (PLAx), 2018 WL 4275998, at *4 (C.D. Cal. Sept. 7, 2018) (quoting *Gunn*, 568 U.S. at 258). Here, all of Plaintiff's claims are created by state law, and Defendants do not contend otherwise.

Where federal law does not create the cause of action, federal jurisdiction over a state law claim will only lie "if a federal issue is (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, *supra*, 568 U.S.

at 258. The Supreme Court has emphasized that this is a "slim," "special and small category" of cases. *Id*.

2. Gunn v. Minton

In *Gunn*, the Supreme Court considered whether there was federal question jurisdiction over a client's malpractice claim against his patent litigation attorneys, and concluded there was not. Conspicuously, although Defendants quote *Gunn* for the applicable standard (Doc. No. 6, pp. 13-14), they do not discuss the facts of *Gunn* or its outcome.

In *Gunn*, the plaintiff, Minton, had filed and lost a patent infringement case, resulting in a judgment that his patent was invalid. *Id.* at 254. Minton then filed a malpractice lawsuit in state court against his attorneys, on the theory that their failure to raise an experimental-use argument had cost him the lawsuit and resulted in the invalidation of his patent. *Id.* at 255. The state court granted summary judgment to the defendant attorneys. *Id*. On appeal, Minton raised a new argument: Because his legal malpractice claim was based on an alleged error in a patent case, Minton asserted that it "arises under" federal patent law for purposes of 28 U.S.C. § 1338(a), and therefore the state court lacked subject matter jurisdiction to hear the case. *Id.* The state appellate court rejected Minton's argument, but the Texas Supreme Court reversed, and the U.S. Supreme Court granted certiorari. *Id.* at 256.

The Supreme Court framed the issue as follows: "whether a state law claim alleging legal malpractice in the handling of a patent case must be brought in federal court." *Gunn*, 568 U.S. at 253. The Supreme Court then applied the four-element *Grable* test: "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id*. at 259 (citing *Grable*, 545 U.S. at 313-314).

The Supreme Court held that the first two elements were satisfied. A federal issue was "necessarily raised," because, to prevail on his legal malpractice claim,

Minton "must show that he would have prevailed in his federal patent infringement case if only petitioners had timely made an experimental-use argument on his behalf." *Gunn*, 568 U.S. at 259. Further, the federal issue was "actually disputed." Indeed, it was "the central point of dispute," as Minton argued that the experimental-use exception would have applied to save his patent from invalidity, while his attorneys argued that it would not. *Id.* at 260.

The third element, however, was not met. *Id.* at 260. The federal issue was "not substantial in the relevant sense." *Id.* "[I]t is not enough that the federal issue be significant to the particular parties to the immediate suit; that will *always* be true when the state claim 'necessarily raise[s]' a disputed federal issue, as *Grable* separately requires. The substantial inquiry under *Grable* looks instead to the importance of the issue to the federal system as a whole." *Id.*

The fourth element also was not met. "That requirement is concerned with the appropriate balance of federal and state judicial responsibilities," and States "have a special responsibility for maintaining standards among members of the licensed professions." *Id.* (internal citations and quotation marks omitted). Indeed, the State's "interest . . . in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administered justice, and have historically been officers of the courts." *Id.*

Because the federal issue in *Gunn* was not "substantial," and because resolution in federal court of Minton's state-law malpractice claim would disrupt "the federal-state balance approved by Congress," the Supreme Court held that there was not federal jurisdiction over Minton's legal malpractice case. *Id.* at 260-265.

3. Under the Grable Test, There Is No Federal Question Jurisdiction

a. Defendants Do Not Identify a Federal Issue That is "Necessarily Raised" or "Actually Disputed"

Here, Defendants have not identified a federal issue that is "necessarily raised"

by Plaintiff's Complaint or that is "actually disputed." Rather, in adjudicating Plaintiff's state-law claims arising out of Defendants' legal advice and representations to Plaintiff, the jury will have to decide whether the advice given to Plaintiff by Defendants fell within the standard of care of a California attorney, including whether Defendants adequately advised Defendant of the risks so that he could make a fully-informed decision. The jury will also have to decide whether Defendants made misrepresentations to Plaintiff that are actionable under California law.

