UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
v.
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;
310 78TH AVE, LLC;
551 3D AVE S, LLC;
604 WEST AZEELE, LLC;
2101 W. CYPRESS, LLC;
2112 W. KENNEDY BLVD, LLC;
5123 E. BROADWAY AVE, LLC;
BLUE WATERS TI, LLC;
BNAZ, LLC;
BR SUPPORT SERVICES, LLC;
BUNGALOWS TI, LLC;
CAPRI HAVEN, LLC;
EA NY, LLC;
EQUIALT 519 3RD AVE S., LLC;
MCDONALD REVOCABLE LIVING TRUST;
SILVER SANDS TI, LLC;
TB OLDEST HOUSE EST. 1842, LLC;
Relief Defendants.
_____/

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

DEFENDANT BRIAN DAVISON'S MEMORANDUM OF LAW
IN OPPOSITION TO SEC ORDER TO SHOW CAUSE

Defendant Brian Davison ("Davison") hereby submits the following in opposition to the proposed Order to Show Cause ("OSC") submitted by plaintiff Securities and Exchange

Commission ("SEC"). As set forth below, the SEC fails to satisfy the two required prongs for the injunctive relief it seeks. First, it fails to establish a *prima facie* case that Davison violated the securities law. Second, it fails to show a reasonable likelihood that Davison will repeat the purported wrong. Consequently, the SEC's application for a preliminary injunction should be denied. Moreover, as the injunction is the predicate for the imposition of a receivership, the receivership should also be lifted and/or modified.

I.

INTRODUCTION

The SEC seeks the extreme remedy of an injunction and the imposition of a receivership over certain entities, including certain real estate debenture investment funds, including EquiAlt LLC (the manager of the following entities), EquiAlt Fund, LLC ("Fund I"), EquiAlt Fund II, LLC ("Fund II"), EquiAlt Fund III, LLC ("Fund III") and EA SIP, LLC ("EA SIP") (collectively, the "Funds").

The Funds were separate investment vehicles that obtained investments through debentures – instruments with set, periodic interest payments – and used those funds to buy distressed real estate assets. Ultimately, according to the Receiver, the Funds acquired over 350 residential units, and other properties. *See, e.g.*, Receiver's First Quarterly Report, Docket Entry 84, at 50. As the independent appraisals of ten properties from 2017 reflect, these properties had substantial value – and this was three years ago. *See* Exhibit 6. These ten properties – out of more than 350 – were worth almost $30 million three years ago.[1]

[1] These appraisals are only a small subset of the independent appraisals conducted in 2017, but it is respectfully submitted that they are indicative of the significant value that these properties represented.

At the time that this action was commenced, several of the Funds had entered into the wind-down phase, some of the Funds had already been gated, and Davison was spearheading the sale of properties to generate funds to pay investors.

The Amended Complaint ("Am. Cmplt.") asserts that the Funds relied on a wide range of purportedly material misrepresentations and omissions to raise money from supposedly unaccredited investors. Yet the SEC's efforts founder upon one essential failure: according to the SEC's own allegations, and the documents it has submitted in support thereof, Davison was not responsible for those misrepresentations. Moreover, to the extent that oral misrepresentations might have been made by other defendants, the written disclosures that investors received directly contradicted those claimed oral misstatements.

Furthermore, since the Funds are no longer taking any new investors, there is no need for the radical remedy of a receivership. That is especially true since the Receiver appears merely to be executing the plan that Davison had set out to liquidate properties in order to pay back investors.

Finally, notwithstanding SEC fear-mongering that this is some kind of classic Ponzi scheme, that inflammatory assertion is negated by the fact that the Funds acquired hundreds of properties, most of which were occupied, and were in the process of selling many of them off.[2] While the SEC apparently confuses the acquisition cost of these properties with their actual fair market value in making the assertion that there insufficient assets to pay back the investors, which is not likely to be the case (*see also* below).

