UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CIVIL ACTION NO. 8:20-cv-325-T-35AEP

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BRIAN DAVISON, et al.,

Defendants, and Relief Defendants.

BARRY M. RYBICKI'S RESPONSE TO ORDER TO SHOW CAUSE

I. INTRODUCTION

Defendant Barry M. Rybicki, by and through the undersigned, respectfully submits the following Response to Order to Show Cause. This Court should deny the pending Motion for Preliminary Injunction and reconsider its orders granting the Commission's emergency *ex parte* motions for appointment of receiver and for temporary restraining order, asset freeze, and other injunctive relief as they relate to Mr. Rybicki. For the reasons set forth below, the Commission is not likely to succeed on the merits in its claims against Mr. Rybicki, who relied upon bad advice of counsel. Moreover, as the evidence shows, Mr. Rybicki immediately took steps to cease any improper conduct as soon as he learned that the advice upon which he relied was faulty, and thus poses no danger of repeated conduct.

II. MEMORANDUM OF LAW

A preliminary injunction is "an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion'" as to each of the four prerequisites.

McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998). To obtain a preliminary injunction, the SEC must first establish, as a threshold matter, that there have been violations of the securities laws. *SEC v. Telecom Marketing, Inc.*, 888 F.Supp. 1160, 1166 (N.D.Ga.1995). In analyzing the need for injunctive relief, courts must then focus on whether there is a reasonable likelihood that the defendant, if not enjoined, will again engage in the illegal conduct. *SEC v. Blatt*, 583 F.2d 1325, 1334 (5th Cir.1978). Factors to be considered are the degree of scienter involved, the isolated or recurrent nature of the infraction, the sincerity of the defendant's assurances against future violations, and the likelihood, based on the defendant's occupation, that future violations might occur. *SEC v. Bonastia*, 614 F.2d 908, 912 (3rd Cir.1980). In its showing of a defendant's reasonable likelihood of future violations of securities laws, it is not enough for the SEC to show mere past violations. Rather, the SEC must move beyond that and offer positive proof of the likelihood of further violations in the future. *SEC v. Warner*, 674 F. Supp. 841, 844 (S.D. Fla. 1987). Moreover, the more onerous the injunction sought by the Commission, the more severe its burden. *See SEC v. Compania Internacional Financiera S.A.*, No. 11 CIV 4904, 2011 WL 3251813, *7 (S.D.N.Y. July 29, 2011) ("Like any litigant, the Commission [is] obliged to make a more persuasive showing of its entitlement to a preliminary injunction the more onerous are the burdens of the injunction it seeks."). As demonstrated below, the Commission is not entitled to a preliminary injunction here. First, even if the Commission could demonstrate a substantial likelihood of success on the merits, it has not presented and cannot offer positive proof that of a reasonable likelihood Mr. Rybicki will commit future violations. Absent this evidence, a preliminary injunction cannot be entered against him. *Warner*, 674 F. Supp. at 844.

A. The Commission Cannot Show a Substantial Likelihood of Success on the Merits

To prevail on the relief sought, the Commission must demonstrate a substantial likelihood of success that Mr. Rybicki violated the registration and antifraud provisions of the securities laws cited in the Commission's *ex parte* motion. *See* Pl. Mot. for TRO (DE 4) at 22-35.

As presented, the Commission's brief and supporting exhibits do not demonstrate any likelihood of success despite the Commission's statement that it has provided a "more than an adequate basis to make a threshold finding" of violations. See Pl. Mot. at 22. The current record does not support the Commission's allegations that EquiAlt is a Ponzi scheme. Instead, the record, as crafted by the Commission and rebutted by this brief, consists exclusively of conclusory allegations and inaccurate interpretations of evidence. These allegations and interpretations serve as central pillars to the Commission's case against EquiAlt, and yet the Commission made no effort to provide specific citations to the underlying support. Indeed, the evidence obtained by Commission prior to filing undermines the Ponzi scheme allegation.

The Commission's allegations regarding Mr. Rybicki's role in EquiAlt fare no better. The Commission's allegations are either unsupported by evidence or contradicted by the testimony they obtained from Mr. Davison and fail to take into account that Mr. Rybicki acted pursuant to legal advice provided by counsel. There is a reason that the Receiver in this case took the highly unusual step of moving this Court, even before the hearing on the Preliminary Injunction, for an order appointing outside counsel to investigate and pursue claims against law firms that provided services to EquiAlt. Rec'r Mot. for Leave to Appoint Counsel (DE 121).