Plaintiff's claims against Defendants raise a myriad of fact-intensive issues that are *not* dependent on federal law[6] but instead depend on California law as to the legal standards of care and duties owed by attorneys, including, for instance:

- Whether Defendants knew, or should have known, that EquiAlt and the EquiAlt Funds were being operated by Davison and Rybicki as a Ponzi scheme, and whether, under California law, Defendants had a duty to disclose these facts to Plaintiff and/or Plaintiff's clients (*see*, *e.g.*, Compl., ¶ 30);
- Whether Defendants made, and/or knew that EquiAlt and the EquiAlt Funds made, false or misleading representations in PPMs and other marketing materials or offering documents, and whether such misrepresentations breached duties Defendants owed to Plaintiff under California law (*id*., ¶¶ 27, 43);
- Whether Defendants knew, or should have known, that EquiAlt commingled and diverted investors' funds for improper purposes and wrongfully enriched themselves by looting millions of dollars from the EquiAlt Funds for their own personal benefit, and whether Defendants made misrepresentations or

[6] "If a state-law claim is supported by a theory that contains an embedded federal issue, but the claim can nonetheless be decided on an alternative theory that is not predicated on federal law or a federal issue, then the claim itself does not *necessarily* raise a stated federal issue." *Merced Irrigation Dist. v. Cty. of Mariposa*, 941 F. Supp. 2d 1237, 1271 (E.D. Cal. 2013).

breached duties of care to Plaintiff under California law with regard to same (*id.*, ¶ 30);

- Whether Defendants breached a duty of care in failing to advise Plaintiff to consult his own independent counsel (*id.*, ¶ 73); and
- Whether Defendants owed and breached a duty to Plaintiff to adequately advise Plaintiff of the potential risks involved in his participation in the sale of the EquiAlt Securities (*id.*, ¶ 80).

All the above key issues are fact-intensive and require application of California law, not federal law.

b. No "Substantial" Federal Issue

Even if Defendants could point to a federal issue that is necessarily raised by Plaintiff's claims in this Action and actually disputed, they have not, and cannot, point to a necessarily-raised federal issue that is "importan[t] to . . . the federal system as a whole." *Gunn*, 568 U.S. at 260, 264. Unlike, for instance, the federal issue raised in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, which involved the issue of whether the Federal Government had acted unconstitutionally in issuing certain bonds, *id.* at 198, Defendants have not pointed to any issue that would necessarily be raised as to the validity or constitutionality of a federal law or regulation. Further, even if the state court were required to construe federal securities laws to determine whether, for instance, the EquiAlt Securities were required to be registered or whether they could lawfully have been sold by Plaintiff, any such decisions would not have far-reaching consequences as to the validity or interpretation of federal securities laws and would not be binding on federal courts. *Gunn*, 568 U.S. at 262.

In addition to *Gunn*, other courts have also found federal question jurisdiction lacking where a plaintiff asserts a state-law malpractice claim relating to an attorney's guidance on a matter of federal law. *See*, *e.g.*, *Maier v. Parkins*, Case No. 20-cv-2621, 2020 WL 5981903, at *3 (E.D. Pa. Oct. 8, 2020) (in malpractice action, issue

as to whether plaintiff had a meritorious claim under 42 U.S.C. § 1983 in the underlying case-within-a-case was not "substantial" federal issue, thus no federal jurisdiction); *Kat House Productions, LLC v. Paul, Hastings, Janofsky & Walker, LLP*, Case No. 07-cv-9700, 2008 WL 11404261, at *3-4 (S.D.N.Y. May 12, 2008) (no federal question jurisdiction over legal malpractice claim arising out of defendant attorney's counseling with regard to trademark law). Further, in a recent case, the District of Maryland held that there was no federal jurisdiction over a breach-of-contract dispute, despite the fact that the defendant asserted a defense involving the requirements of Regulation D of the Securities Act of 1933. *Ghias v. Sirnaomics, Inc.*, Case No. 8:22-cv-02808-PX, 2022 WL 17812638, at *2-3 (D. Md. Dec. 19, 2022).