[2] Further demonstrating that the operations of the Funds were real and substantial, the Funds were recognized as one of the larger purchasers of tax liens that allowed them to buy assets cheaply. *See*, *e.g.*, https://www.tampabay.com/news/business/realestate/tampa-investor-profits-when-people-dont-pay-their-property-taxes/2223949/; *see also* https://www.businessobserverfl.com/article/equialt-tampa-distressed-property-investment.

II.

BACKGROUND – THE SEC'S OWN SUBMISSIONS DEMONSTRATE THE ABSENCE OF ACTIONABLE CLAIMS AGAINST DAVISON

For a case that alleges a widespread scheme to defraud by misrepresenting the nature of interests purchased by investors and the risks associated with that investment, it is striking that the SEC's submissions not only demonstrate that Davison played no role in making those alleged misrepresentations, but that many of these were directly contradicted by written disclosures provided to investors.

First, the Amended Complaint fails to set out that Davison is responsible for those misrepresentations. The Amended Complaint clearly states – repeatedly – that it was Rybicki who was in charge of the marketing and selling process. It states that "Davison and Rybicki largely split their primary functions" (Am. Cmplt. ¶ 38) and that "Rybicki primarily controlled communications with investors [and] marketing" and executed agreements with investors. *Id*., ¶ 4. *See also id*., ¶ 11 ("Rybicki's activities were largely directed toward soliciting and raising money from investors" and "Rybicki communicated directly with investors, and raised money from investors for the Funds"), ¶ 41("Rybicki was otherwise primarily responsible for raising money for the Funds from investors.")

Rybicki was in charge of the sales force, as well as marketing materials. The Amended Complaint alleges that "Rybicki created, reviewed, or approved changes to marketing materials" and "controlled the distribution or dissemination of the Funds offering documents to prospective investors." Am. Cmplt. ¶ 40. The SEC makes clear that "Rybicki primarily controlled the sales force and communications with investors" (*id*.) and that he "managed EquiAlt's relationships with various third-party sales agents," "provided those agents with marketing and offering materials" and "advised third-party sales agents that neither a license nor registration were

required to sell EquiAlt securities." *Id*., ¶ 41; ¶ 47 ("sales force was amassed in large part by Rybicki.") *See also id*. at ¶¶ 58, 64-67, 71-72, 76.

Second, the materials submitted by the SEC in support of the Order to Show Cause, consisting of investor questionnaires and other materials from investors, further demonstrate that Davison cannot be implicated in any misrepresentations in the selling process.

The SEC submitted, contemporaneously with its initial application, what were marked as Exhibits 6, 36, 37 and 28 (Docket Entries 7-2, 7-6, 7-7 and 7-8; these are attached hereto as Exhibits 1, 2, 3 and 4). These exhibits included questionnaires from various investors, and a declaration of one investor, James M. Conley, that attached the disclosure materials he received from one of the sales agents Rybicki controlled. *See* Ex. 4, DE 7-8 at ¶¶ 9, 17.

In the first investor questionnaire (Ex. 1, DE 7.2 at pages 1-7)) the investor relates that it was Rybicki who contacted them, notes no misrepresentations were made to that investor, and then adds "Everything has gone smoothly." The second investor questionnaire (DE 7.2 at pages 8-14) also states that the investor was contacted by Rybicki, not Davison.

Docket Entry 7.6, Exhibit 2 hereto, includes questionnaires from multiple investors. Not one says they had any contact with Davison but instead they state that they interacted with Rybicki or sales agents Rybicki purportedly controlled. Some also note no alleged misstatements were made, *see, e.g*., DE 7.6 at 5-6, and as another investor proclaimed "So Far I'm Happy With Them!" DE 7.6 at 63; Ex. 2 hereto.

