UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

Case No. 8:20-CV-325-T-35MRM

BRIAN DAVISON;
BARRY M. RYBICKI;
EQUIALT LLC;
EQUIALT FUND, LLC;
EQUIALT FUND II, LLC;
EQUIALT FUND III, LLC;
EA SIP, LLC;

Defendants, and

128 E. DAVIS BLVD, LLC, et al.,

Relief Defendants.
_____/

OBJECTION TO OMNIBUS ORDER
REGARDING DAVISON SUBPOENAS

Burton W. Wiand, as receiver for EquiAlt, LLC ("**EquiAlt**") and related entities (the "**Receiver**") objects to the Omnibus Order (Doc. 919) regarding subpoenas issued to defendant Brian Davison and Nicole Davison. *See* Docs. 637, 638, 669, 703, 704. The Omnibus Order quashes the Receiver's subpoena to Mrs. Davison, and only preserves requests 4-6 in the Receiver's subpoena to Mr. Davison, which relate to certain undelivered coins. The Receiver objects to

the Omnibus Order because it conflicts with the Report and Recommendation (Doc. 918) (the "**R&R**") denying the Receiver's Renewed Verified Motion for an Order to Show Cause Why Brian Davison Should Not Be Held in Contempt for Failure to Comply with the Court's Order (Doc. 767).

As explained below, the R&R rejects several of the Receiver's proposed remedies because it claims the Receiver has not provided sufficient evidence that Mr. Davison can comply with his disgorgement obligations by paying the "**Final Judgment**" (Doc. 355) against him. But the Omnibus Order prevents the receiver from inquiring about collateral or substitute assets that could demonstrate Mr. Davison's ability to pay like the existence of bank accounts and cryptocurrencies. The Receiver has objected to the R&R, but if the Court adopts its reasoning, it should also afford the Receiver the opportunity to obtain the requisite evidence.

BACKGROUND

This dispute arises from the settlement of (1) the SEC's enforcement action **and** (2) the Receiver's independent claims against Brian Davison. Specifically, the SEC charged Davison with perpetrating a massive Ponzi scheme and defrauding over 1,500 individuals of more than $180 million, including many seniors who entrusted Davison with their retirement funds. Davison made false representations that EquiAlt and other entities he controlled would (1) raise money from participants, (2) invest 90% of that

money in real estate, and (3) pay returns between 8% and 12% to the victims of the scheme. **None of this was true**. Davison only invested a small portion of the money he raised in real estate, he paid purported returns from earlier investors' principal investment amounts, and his scheme was insolvent from its inception. For example, when the SEC sued Davison and froze his assets in 2020, the scheme was generating $500,000 per month in income but accruing interest obligations on debentures sold to investors in excess of $1.2 million per month. Further, $30 million dollars of debentures had matured, but EquiAlt and Davison had no ability to pay them because, in part, he and his codefendant misappropriated tens of millions of dollars for their personal benefit. The SEC sought to enjoin Davison from further violations of the federal securities laws as well as disgorgement of his illegal profits and the imposition of a civil penalty.

The Receiver also had claims against Davison on behalf of the Receivership Entities, including breach of fiduciary duty, unjust enrichment, and the avoidance of fraudulent transfers. *See, e.g., Wiand v. Lee*, 753 F.3d 1194, 1203 (11th Cir. 2014) (holding receivership entities had claim against Ponzi perpetrator "because he harmed the corporations by transferring assets rightfully belonging to the corporations and their investors in breach of his fiduciary duties"). The SEC did not (and, in fact, could not) assert such claims against Davison. The Receiver's claims were separate and distinct from the

claims underlying this enforcement action, and the Receiver was thus not bound by certain defenses that Davison invoked against the SEC. As a result, the Receiver estimates that his claims were worth more than $100 million.

On or about May 17, 2021, the SEC and Davison entered into a settlement agreement, consent judgment, and assignment to resolve the SEC's claims arising from the EquiAlt scheme. *See* Doc. 767-1 (the "**Assignment**"). Davison agreed, among other things, to pay disgorgement of $24,600,000, interest of $913,060, and a civil penalty of $1,500,000 for a total amount of $27,013,060. R&R at 2. Davison and the SEC negotiated that amount, which represents the illegal profits Davison made from the scheme minus more than $8 million of deductions pursuant to *Liu v. S.E.C.*, 207 L. Ed. 2d 401, 140 S. Ct. 1936, 1937 (2020) (limiting disgorgement). These agreements, however, did not resolve the Receiver's claims against Davison.