In sum, there is no federal issue here that is sufficiently "substantial" to justify federal question jurisdiction.

c. Requiring Plaintiff to Adjudicate his State-Law Claims in Federal Court Would "Disrupt[ ] the Federal-State Balance Approved by Congress"

Finally, as in *Gunn*, the fourth element of the *Grable* test is not met here. Requiring Plaintiff to litigate his purely state-law claims in federal court would "disrupt[ ] the federal-state balance approved by Congress." *Id.* at 258, 264. As the Supreme Court emphasized in *Gunn*, States "have a special responsibility for maintaining standards among members of the licensed professions," and "[t]heir interest in regulating lawyers is especially great." *Id*. at 264. Wassgren was a California-licensed attorney operating out of the Los Angeles offices of Fox Rothschild and DLA. (Compl., ¶¶ 15-17.) California has an "especially great" interest in regulating its lawyers, and this Action belongs in California Superior Court.

In sum, Plaintiff's purely state-law claims against Defendants do not arise under any federal laws. Thus, thus the Court lacks federal-question jurisdiction over them. 28 U.S.C. § 1331.

d. Defendants' Purported Defense Relating to Indemnification Does Not Support Federal Question Jurisdiction

In the Notice of Removal, Defendants assert that "[t]hrough this action, Armijo, in substance, seeks indemnification for any federal judgment against him in the pending federal actions brought by the SEC and EquiAlt's Receiver—even though long-standing SEC policy and federal law prohibit indemnification for violations of federal securities law." (Doc. No. 6, p. 10.) Plaintiff disputes this characterization. But, more importantly for purposes of this motion, even if this were a legitimate issue, it would not provide a basis for federal question jurisdiction, because, as this Court has stated, "[t]he Court does not consider potential defenses in assessing federal question jurisdiction." *Vieira v. Mentor Worldwide, LLC*, Case No. 2:18-cv-06502-AB (PLAx), 2018 WL 4275998, at *5 (C.D. Cal. Sep. 7, 2018).

Under the well-pleaded complaint rule, the existence of a federal defense is not enough to justify removal to federal court. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). It is "settled law that a case may *not* be removed to federal court on the basis of a federal defense . . ., even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Id*., *see also City of Oakland v. BP PLC*, 969 F.3d 895, 907, n.6 (2020) ("We do not address whether such interests may give rise to an affirmative federal defense because such a defense is not grounds for federal jurisdiction.").

C. In *Wiand v. Wassgren*, Defendants Admitted, and this Court Found, that the Court Lacked Subject Matter Jurisdiction Over the Receiver's Claims Against Defendants – and There is No Basis to Rule Differently in this Case

As stated above, the Receiver previously filed a complaint against Defendants in this Court in the related case *Wiand v. Wassgren*, C.D. Cal. Case No. 2:20-cv-08849. The Receiver asserted claims against Defendants for breach of fiduciary duty, negligence/gross negligence/professional malpractice, common law aiding and abetting fraud, and common law aiding and abetting of breach of fiduciary duty.

These claims were premised in part on the Receiver's allegation that Defendants knew or should have known that federal securities laws were being violated. (RFJN, Ex. 1, ¶ 23.) Nonetheless, Defendants argued in *Wiand v. Wassgren* that this Court lacked subject matter jurisdiction over the Receiver's claims against Defendants for professional negligence because the claims did not arise under federal law. (RFJN, Ex. 2, p. 6 [the C.D. Cal. "does not have subject matter jurisdiction to hear this dispute because there is no diversity jurisdiction **and the Receiver asserts no claims arising under federal law**."].)

This Court dismissed the Receiver's complaint against Defendants without prejudice after determining – based in part on the Defendants' agreement – that there is no federal question jurisdiction over the Receiver's claims against Defendants for, among other things, providing negligent advice concerning federal securities laws. (RFJN, Ex. 4, p. 2 ["All parties agree that this Court lacks subject matter jurisdiction over this case."].)

Given Defendants' admission and the Court's ruling in *Wiand v. Wassgren* that the Court lacks subject matter jurisdiction over materially identical claims, it is clear that Plaintiff's claims against Defendants do not support federal question jurisdiction.