Exhibit 37 (Docket Entry 7.7, and Exhibit 3 hereto) contains an additional investor questionnaire, which provides he had not been contacted by Davison. *See, e.g*., DE 7.7 at 3.[3]

[3] This questionnaire also included a January 8, 2020 letter (page 8), noting that the Fund is closed and that they would shift to "the sale of the fund's assets to repay all investor principle starting in Q1 2020." It provided that

Exhibit 38, DE 7-8, Exhibit 4 hereto, which includes the materials from Conley, also indicate that he never spoke to Davison.[4]

Third, the allegations set out in the Amended Complaint are directly contradicted by disclosures set out in the materials sent to investors. A comparison of the allegations set out in the Amended Complaint with statements made in disclosure documents sent to investors further erodes the claims made by the SEC.

WHAT IS CLAIMED	**WHAT THE DISCLOSURES SAID**
Investors were told that investments in the EquiAlt funds were secure, safe, low risk, and conservative. Am. Cmplt. ¶¶ 3, 46, 72	The written disclosures provided to investors stated that "INVESTMENT IN THE SECURITIES INVOLVES A HIGH DEGREE OF RISK" (Fund II May 10, 2013 Private Placement Memorandum ("PPM"), Ex. 5,[5] at i; *see also id.* at 3; Fund II March 29, 2017 PPM at 3, and 5 ("Investment herein involves substantial risk.")[6]; EA SIP LLC January 23, 2016 PPM at i-ii, and 7-9[7]; Equialt Fund LLC 2018 Subscription Agreement, Section 4.1.[8]
The PPM's misstated the uses of investor proceeds.	"Because any projection of the future is subject to uncertainties, actual results could vary significantly from those estimated. All uses of proceeds are estimated and subject to

"Management estimates that the value of the assets exceeds the liabilities against the fund." Finally, it sets out a plan involving "a pipeline of short-term flips to assist with cash flow and liquidity in the wind-down process."

[4] Conley's Declaration included various disclosures, which provided, among other things, that investments were risky and not registered (Ex. 4, at 68, 75, 85); that investor had to be accredited (*id*., 72), and that commissions of up to 14% would be paid (*id*., 100). All these disclosures negate the claim by the SEC of misrepresentations regarding those matters.

[5] A copy of this PPM was included as Exhibit 12, Docket Entry 7-5, pages 1 through 14 to the SEC's original moving papers, and is submitted with this memorandum as Exhibit 5.

[6] This PPM is included in Docket Entry 7-8, included as Exhibit 4 hereto, at pages DE 7-8 at pages 11-29.

[7] This PPM is included as pages 32 through 49 of Docket Entry 7-5.

[8] This subscription agreement is included as pages 35 through 63 of Docket Entry 7.6, which is included as Exhibit 2 to this Memorandum.

	change." 10. Fund II May 10, 2013 PPM, Ex., at 4; *see also* EA SIP LLC PPM, at 9.
"EquiAlt false told investors in at least one Fund (Fund 2) it was registered with the Commission." Am. Cmplt. ¶ 79.	"THESE SECURITIES HAVE NOT BEEN REGISTERED WITH NOR APPROVED OR DISAPPROVED BY THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION. . . . THIS OFFERING HAS NOT BEEN APPROVED OR DISAPPROVED UNDER APPLICABLE STATE SECURITIES LAWS" Fund II May 10, 2013 PPM, at i. *See also* March 29, 2017 PPM at i, 4; Subscription Agreement at Section 4.6; EA SIP LLC PPM at i, 5; 2018 Equialt Fund, LLC Subscription Agreement, at Section 4.6 ("The Subscriber understands that the Units have not been registered.")
"Defendants also failed to disclose the various fees being paid by the Funds." Am. Cmplt. ¶ 60; *see also id*. at 61; 69 ("Investors were also misled about the payment of management fees to EquiAlt").	"This Offering offers substantial compensation and benefits to the Manager and other affiliates." Fund II May 10, 2013 PPM, at 12. *See also* March 29, 2017 PPM at 9, 13; EA SIP LLC PPM at 4, 10, 12.
"Defendants also failed to adequately disclose to investors that their funds would be used to pay commissions to unregistered third party sales agents." Am. Cmplt. ¶ 63.	"The Company may utilize the services of one or more registered broker/dealers or other financial intermediaries. In such cases, the Company may pay commissions or fees of up to 12% to such persons." Fund II May 10, 2013 PPM, at 3. *See also* Subscription Agreement for Fund II, at Section 3.8 ("The Company may pay commissions of up to fourteen percent (14%) to licensed broker/dealers or finders in connection with this Offering.")