To settle the Receiver's claims, Davison assigned all his assets, except for certain express exclusions, to the Receiver:

> (1) Davison assigns and shall deliver and turn over all assets reflected on Exhibit "A" (List of Specified Assets to Assign and Turn Over to Receiver) attached hereto and made apart hereof or, where necessary, execute the appropriate quitclaim in connection with real estate properties. Mr. Davison will keep all assets reflected on Exhibit "B" (List of Assets to be Retained by Davison) attached hereto and made a part hereof. This General assignment serves to assign to the Receiver the Specified Assets **and all assets owned or controlled by Davison** other [than] those assets specifically excluded in Exhibit B.

767-1 at 2 (emphasis added); *see also id.* at 2 ("By virtue of this Assignment, the Receiver foregoes any claims that the Receiver would have against Davison, his wife, or the entities he controls….").[1]

The Assignment is the only settlement document executed by and thus binding on the Receiver. Importantly, the Receiver would not have settled his claims without the assignment of all Davison's assets. The Court ordered Davison to swear under oath that the matters contained in the Assignment were true and correct:

> As part of his disgorgement obligation, Davison shall execute a general assignment of assets to be provided to the Receiver warranting that he has disclosed all owned assets valued at more than $5,000 to the Receiver and **assigned all owned assets except those excluded** in the assignment. The Assignment shall be signed and notarized and contain a statement by Davison under oath that all of the information contained therein is **true and correct**.

Doc. 355-1 at 8. The Assignment reflects Davison's agreement to turn over all his assets – not just the assets listed on Exhibit A – in satisfaction of the Receiver's claims. The Receiver insisted upon these provisions because his claims against Davison far exceeded the SEC's disgorgement demand. As

[1] The R&R misses this important point. *See, e.g.,* R&R at 2 ("In addition, Mr. Davison entered into an assignment with the Receiver ('Assignment') in which he agreed to turn over all assets on Exhibit A of that Assignment, including the platinum and gold coins. (Doc. 767-1 at 2, 9)."). As explained throughout this objection, the Assignment is not limited to the assets on Exhibit A. Davison committed all his assets to the Receiver, except household goods worth less than $5,000 and those on Exhibit B. It is thus impossible for the Receiver to obtain a windfall because the Assignment is extremely broad and not limited by *Liu* or the SEC's negotiated disgorgement amount. Because Davison committed all his assets, the Receiver is entitled to broad post-judgment discovery regarding all his assets and not just any coins he may or may not possess.

mentioned above, the SEC gave Davison a credit of more than $8 million pursuant to *Liu*, but that case does not apply to the Receiver's claims. *See Wiand v. Family Tree Estate Planning*, Case No. 8:21-cv-361-SDM-AAS (M.D. Fla. March 24, 2023), Doc. 229 at 15 (holding that *Liu* does not preempt Florida law, including the Receiver's fraudulent transfer claims). By agreeing to deliver all his assets, except those specifically excluded on Exhibit B to the Assignment, Davison bought his freedom from further litigation and damages. *See* Doc. 767-1 at 2.

Shortly after the Court entered the Judgement, Davison met with the Receiver at his former home to turn over his physical assets. Davison delivered several valuable watches, jewelry, and what he asserted to be 480 platinum coins, as listed in Exhibit A to the Assignment that Davison executed as "true and correct" under oath. In delivering the coins, Davison even remarked on the "shininess" of the platinum. An expert the Receiver retained, however, determined that the coins were silver – not platinum, which is more valuable than silver. For example, as of this filing, an ounce of platinum is worth $1,127 whereas an ounce of silver is worth $23.40. Davison denied the coins were silver until he was shown the phrase "fine silver" on the coins themselves. Davison has never explained why he had silver coins instead of platinum, where he acquired the silver coins, and why he lied under oath about possessing the platinum coins.