B. The Commission's Ponzi Scheme Analysis is Flawed

The Commission's first allegation of fraud is that EquiAlt is a Ponzi scheme. Amended Complaint (DE 138), ¶ 2 ("[w]ithout sufficient revenues to pay the money owed to investors, the Defendants, in classic Ponzi scheme fashion, resorted to using new investor money to pay the returns promised to existing investors.") The Ponzi scheme, according to the Commission, operated by "paying investors their monthly interest payments for the debentures by raising and using new investor funds to pay old investors." *Id.* at ¶48. However, the Commission's allegations that EquiAlt was operated as a Ponzi scheme are flawed.

The SEC's allegations plainly contradict its assertions that the Defendants operated EquiAlt as a Ponzi scheme. Amend. Compl. ¶48. The Eleventh Circuit has described a Ponzi scheme as a "phony investment plan in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors." *United States v. Silvestri*, 409 F.3d 1311, 1317 n.6 (11th Cir. 2005). Black's Law Dictionary defines a Ponzi scheme as:

> A fraudulent investment scheme in which money contributed by later investors generates artificially high dividends for the original investors, whose example attracts even larger investments. Money from the new investors is used directly to repay or pay interest to old investors, usually *without any operation or revenue-producing activity* other than the continual raising of new funds. This scheme takes its name from Charles Ponzi, who in the later 1920s was convicted for fraudulent schemes he conducted in Boston.

Black's Law Dictionary (7th ed.1999) at 1180 (emphasis added).

However, instead of a "phony investment plan" "without any operation or revenue producing activity," the Commission's allegations establish that EquiAlt's and Mr. Davison's use of investor proceeds generated real estate and cash holdings totaling at least $145 million. Amend. Compl. ¶ 45. Additionally, the Commission even concedes that "in December 2016 non-investor revenues for the Funds for that month were $1.6 million," demonstrating that the

investor proceeds were generating real estate and cash holdings. *Id.* at ¶ 49. Moreover, the Commission's $145 million estimate of EquiAlt's real estate and cash holdings does *not* include those of Fund III, Amend. Compl. ¶ 6, which stopped raising investor proceeds in December 2015 and is now closed, Amend. Compl. ¶ 15. The Commission alleges that Funds I, II, III, and EA SIP raised $170 million but "only" have real estate and cash holdings totaling $145 million; however, they fail to account for the real estate and cash holdings Fund III generated before it closed.

Given the Commission's allegations of a Ponzi scheme, this omission is critical. Even *excluding* the assets in Fund III, EquiAlt *still* held cash and real estate valued at more than 85% percent of the total deposited by investors ($145/170 million), and bears little resemblance to the "phony investment plan" contemplated by the Eleventh Circuit in *Silvestri*, or the investment "without any operation or revenue producing activity" described by Black's Law Dictionary.

This is not the only instance the Commission fails to properly characterize the true nature of the Funds. The Commission alleges that by December 2020, investors in Fund I, II, and EA SIP "will be owed approximately $68.9 million in revenue." Amend. Compl. ¶ 50. But the Commission's description of the debentures sold to investors in those Funds—which define what investors are owed and when—undermines its own allegation. The Commission alleges that Defendants sold investors "3-year or 4-year debentures providing fixed annual returns of 8-10%." Amend. Compl. ¶46. As such, Defendants would be obligated to pay back principal to investors three or four years from the date of investment. However, the investors did not all invest at the same time. Absent some warp in the space-time continuum, there is simply no way that all the debentures (signed at different times and with different terms) *could* mature in

December 2020 as the Commission alleges. Aside from being temporally flawed, this allegation is also internally inconsistent with other allegations.

The Amended Complaint, alleges that "[w]hile Fund 3 is now closed, Fund 1, Fund 2, and the EA SIP Fund have collectively been raising from investors $2-3 million per month since January 2018, and have raised more than $170 million from investors." *Id.* at ¶ 48. Even if true, EquiAlt will owe principal to those investing in January 2018 in three or four years (depending on the language of the debenture), meaning in six months from the filing of this document and nearly a full *year* after the Commission filed the original Complaint in this case. Those investing after January 2018 would not be eligible to receive their principal until 2021 or 2022. *None* of the principal raised in 2018 and 2019 (about 28-42% of the total amount EquiAlt raised) would be owed by the December 2020 date asserted in the Amended Complaint. Simply put, the Commission's allegations regarding the December 2020 date and EquiAlt's "inability" to meet its payment obligations by that date are subverted by other allegations that deliver a self-inflicted mortal wound to the Commission's Ponzi scheme theory.