III.

THE SEC IS UNLIKELY TO PREVAIL ON ITS CLAIMS

A. The Section 5 Claims Are Deficient (Count I)

To prevail on a claim for violation of Section 5, the SEC must show that Davison was a "necessary participant" and "substantial factor" in the sale of the unregistered securities at issue.

Here, the SEC has not sufficiently alleged that Davison was either and, accordingly, they are not like to prevail on this claim.

The elements of a Section 5 violation are that: (1) the defendant sold or offered to sell securities; (2) no registration statement covered the securities; and (3) the sale or offer was made through the use of interstate facilities or mails. *SEC v. Randy*, 38 F. Supp. 2d 657,667 (N.D. Il. 1999).

"To demonstrate that a defendant sold securities, the SEC must prove that the defendant was a 'necessary participant' or 'substantial factor' in the illicit sale." *SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004). When determining whether the defendant was a "necessary participant," the courts will look at "whether, but for the defendant's participation, the sale transaction would not have taken place." *SEC v. Universal Exp., Inc.*, 475 F. Supp. 2d 412, 422 (S.D.N.Y. 2007) (citing *SEC v. Murphy*, 626 F.2d 633, 650–51 (9th Cir. 1980).) However, but-for causation is not sufficient for liability. *SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248 (9th Cir. 2013).

> For example, a printer may prepare key documents or a bank may advance cash to a customer upon the customer's presentation of an instrument and then pass the instrument to another person. Both would satisfy a "but for" causation test, but these acts nonetheless do not render the defendants sellers. Before a person's acts can be considered the proximate cause of a sale, his acts must also be a substantial factor in bringing about the transaction.

Id. at 1255 (quoting *Murphy*, 626 F.2d at 650.)

Additionally, a defendant's title alone does not determine whether he is liable for violating Section 5. *Id.* at 1258. For example, in *SEC v. Jammin Java Corp.*, 2016 WL 6595133, at *17 (C.D.Cal. July 18, 2016), the court held that allegations of ownership of an allegedly illicit seller, absent further allegations of participatory conduct in a scheme, were insufficient to state a

claim for violation of Section 5. There, the court dismissed the complaint against defendants against whom there were only conclusory allegations of participation in their respective entities' sale of stock, noting that "SEC seeks the unreasonable inference that their ownership is sufficient to establish then personal participation." *Id.*

A similar result was reached in *SEC v. BIH Corp.*, 5 F. Supp. 3d 1342, 1347 (M.D. Fla. 2014), where the court held that a defendant who admitted to receiving sale proceeds and writing and disseminating press releases for the company, but denied approaching the buyers and structuring the transaction at issue, was not, as a matter of law, a "necessary participant" or a "substantial factor" in the sale.

Here, the Amended Complaint makes clear that it was not Davison, but Rybicki, who is alleged to have sold or offered to sell securities in violation of Section 5: "Davison and Rybicki largely split their primary functions" (Am. Cmplt., ¶ 38); "Rybicki primarily controlled communications with investors [and] marketing…and executed agreements with investors" *(id.* at ¶ 4); "Rybicki's activities were largely directed toward soliciting and raising money from investors" (*id.* at ¶ 11); "Rybicki communicated directly with investors, and raised money from investors for the Funds." (*id.*); "Rybicki primarily controlled the sales force and communications with investors" (*id.* at ¶ 40); "Rybicki was otherwise primarily responsible for raising money for the Funds from investors" (*id.* at ¶ 41); "Rybicki managed EquiAlt's relationships with various third-party sales agents (acting as unregistered broker-dealers)" (*id.*); "Rybicki even advised third-party sales agents that neither a license nor registration were required to sell EquiAlt securities" (*id.*); and "Rybicki also met with investors and solicited investments in the Funds directly" (*id.*).