D. The Court Should Adjudicate the Motion to Remand Prior to Adjudicating Defendants' Motions to Transfer Venue and Motions to Dismiss

The Court should adjudicate the Motion to Remand prior to adjudicating Defendants' Motion to Transfer Venue or Defendants' Motions to Dismiss. "Most courts, when faced with concurrent motions to remand and transfer, resolve the motion to remand prior to, and/or to the exclusion of, the motion to transfer." *Pac. Inv. Mgmt. Co. LLC v. Am. Int'l Grp., Inc.*, Case No. 15-cv-0687-DOC, 2015 WL 3631833, at *4 (C.D. Cal. June 10, 2015) (collecting cases); *see also Hawkins v. Biotronik, Inc.*, Case No. 16-cv-2227-DOC (KESx), 2017 WL 838650, at *3 (C.D. Cal. March 3, 2017) ("Only in rare circumstances should motions to transfer be considered before motions to remand").

Here, there is no reason to depart from the typical practice of deciding motions to remand prior to motions to transfer venue. Deciding the Motion to Remand first will create efficiencies for the Court and the parties, as the Court's decision on the Motion to Remand could (and should) render Defendants' motions moot.

IV.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant Plaintiff's Motion and remand this Action to the Superior Court of California, County of Los Angeles (Case No. 22STCV32793).

Dated: January 5, 2023

DUNN DESANTIS WALT & KENDRICK, LLP

By: */s/ James A. McFaul*
Kevin V. DeSantis
James A. McFaul
David D. Cardone
Adam J. Yarbrough
Attorneys for Plaintiff,
Robert Joseph Armijo

CERTIFICATE OF COMPLIANCE (L.R. 11-6.2)

The undersigned, counsel of record for Plaintiff Robert Joseph Armijo, certifies that this brief contains 6,474 words, which complies with the word limit of L.R. 11-6.1.

/s/ James A. McFaul
James A. McFaul

EXHIBIT C

NAME, ADDRESS, AND TELEPHONE NUMBER OF ATTORNEY(S)
OR OF PARTY APPEARING IN PRO PER
Heather L. Rosing, Bar No. 183986
Daniel S. Agle, Bar No. 251090
Amara S. Barbara, Bar No. 323332
Klinedinst PC
501 W. Broadway, Suite 600
San Diego, CA 92101
Tel (619) 400-8000
ATTORNEY(S) FOR: DLA Piper LLP (US)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Robert Joseph Armijo Plaintiff(s), v. Paul Wassgren, et al. Defendant(s)	CASE NUMBER: **CERTIFICATION AND NOTICE OF INTERESTED PARTIES (Local Rule 7.1-1)**

TO: THE COURT AND ALL PARTIES OF RECORD:

The undersigned, counsel of record for DLA Piper LLP (US) or party appearing in pro per, certifies that the following listed party (or parties) may have a pecuniary interest in the outcome of this case. These representations are made to enable the Court to evaluate possible disqualification or recusal.

(List the names of all such parties and identify their connection and interest. Use additional sheet if necessary.)

PARTY	CONNECTION / INTEREST
Paul R. Wassgren	Defendant
DLA Piper LLP (US)	Defendant
Fox Rothschild LLP	Defendant
Robert Joseph Armijo	Plaintiff
Beazley Syndicates AFB	DLA Piper LLP (US) Insurer
Swiss Re International SE	DLA Piper LLP (US) Insurer
HDI Global Specialty SE	DLA Piper LLP (US) Insurer
MS Amlin Underwriting Limited	DLA Piper LLP (US) Insurer
Securities and Exchange Commission v. Armijo, et al., Case No. 21-cv-01107 Securities and Exchange Commission	 Plaintiff

December 6, 2022
Date

/s/ Heather L. Rosing
Signature

Attorney of record for (or name of party appearing in pro per):

DLA PIPER LLP (US)

NAME, ADDRESS, AND TELEPHONE NUMBER OF ATTORNEY(S)
OR OF PARTY APPEARING IN PRO PER
Heather L. Rosing, Bar No. 183986
Daniel S. Agle, Bar No. 251090
Amara S. Barbara, Bar No. 323332
Klinedinst PC
501 W. Broadway, Suite 600
San Diego, CA 92101
Tel (619) 400-8000
ATTORNEY(S) FOR: DLA Piper LLP (US)

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(List the names of all such parties and identify their connection and interest. Use additional sheet if necessary.)