Given these circumstances, the Magistrate Judge was far too credulous of Davison's repeated misrepresentations, but the R&R nevertheless contains several undisputed facts. Specifically, the Magistrate Judge certified…

> the following facts, none of which the parties dispute: (1) The Court entered a Final Judgment against Mr. Davison that requires him to disgorge to the Receiver within thirty days of entry of the Final Judgment, among other assets, 480 platinum American Eagle coins and 61 gold American Eagle coins, (Doc. 355-1); (2) The Final Judgment requires Mr. Davison to execute a general Assignment with the Receiver, (*id.*); (3) Both the Final Judgment and the Assignment contain provisions approving, when appropriate, sanctions for contempt, (*id.*; Doc. 767-1); (4) Mr. Davison disgorged 480 silver and 58 gold coins, (*See* Docs. 767, 767-2, 768, 768-1); (5) Mr. Davison never disgorged 480 platinum coins or the three remaining gold coins, (Docs. 768-1).

R&R at 16. The Receiver does not object to any of these factual determinations. Indeed, they should be dispositive – to induce the settlement of the Receiver's claims, Davison lied under oath that Exhibit A of the Assignment was "true and correct." It was false because it contained the phantom platinum coins, omitted the silver coins, and misnumbered the gold coins. *See* R&R at 6 ("The Final Judgment contemplates that Mr. Davison must turn over certain assets, including the coins, to satisfy the Final Judgment, and, by not doing so, Mr. Davison has not satisfied the Final Judgment.").

The Magistrate Judge even made clear that Davison is solely responsible for his failure to comply with the Court's order and the Assignment. *Id.* at 8 ("The mistake, therefore, was entirely attributable to Mr. Davison: he could have ensured that the assets he claimed to have were actually in his

possession."). But the R&R and the Omnibus Order stop short of affording the Receiver a remedy for this undisputed conduct. Because Davison committed all his assets, the Receiver is entitled to broad post-judgment discovery regarding all his assets and not just any coins he may or may not possess. If the Court adopts the R&R, at minimum, it should also afford the Receiver the opportunity to conduct the discovery necessary to comply with the R&R's reasoning by establishing Davison's ability to pay the Final Judgment through the delivery of substitute assets or the entry of a money judgment as a compensatory sanction.

ARGUMENT

I. THE RECEIVER IS ENTITLED TO DISCOVERY REGARDING ALL DAVISON'S ASSETS

As an initial matter, the Receiver agrees with the conclusions in the Omnibus Order that the Receiver is authorized to issue subpoenas and that requests 4-6 in the subpoena to Mr. Davison are proper. Doc. 919 at 2-6. The Receiver objects to the denial of the other requests, however, and the Receiver's objection is largely premised on and required by the R&R.

According to the R&R, an order to show cause is not justified here because the Receiver has not proven that Davison had the ability to comply with the pertinent order. *See* R&R at 11 ("The crux of the issue, then, is whether the Receiver has established by clear and convincing proof that

Mr. Davison had the ability to comply with the Final Judgment."). In other words, the Receiver must prove that Davison owned 480 platinum (as opposed to silver) coins as well as the three additional gold coins. The Magistrate Judge determined, however, "that the Receiver has fallen just short of that burden" because "the evidence currently weighs in favor of finding that [Davison] never had possession of 480 platinum coins or the three additional gold coins." *Id.* at 12-13. Without ever possessing those assets, Mr. Davison could not comply with the Court's Final Judgment by turning over the assets to the Receiver. *Id.* at 13. But that conclusion – even if accurate and adopted – does not end the inquiry. The R&R found that Mr. Davison failed to pay the Final Judgment entirely through his own conduct, and the Receiver is thus entitled to some remedy. Otherwise, the Court's order will remain unsatisfied.

The R&R rejected three of the Receiver's proposed remedies on grounds that could be addressed by the additional discovery sought from Mr. Davison through his subpoena.

> The Receiver also argues that Mr. "Davison could also purchase 480 platinum coins and turn them over to the Receiver in accordance with the Court's order." (Doc. 14). This argument is not without merit. <u>But the Receiver makes no showing of how Mr. Davison could make such a purchase considering the freeze on his assets</u>. (See Doc. 10 (order instituting asset freeze)). If Mr. Davison could use funds to purchase the required assets and then turn them over to the Receiver, that would both ensure his compliance with the Final Judgment and demonstrate that he had the ability to comply with it. <u>The Receiver, however, has not met his burden in demonstrating that fact by clear and convincing evidence</u>.