Given the paucity of sufficiently specific allegations against Davison with respect to the offering and sale of the securities at issue, the SEC is not likely to prevail on the merits of its Section 5 claim.

B. The Fraud Claims Are Deficient

Nor is the SEC likely to prevail on its other claims, all of which sound in fraud. Among other things, the Amended Complaint fails to plead fraud with particularity.

"Rule 9(b) of the Federal Rules of Civil Procedure provides, in pertinent part, that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.' Fed.R.Civ.P. 9(b).'" *SEC v. Spinosa*, 31 F.Supp. 3d 1371, 1374 (S.D. Fla. 2014). "This Rule 'serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." *Id* at 1374-75. (internal citations omitted). In order to satisfy this requirement, the complaint must set forth "(1) the exact statements or omissions made; (2) the time and place of each such statement and who made the statement or omission; (3) the substance of the statement and how it misled the plaintiff and (4) the defendants' gain due to the alleged fraud." *Spinosa*, 31 F.Supp. 3d at 1375 (internal citations omitted). *See also SEC v. Spartan Sec. Grp., Ltd*., 2019 WL 2372277 (M.D.Fla. June 5, 2019) (Rule 9(b) requires the claim to set forth: "'(1) precisely what statements or omissions were made in which documents or oral representations; (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) them; (3) the content of such statements and the manner in which they misled the plaintiff, and; (4) what the defendant obtained as a consequence of the fraud.'"

While the Amended Complaint asserts that investors were misled, it does not contain the kind of detailed statements required to demonstrate that it was Davison who misled them, let alone demonstrate the time or place of each such misstatement. Remarkably, the materials affirmatively demonstrate that Davison did not make any actionable misrepresentations to investors. Due to the failure to satisfy Fed.R.Civ.Proc. 9(b), it is unlikely that the SEC can prevail on the fraud claims set out against Davison.

The fraud claims are additionally defective for the reasons set out below.

C. The Section 10(b) Claims Are Deficient

In addition to being defective for failing to satisfy Fed.R.Civ.Proc. 9(b), the claims under Section 10(b) of the Exchange Act (Counts V, VI and VII) are deficient.

1. Count VI (violations of Section 10(b) and Rule 10b-5(b) thereunder) Fails

First, the Section 10(b) claim must be dismissed because the SEC fails to allege facts in the Amended Complaint that demonstrate that Davison is the author of any misstatement. As the Supreme Court held in *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011), the "maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it" and that person is the only one who can be held liable for it. As set out below, it was Rybicki, not Davison, who made all of the actionable statements identified by the SEC. Second, to the extent that any misstatements were made in official documents, those misstatements are made by the Funds, not by Davison. Only those corporate defendants, arguably, can be the maker of those statements.

Precedent establishes that the SEC's allegations cannot suffice. For example, in this Circuit, allegations that defendants paid stock promoters to write flattering articles about their company and its stock price and even "worked in conjunction with stock promoters, particularly

with respect to the timing of articles by the stock promoters and company press releases," without disclosing to investors that the articles were paid for, were not sufficient to support a claim for securities fraud because the defendants were not the "makers" of the statements in the articles. *In re Galectin Therapeutics, Inc. Sec. Litig*., 843 F.3d 1257, 1272 (11th Cir. 2016). *See also SEC v. Radius Capital Corp*., 2012 WL 695668, at *7 (M.D. Fla. Mar. 1, 2012) (dismissing 10b-5 claim involving allegedly false statements in prospectuses where the complaint failed to explain "the process by which prospectuses [were] issued and distributed and [did] not identify who was ultimately responsible for the content of the prospectuses.")