PARTY	CONNECTION / INTEREST
Joseph Financial, Inc.	Defendant
Joseph Financial Investment Advisors, LLC	Defendant
Burton Wiand v. Family Tree Estate Planning, LLC, Case No. 8:21-cv-00361. Burton Wiand as Receiver for EA SIP, LLC, Equialt Fund LLC, Equialt Qualified Opportunity Zone Fund, LP, Equialt Fund II, LLC, Equialt Fund III, LLC, Equialt Secured Income Portfolio REIT, Inc.	Plaintiff
Family Tree Estate Planning, LLC	Defendant
All similarly situated defendants in Burton Wiand v. Family Tree Estate Planning, LLC, Case No. 8:21-cv-00361	Defendant

December 6, 2022
Date

/s/ Heather L. Rosing
Signature
Attorney of record for (or name of party appearing in pro per):

DLA PIPER LLP (US)

KLINEDINST PC
501 WEST BROADWAY, SUITE 600
SAN DIEGO, CALIFORNIA 92101

CERTIFICATE OF SERVICE

Robert Joseph Armijo v. Paul R. Wassgren, et al.
Case No.22-cv-08851

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Diego, State of California. My business address is 501 West Broadway, Suite 600, San Diego, California 92101.

On December 6, 2022, I served true copies of the following document(s) described as **CERTIFICATE OF INTERESTED PARTIES** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 6, 2022, at San Diego, California.

/S/Maria Suarez-Lopez
Maria E. Suarez-Lopez

SERVICE LIST
Robert Joseph Armijo v. Paul R. Wassgren, et al.
Case No.

Dan Stanford STANFORD AND ASSOCIATES 101 W Broadway, Suite 810 San Diego, CA 92101 dan@stanfordandassociates.com	Counsel for Plaintiff Robert Armijo
Kevin DeSantis James McFaul David D. Cardone Adam J. Yarbrough 750 B. Street Suite 2620 San Diego, CA 92101 kdesantis@ddwklaw.com jmcfaul@ddwklaw.com dcardone@ddwklaw.com ayarborough@ddwklaw.com	Counsel for Plaintiff Robert Armijo
Edward Swanson Britt Evangelist SWANSON & McNAMARA LLP 300 Montgomery Street, Suite 1100 San Francisco, CA 94104	Counsel for Defendant Paul Wassgren
Michael P. McNamara Effiong Dampha JENNER & BLOCK LLP 515 South Flower Street, Suite 3300 Los Angeles, CA 90071	Counsel for Fox Rothschild LLP

KLINEDINST PC
501 WEST BROADWAY, SUITE 600
SAN DIEGO, CALIFORNIA 92101

EXHIBIT D

NAME, ADDRESS, AND TELEPHONE NUMBER OF ATTORNEY(S)
OR OF PARTY APPEARING IN PRO PER
Michael P. McNamara (Cal. Bar No. 106079)
Effiong Dampha (Cal. Bar No. 323554)
JENNER & BLOCK LLP
515 South Flower Street, Suite 3300
Los Angeles, CA 90071
Telephone: (213) 239-5100

ATTORNEY(S) FOR: Fox Rothschild LLP

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Robert Joseph Armijo

Plaintiff(s),

v.

Paul Wassgren, et al.

Defendant(s)

CASE NUMBER:

CERTIFICATION AND NOTICE OF INTERESTED PARTIES (Local Rule 7.1-1)

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(List the names of all such parties and identify their connection and interest. Use additional sheet if necessary.)

PARTY	CONNECTION / INTEREST
- Paul R. Wassgren	Defendant
- DLA Piper LLP (US)	Defendant
- Fox Rothschild LLP	Defendant
- Robert Joseph Armijo	Plaintiff
- Joseph Financial, Inc.	Entity owned by Plaintiff
- Joseph Financial Investment Advisors, LLC	Entity owned by Plaintiff
- Burton Wiand as Receiver for EA SIP, LLC, Equialt Fund LLC, Equialt Qualified Opportunity Zone Fund, LP, Equialt Fund II, LLC, Equialt Fund III, LLC, Equialt Secured Income Portfolio REIT, Inc.	Receiver / Plaintiff in Wiand v. Family Tree Estate Planning, LLC, Case No. 8:21-cv-00361 (M.D. Fla.)
- Family Tree Estate Planning, LLC and all similarly situated defendants in Burton Wiand v. Family Tree Estate Planning	Defendants in Wiand v. Family Tree Estate Planning