> The Receiver proposes two other solutions: (1) Mr. Davison disgorge other assets that he was initially allowed to retain, or (2) Mr. Davison turnover assets or money for the difference in value between the platinum and silver coins. (Doc. 767 at 14, 17). These may be viable options for the parties to resolve the dispute among themselves. But neither solution stems from Mr. Davison's ability to comply with the Final Judgment; in other words, the Receiver relies on a finding of contempt to effectuate these solutions. Because the Undersigned finds that the burden has not been met for a contempt hearing, these solutions are inapplicable at this time.

R&R at 13-14 & n. 2. The R&R faults the Receiver for failing to provide evidence that Mr. Davison has other "unfrozen" or exempt assets that he could turnover or use to purchase the missing coins, but the Omnibus Order prohibits the Receiver from seeking discovery regarding those other assets.

For example, the first request for production in Mr. Davison's subpoena states as follows:

> Produce any and all documents in your possession, custody or control regarding or relating to or reflecting any account in your name or over which you have any direct or indirect control or signature authority with any financial institution for the period of February 14, 2020 to the present. This should include any firm that does business in securities, precious metals, currencies, cryptocurrencies, commodities, mortgages, options, or futures."

Doc. 637-1 at 8. Responsive documents would establish that Mr. Davison has assets that could be used to effectuate each of the Receiver's three alternative solutions, as discussed in the R&R. Specifically, Mr. Davison's assets could be used to buy and deliver the missing coins. Skipping that step, Mr. Davison could deliver substitute assets to the Receiver. Or, he could simply pay the

difference between the value of the coins he promised and the value of the coins he provided – approximately $530,000, based on current prices.

Similarly, request 7 calls for the production of "any and all documents relating to, regarding or evidencing and transaction or proposed transaction in any cryptocurrency" and request 8 seeks "[a]ny documents that relate or reflect and communication regarding cryptocurrency or any proposed transaction, including any firm or individual that transacts business in cryptocurrency." Doc. 637-1 at 8.[2] Like bank accounts or other financial assets, cryptocurrency could fund the purchase of the missing coins, serve as a substitute asset for turnover, or simply be liquidated to pay a $530,000 money judgment.

According to the R&R, the Receiver must demonstrate Mr. Davison's ability to comply with the Court's order – *i.e.*, to pay the Final Judgment. If Mr. Davison never truly owned the coins he claimed to own, he must remedy his noncompliance from another source like a bank account or cryptocurrency. The Court should not require the Receiver to prove Mr. Davison's ability to comply in the R&R while simultaneously denying the Receiver the ability to inquire through subpoenas into such collateral sources in the Omnibus Order. Put simply, the Court should not fault the Receiver for failing to provide evidence while limiting his attempts to obtain the requisite evidence.

[2] The other requests in Mr. Davison's subpoenas related to watches, and the Receiver believes that dispute has been resolved.

II. NICOLE DAVISON IS ALSO BOUND BY THE ASSIGNMENT

Brian Davison executed the assignment not only on his own behalf but also on behalf of his wife, Nicole Davison:

> WHEREAS, Brian Davison represents that he has the express authority to enter into this Assignment on behalf of himself, his wife and those entities which he controls…
>
> Mr. Davison represents and warrants that the assets listed on Exhibits A and B are the only assets owned by him, his wife or the entities he controls that exceed $5,000 in value…
>
> By virtue of this Assignment, the Receiver forgoes any claims that the Receiver would have against Davison, his wife, or the entities he controls…

Doc. 767-1 at 1-2 (emphasis added). As such, Nicole Davison is a party to this dispute, and the arguments made above with respect to Brian Davison apply with equal force to Nicole Davison.

CONCLUSION

If the Court adopts the R&R, it should also allow the Receiver to obtain documents regarding Mr. Davison's substitute assets, including bank accounts and cryptocurrency, so that the Receiver can demonstrate Mr. Davison's ability to comply with the Court's order and to pay the Final Judgment, even if Mr. Davison never owned the coins that he pledged in partial satisfaction of his disgorgement obligation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 30, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

Respectfully submitted,

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