Here, as in the cases above, the Amended Complaint does not allege, other than in conclusory fashion, that Davison was the "maker" of any of the false or misleading statements at issue here. In fact Davison is not alleged to have made any oral misstatements to investors or to have been the author of any written misstatements, all of which were alleged to have been made by Rybicki: "Davison and Rybicki largely split their primary functions" (Am. Cmplt., ¶ 38); "Rybicki primarily controlled communications with investors [and] marketing…and executed agreements with investors" (*id*. at ¶ 4); "Rybicki primarily controlled the sales force and communications with investors" "Rybicki created, reviewed, or approved changes to marketing materials" and "controlled the distribution or dissemination of the Funds offering documents to prospective investors" (*id*.); "Rybicki, or others under his direction, supervision, or control, provided account statements to investors showing that almost 90% of investors' funds were invested in real estate" (*id*. at ¶ 58); "Rybicki knew that many of the subscription agreements he signed with investors falsely stated that investments in the Funds were being sold 'without commissions'" (*id*. at ¶ 64); "Rybicki also knew his representations to investors about commissions were false as it was his role to recruit and pay the sales agents' commissions" (*id*.

at ¶ 65); "The misrepresentations [regarding management fees] were repeated in Account Statements Rybicki drafted and sent to investors" (*id*. at ¶ 72); and "Rybicki also made oral misrepresentations to investors regarding the safety of investing in the funds" (*id*. at ¶ 76).

Furthermore, the SEC is not likely to prevail on this count because it cannot show, based on the allegations in the Amended Complaint, that it was Davison who made any oral misrepresentations to investors. In order to show that the defendant violated subsection (b), "'the SEC must allege that the defendant '(1) made a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities.'" *SEC v. Fiore*, 416 F.Supp. 3d 306 (S.D.N.Y. 2019) (quoting *SEC v. Frohling*, 851 F.3d 132, 136 (2d Cir. 2016)). *See also SEC v. Monterosso*, 756 F.3d 1326, 1333-34 (11th Cir. 2017). The absence of specific allegations that Davison made actionable misrepresentations to investors further dooms this claim.

2. Counts V and VII Are Defective

In Counts V and VII, the SEC alleges violations of Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c) thereunder. Each of these also fails.

In order to establish that a defendant violated subsection (a) or subsection (c), "'the SEC must allege that the defendant (1) committed a manipulative or deceptive act; (2) in furtherance of the alleged scheme to defraud; and (3) with scienter.'" *Fiore*, 416 F.Supp. 306, at 319 (quoting *SEC v. Thompson*, 238 F.Supp. 3d 575 (S.D.N.Y. 2017)).

But there are no allegations that Davison personally committed any manipulative acts in connection with the purchase or sale of a security. The Supreme Court recently clarified the effect of its *Janus* ruling on the other subsections of Section 10(b), in *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019). In *Lorenzo*, the Supreme Court held that in certain circumstances a person can be

held liable under subsections (a) and (c) for directly disseminating misleading statements to investors, even if they are not the maker of those statements. However, as set out in *Lorenzo*, they must have directly distributed materials containing misstatements to investors, while knowing that they were false.

Thus, the Amended Complaint fails under *Lorenzo*, as there are no allegations that Davison directly disseminated misleading materials to investors. Again, not only are there no allegations to that effect, all the materials submitted by the SEC demonstrate that Davison had no involvement with distribution of materials to investors. Moreover, as set forth above, claimed oral misrepresentations were contradicted by written statements, making even less likely that the SEC will prevail on this claim.

D. The Section 17 Claims Fail (Counts II through IV)

As the person not involved in investor communications, who did not get directly involved in or transmit the alleged misstatements to investors, it will be difficult for the SEC to prove a case under 17(a)(1) or (a)(3) against Davison. In addition to the reasons set out above, there is an additional reason to dismiss these claims: Davison did not commit fraud in connection with the purchase or sale of securities.