December 6, 2022
Date

Signature

Attorney of record for (or name of party appearing in pro per):

Fox Rothschild LLP

NAME, ADDRESS, AND TELEPHONE NUMBER OF ATTORNEY(S)
OR OF PARTY APPEARING IN PRO PER
Michael P. McNamara (Cal. Bar No. 106079)
Effiong Dampha (Cal. Bar No. 323554)
JENNER & BLOCK LLP
515 South Flower Street, Suite 3300
Los Angeles, CA 90071
Telephone: (213) 239-5100

ATTORNEY(S) FOR: Fox Rothschild LLP

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Robert Joseph Armijo

Plaintiff(s),

v.

Paul Wassgren, et al.

Defendant(s)

CASE NUMBER:

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(List the names of all such parties and identify their connection and interest. Use additional sheet if necessary.)

PARTY	CONNECTION / INTEREST
- Securities Exchange Commission	Plaintiff in regulatory action SEC v. Robert Joseph Armijo, Case No. 3:21-cv-0110 (S.D. Cal.)
- Attorneys Liability Assurance Society (ALAS)	Fox Rothschild s insurer
- Endurance American Specialty Insurance Company	Fox Rothschild s insurer
- Mar el Insurance SE	Fox Rothschild s insurer
- National Fire Marnie Insurance Company	Fox Rothschild s insurer
- QBE Speciality Insurance Company	Fox Rothschild s insurer
- Sompo International	Fox Rothschild s insurer

December 6, 2022
Date

Signature

Attorney of record for (or name of party appearing in pro per):

Fox Rothschild LLP

KLINEDINST PC
501 WEST BROADWAY, SUITE 600
SAN DIEGO, CALIFORNIA 92101

CERTIFICATE OF SERVICE

Robert Joseph Armijo v. Paul R. Wassgren, et al.
Case No.22-cv-08851

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 6, 2022, at San Diego, California.

/S/Maria Suarez-Lopez
Maria E. Suarez-Lopez

SERVICE LIST
Robert Joseph Armijo v. Paul R. Wassgren, et al.
Case No.

Dan Stanford STANFORD AND ASSOCIATES 101 W Broadway, Suite 810 San Diego, CA 92101 dan@stanfordandassociates.com	Counsel for Plaintiff Robert Armijo
Kevin DeSantis James McFaul David D. Cardone Adam J. Yarbrough 750 B. Street Suite 2620 San Diego, CA 92101 kdesantis@ddwklaw.com jmcfaul@ddwklaw.com dcardone@ddwklaw.com ayarborough@ddwklaw.com	Counsel for Plaintiff Robert Armijo
Edward Swanson Britt Evangelist SWANSON & McNAMARA LLP 300 Montgomery Street, Suite 1100 San Francisco, CA 94104	Counsel for Defendant Paul Wassgren
Michael P. McNamara Effiong Dampha JENNER & BLOCK LLP 515 South Flower Street, Suite 3300 Los Angeles, CA 90071	Counsel for Fox Rothschild LLP

KLINEDINST PC
501 WEST BROADWAY, SUITE 600
SAN DIEGO, CALIFORNIA 92101

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

BURTON WIAND, as Receiver for EquiAlt LLC, EquiAlt Fund, LLC, EquiAlt Fund II, LLC, EquiAlt Fund III, EA SIP, LLC, EquiAlt Secured Income Portfolio REIT, Plaintiff, vs. FAMILY TREE ESTATE PLANNING, LLC, et al., Defendants.	Case No. 8:21-cv-00361-SDM-AAS

VIDEOTAPED VIDEOCONFERENCE DEPOSITION OF

PHILIP A. FEIGIN, ESQ.

Morrison, Colorado
September 9, 2022
8:54 a.m. Mountain Daylight Time

REPORTED STENOGRAPHICALLY BY:
PAMELA A. GRIFFIN, RPR, CRR, CRC
Certified Reporter
Certificate No. 50010

PREPARED FOR:
CONDENSED/ASCII

(Certified Copy)

I N D E X

E X H I B I T S

VIDEOTAPED VIDEOCONFERENCE DEPOSITION OF PHILIP A. FEIGIN, ESQ., was taken on September 9, 2022, commencing at 8:54 a.m. at the witness location in Morrison, Colorado, before PAMELA A. GRIFFIN, a Certified Reporter in the State of Arizona.

COUNSEL APPEARING:

For the Plaintiff:

JOHNSON, CASSIDY, NEWLON & DECORT, PA
By: Ms. Katherine C. Donlon
2802 North Howard Avenue
Tampa, Florida 33607-2623

For the Defendants Joseph Financial, Inc., and Robert Joseph Armijo:

WRIGHT, L'ESTRANGE & ERGASTOLO
By: Mr. Robert C. Wright
402 West Broadway
Suite 1800
San Diego, California 92101-8514

ALSO PRESENT:

Ms. Alison Bowlby
Johnson, Cassidy, Newlon & Decort, PA
Law Clerk

Mr. James Gray
Seek Insurance Services, LLC

Mr. Michael Noonan
VideoDep, Incorporated
Video Specialist

THE VIDEO SPECIALIST: We are on the record. Today's date is September 9th, 2022. The time on the video monitor is 8:54 a.m. Mountain Daylight Time.

This is the video deposition of Philip Feigin noticed by counsel by the Defendant in the matter of Burton Wiand, Receiver for EquiAlt, versus Family Tree Estate Planning, LLC, et al., in the United States District Court, Middle District of Florida, Tampa Division, Case Number 8:21-cv-00361-SDM-AAS.

The court reporter is Pam Griffin representing Griffin Group International, 3200 East Camelback Road, Suite 177, Phoenix, Arizona 85018.

Our deposition today is being on the Zoom conference platform.

My name is Michael Noonan. I'm the certified legal video specialist for the firm of VideoDep, Incorporated, located in Phoenix, Arizona.

Counsel, please identify yourselves. State whom you represent for the record at this time, beginning with the Plaintiff's counsel.

MR. WRIGHT: Robert Wright appearing for Robert Armijo and Joseph Financial, Inc.

MS. DONLON: Kacy Donlon on behalf of Burton Wiand, Receiver.

THE VIDEO SPECIALIST: Would the court

reporter please swear in the witness.

PHILIP A. FEIGIN, ESQ.,

a witness herein, having been first duly sworn by the Certified Reporter to speak the truth and nothing but the truth, was examined and testified as follows:

THE VIDEO SPECIALIST: Please proceed, when ready.

MR. WRIGHT: I will. Let me ask one question before we start.

Are you recording the deposition today?

THE WITNESS: Who's you?

THE VIDEO SPECIALIST: Yes, sir, I am recording the deposition.

MR. WRIGHT: Good. I just wanted to clarify that. I didn't mean to address it to you, Mr. Feigin.

THE WITNESS: Okay.

EXAMINATION

BY MR. WRIGHT:

Q. Can you say your full name for the record, please.

A. Philip A. Feigin.

Q. What is your business address?

A. 5450 Windsong Court, Morrison, Colorado 80465.

Q. Have you ever been deposed before?

A. Yes, sir.

Q. Have you ever taken a deposition before?

A. I think I've participated in them, but I haven't been the chief counsel in a deposition, no.

Q. Do you understand that your testimony is being given under oath today and has the same force and effect as if you were testifying in a court of law?

A. I do.

Q. Is there any physical reason why you can't give your best testimony today?

A. No, sir.

Q. Are you under the influence of any medications that would impair your ability to remember or to testify?

A. No, sir.

Q. Do you have any questions about the deposition procedure before we begin?

A. No. Just that this is my first COVID deposition, so it's a little different than I'm used to, but I guess that's true for all of us.

Q. When you say it's your first COVID deposition, you mean it's the first video deposition you've been involved in?

A. Yes, from my home. I've been in other depositions before, but from my home is a little odd.

Q. Yes.

BY MR. WRIGHT:

Q. I -- I don't see Mr. Feigin on the screen.

THE CERTIFIED STENOGRAPHER: Oh. He's on -- he is on the screen for me.

MS. DONLON: Yeah, I see him.

THE CERTIFIED STENOGRAPHER: Maybe you can change your view, Mr. Wright.

MR. WRIGHT: I don't know. It's a -- I'll try this. Now I can see him down in the corner. That's good enough.

THE CERTIFIED STENOGRAPHER: Maybe you can pin him.