"Section 17(a) of the Securities Act, section 10(b) of the Exchange Act and Rule 10b–5, all proscribe fraudulent conduct ***in the purchase or sale of securities***." *SEC v. Radius Capital Corp*., 2012 WL 695668, *3 (M.D. Fla. Mar. 1, 2012) (emphasis supplied). *See also SEC v. Levin*, 2014 WL 11878357, *14 (S.D. Fla. Oct. 6, 2014) "Section 17(a) of the Securities Act prohibits fraud ***in the offer or sale of securities***.")(emphasis supplied)

Whatever Davison might have done with respect to managing the Funds, that purported misconduct is irrelevant when weighed against the fact that there are no claims against him that

are in connection with the offer or sale of securities. Back office shenanigans, even if proven, cannot be the basis of a Section 17 claim.

E. Control Person Liability (Count VIII) Cannot Be Established

The SEC does not allege facts sufficient to show that Davison controlled Rybicki or the sales agents. To the contrary, the Amended Complaint sets out that Rybicki controlled them. As noted in *SEC v. LottoNet Operating Corp*., 2017 WL 6949289 (S.D. Fla. Mar. 31, 2017), for control person liability to attach in the Eleventh Circuit, the defendant has to have had the power to control the general affairs of the entity primarily liable at the time the entity violated the securities laws ... [and] had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in the primary liability.'" Id. at *17. *See also SEC v. Huff*, 758 F.Supp.3d 1288, 1342 (S.D. Fla. 2010) (control person liability requires the power to direct and control the conduct that resulted in the primary liability).

Here, as the Amended Complaint sets out, it was Rybicki who controlled the sales staff. *See, e.g*., Am. Cmplt. ¶¶ 11, 40, 41, 47, 58. Given that, it is unlikely that the SEC will prevail on this claim either.

F. Aiding and Abetting Liability (Count IX) Is Not Established

"For aiding and abetting liability under the federal securities laws, three elements must be established: (1) a primary or independent securities law violation committed by another party; (2) awareness or knowledge by the aider and abettor that his or her role was part of an overall activity that was improper; also conceptualized as scienter in aiding and abetting antifraud violations; and (3) that the aider and abettor ***knowingly and substantially assisted the conduct that constitutes the violation***." *SEC v. Levin,* 2014 WL 11878357, *20 (S.D. Fla. Oct. 6, 2014) (emphasis supplied)(citation omitted); *see also SEC v. Spartan*, * 6; *SEC v. LottoNet Operating Corp*., 2017 WL 6949289, *18 (S.D.Fla. Mar. 31, 2017).

Here, the Amended Complaint is devoid of allegations that Davison "knowingly and substantially assisted" the purportedly violative conduct of Rybicki and the sales staff Rybicki supervised. Nor does the SEC allege facts that would show that Davison even knew about Rybicki's alleged misconduct with respect to investors. Accordingly, the SEC is unlikely to prevail on this claim.

IV.

THE SEC HAS NOT SHOWN A LIKELIHOOD OF THE WRONG BEING REPEATED

The gravamen of the SEC's Amended Complaint is the claim that there was an ongoing sale of investments in the Funds that had to be halted. *See, e.g.,* Am. Cmplt. ¶¶ 1, 3, 9. Leaving aside the question of whether that was completely true at the time this action was commenced (and indeed, the January 8, 2020 letter to investors, at Docket Entry 7-7, page 8, would indicate that at least by that point some of the Funds were being wound down and assets being sold to pay back investors), it is certainly no longer the case.

There are not going to be any additional investors. The Receiver is executing the plan originally created by Davison to realize value for investors by selling off properties – including one that had been listed prior to the Receivership. (*See* Docket Entry 137). There is thus no ongoing fraud to block.

Instead there is simply the orderly wind-down of the funds. As Docket Entry 137 reflects, Davison purchased the property in question at a tax auction for $10,500 on June 13, 2013. *See* Docket entry 137, at 4 n.3. The Receiver is selling it for $92,500.00 – a substantial increase of value that proves the validity of the Funds' investment thesis of investing in distressed real estate.