MR. WRIGHT: Yeah. Okay. Now I'm fine.

BY MR. WRIGHT:

Q. Excuse us for all this delay, Mr. Feigin. We'll do our best here to get through this.

A. Okay.

MR. WRIGHT: Are we ready to go?

THE VIDEO SPECIALIST: Yes, sir. We are recording.

BY MR. WRIGHT:

Q. All right. In connection with your initial contact by the plaintiffs in the case against Wassgren and the law firms, did you form any opinions preliminarily based on what you saw and what you were told?

A. Yes.

Q. What were your preliminary opinions?

A. That if I were still in office, I would try to prosecute Mr. Wassgren.

Q. Criminally?

A. Yes, sir. I would have referred him for criminal prosecution.

Q. What do you think Mr. Wassgren did that would have justified criminal prosecution?

A. Based on the complaint that I read, if the facts were accurate, I would have said that he aided and abetted a major Ponzi scheme.

Q. Okay. Did you form any opinions about whether Mr. Wassgren had incorrectly advised sales agents about whether they could sell EquiAlt securities without a license?

A. The sales agent aspect was a -- was a tangent. I was more focused -- and I think the class action complaint was more focused on the advice and the counsel that he gave to the two principals of the issuer. And also his participation, or at least the alleged participation, in -- in directly dealing with investors.

Q. All right. Did -- in terms of -- of facts that you may have focused on in reaching your opinion to refer it for criminal prosecution, can you think of anything more

specific than what you've already mentioned?

A. Just that any attorney in his position had to know better and would have known better and should have known better.

Q. And when you say "had to know better," what are you referring to?

A. The obfuscation of the number of unsophisticated, nonaccredited investors; the vague responses or guidance he gave to his clients on a number of issues; and inserting himself and his law firm into the offering process were all, in my view, reprehensible.

Q. And have you seen other criminal prosecutions in your experience based on a conduct similar to what Mr. Wassgren did?

A. Not off the top of my head except I -- I referred a bunch of accountants for prosecution for selling interest in a Ponzi scheme early on. But not particularly going after an attorney for what he had done like Mr. Wassgren.

Q. Okay. Was -- was Mr. Wassgren's conduct extraordinary in your experience?

A. Yes.

Q. Okay. With -- with respect to your consideration of becoming an expert in that case, were you shown any documents other than the complaint? For example, did you see any e-mails between Mr. Wassgren and Mr. Rybicki?

but Mr. Feigin will -- will read.

THE VIDEO SPECIALIST: This will mark the end of Video Number 1.

MR. WRIGHT: Before we go to that, are you requesting that he have the opportunity to review, correct, and sign the deposition transcript?

MS. DONLON: Yes.

MR. WRIGHT: Okay. I will too if you don't. So other than that, that's all I have to add.

THE VIDEO SPECIALIST: Deposition has concluded. We are off the record at 11:15 a.m.

(The deposition concluded at 11:15 a.m.)

PHILIP A. FEIGIN, ESQ.

CERTIFICATE OF CERTIFIED REPORTER

BE IT KNOWN that the foregoing proceedings were taken before me; that the witness before testifying was duly sworn by me to testify to the whole truth; that the foregoing pages are a full, true, and accurate record of the proceedings, all done to the best of my skill and ability; that the proceedings were taken down by me in shorthand and thereafter reduced to print under my direction; that I have complied with the ethical obligations set forth in ACJA 7-206(F)(3) and ACJA 7-206 J(1)(g)(1) and (2).

I CERTIFY that I am in no way related to any of the parties hereto, nor am I in any way interested in the outcome hereof.

[X] Review and signature was requested; any changes made by the witness will be attached to the original transcript.
[ ] Review and signature was waived/not requested.
[ ] Review and signature not required.

Dated at Phoenix, Arizona, this 27th day of September, 2022.

_____/s/ Pamela A. Griffin___ _
PAMELA A. GRIFFIN, RPR, CRR, CRC
Certified Reporter
Arizona CR No. 50010

* * * * *

I CERTIFY that GRIFFIN GROUP INTERNATIONAL, has complied with the ethical obligations set forth in ACJA 7-206 (J)(1)(g)(1) through (6).

_____/s/ Pamela A. Griffin_____
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