Moreover, we understand that the Receiver has largely retained the same staff that Davison employed. If the Funds were being run as an illegal scheme, it makes little sense that the Receiver would retain the same staff.

Given that the SEC's legal case against him is weak, and there is no likelihood of the purported wrong continuing, it makes sense for the Court to lift the Receivership, or convert it into a monitorship, as set out below.

V.

IF NOT LIFTED, THE RECEIVERSHIP SHOULD BE CONVERTED INTO A MONITORSHIP

The appointment of a receiver by a federal court is governed by federal law and equitable principles. Fed. R. Civ. P. 66; *Cadence Bank, N.A. v. E. 15th St., Inc.*, 2013 WL 2151743, at *3 (M.D. Fla. May 16, 2013); *Marolax*, 2008 WL 6256745, at *1 (*citing National Partnership Investment Corp. v. National Housing Development Corp.*, 153 F.3d 1289, 1292 (11th Cir. 1998)).

As multiple courts have proclaimed, the appointment of a receiver is an extraordinary equitable remedy, justified only in extreme circumstances, when there is no remedy at law or the remedy is inadequate. *Cadence Bank, N.A. v. E. 15th St., Inc.*, 2013 WL 2151743, at *3 (M.D. Fla. May 16, 2013); *Marolax Handels-Und Verwaltungsgesellschaft MBH v. 898 5th Ave. S. Corp.*, 2008 WL 6256745, at *1 (M.D. Fla. Dec. 17, 2008), report and recommendation rejected on substantive grounds, 2009 WL 1660036 (M.D. Fla. June 15, 2009) (*citing Hollywood Healthcare Corp. v. Deltec, Inc.*, 2004 WL 1118610 *10 (D. Minn. May 17, 2004).[9] It is

[9] *See also F.T.C. v. Direct Mktg. Concepts, Inc.*, 2006 WL 149039, at *4 (D. Mass. Jan. 19, 2006) ("[T]he appointment of a receiver is an extreme remedy, described by some as "draconian," and is not a course to be cavalierly pursued."); *Fid. Bank v. Key Hotels of Brewton, LLC*, 2015 WL 1623952, at *4 (S.D. Ala. Apr. 13, 2015) (denying receivership because placing property into hands of receiver would have been "draconian step").

especially draconian here given that the SEC never gave Davison notice of the pending action and never gave him the opportunity to address any problematic operational issues.

This draconian remedy is not justified here. Instead, to the extent the Court believes that some sort of supervision over the wind-down of the Funds is required, it should impose a monitorship instead. Under some circumstances, the appointment of monitor-type arrangements are preferable to receiverships because they are less intrusive. *See, e.g., Sec. P. Mortg. and Real Est. Services, Inc. v. Republic of Philippines*, 962 F.2d 204, 212 (2d Cir. 1992) (monitor-like special property advisor approved in part because it was deemed "far less intrusive than a receiver); *U.S. v. Govt. of Guam*, 2008 WL 732796, at *3 (D. Guam Mar. 17, 2008), order clarified, CV 02-00022, 2017 WL 5907861 (D. Guam Jan. 27, 2017) ("monitors generally play a less intrusive role than masters or receivers").

Davison would consent to convert the receivership into a monitorship, and is committed to working hand in glove with the Monitor to maximize value for investors. Moreover, to assuage any potential judicial concerns, Davison would agree to have all significant expenditures and sales subject to court approval.

CONCLUSION

As set forth above and in the accompanying papers, the SEC has failed to establish a likelihood of success on its claims against Davison. Consequently, the relief it seeks – including the appointment of a receiver – should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed via the Court's CM/ECF system, which will send an electronic copy of the foregoing and a notice of filing same to all counsel of record, on this 29th day of July, 2020.

/s/ Gerald D. Davis
Attorney