C. The Commission's Allegations Regarding Mr. Rybicki's Role at EquiAlt Are Undermined by The Evidence It Collected.

In pursuit of its Ponzi scheme theory, the Commission has made a number of incorrect and unfounded allegations about Mr. Rybicki, including that: (1) Mr. Rybicki exercised a degree of control over EquiAlt or the Funds; (2) Mr. Rybicki was solely responsible for the content and substance of EquiAlt's marketing materials, including the private placement memoranda for the Funds; (3) Mr. Rybicki knew (or was extremely reckless in not knowing) that third-party sales agents were not registered; (4) Mr. Rybicki and BR Support Services, LLC received approximately $24 million of payments from investors; (5) Mr. Rybicki improperly took cash distributions, between 2017 and 2018 totaling $3.7 million for "return on principal payments"

and (7) Mr. Rybicki made certain specific misrepresentations to investors. These allegations either are "supported" by out-of-context and cherry-picked citations to exhibits or, worse, completely unmoored to evidence or the facts. A careful study of the exhibits used by the Commission to support their untrue allegations reveals that the allegations are without merit.

As will be discussed below in further detail, the facts demonstrate that Mr. Rybicki did not knowingly violate any registration or anti-fraud provisions of the securities laws.

1. Mr. Rybicki Has Not Exercised Any Degree of Control over EquiAlt or the Funds

In its motion for a temporary restraining order, the Commission states that Mr. Rybicki is a principal and "Director of the Funds," that Mr. Rybicki handled investor relations, including relationships with various financial advisors who promoted the Funds, and that Mr. Rybicki spoke directly with prospective investors about investing in the Funds. Pl. Mot. for TRO (DE 4) at 11; Pl. Mot. for TRO, Ex. 4, Davison Tr. at 72-76, 88-89, 94-95. The Commission further asserts that Mr. Rybicki signed subscription agreements with investors and was in charge of the marketing materials and offering documents for the Funds. Pl. Mot. for TRO at 33. Through these allegations, the Commission painted a false picture that Mr. Rybicki exercised control over EquiAlt and the Funds, but, once again, the Commission's own allegations and investigation undermine the Commission's characterization of Mr. Rybicki as a control person.

First, Mr. Rybicki did not exercise any control over the general affairs and specific corporate policies of EquiAlt or the Funds, as that responsibility lay solely with Mr. Davison. As Mr. Davison testified to the Commission, Mr. Rybicki never had any ownership interest in EquiAlt. Pl. Mot. for TRO, Ex. 4, Davison Tr. at 46. Mr. Davison also testified that Mr. Rybicki did not have access to EquiAlt's accounting software and was not involved in the day-to-day management of the Funds. *Id*. at 54, 55, 74. According to the Amended Complaint, it is Mr.

Davison, not Mr. Rybicki, who had signature authority over and controlled the Funds' bank accounts. Amend. Compl. ¶ 10, 39. Indeed, when asked by the Commission to describe EquiAlt's reporting structure, Mr. Davison said that Mr. Rybicki "technically reports to me." *Id.* at 76.

Mr. Davison's testimony to the Commission about Mr. Rybicki's limited role at EquiAlt was verified in testimony the Commission obtained from Denver Stoddart, EquiAlt's controller of accounting. Stoddart Tr., attached as Exhibit "1" at 26. Ms. Stoddard first confirmed to the Commission the reporting structure Davison laid out in his testimony. She testified that she had been interviewed and hired by Davison and that Rybicki played no role in either hiring or supervising her. *Id.* at 30, 35. When asked about Mr. Rybicki's involvement with various financial reports she testified that she had prepared for Davison, Ms. Stoddard testified that she had not discussed the reports with Mr. Rybicki, that he never asked her to provide those financial reports to him, and indeed, that he had not received them. *Id*. at 40. When asked who makes strategic decisions for the funds, Ms. Stoddart replied, "Mr. Davison." *Id*. at 50. When asked who was responsible for analyzing the financial performance of the funds, she identified Tony Kelly, not Mr. Rybicki. *Id*. at 53. Simply put, EquiAlt's CEO and Accounting Controller's testimony to the Commission contradicts the Commission's allegations that Mr. Rybicki had access to or knowledge of EquiAlt's financial records or performance.

2. <u>Mr. Rybicki Is Not in Charge of EquiAlt's Investor Documents.</u>

The Commission relies on the testimony of Mr. Davison to allege that Mr. Rybicki was in charge of the content and substance of EquiAlt's marketing materials and offering documents, including the PPMs and subscription agreements. Pl. Mot. for TRO at 33. However, the Commission cherry-picks from Mr. Davison's testimony while ignoring other, clearly

contradictory testimony he provided in this regard. Worse still, the Commission ignores the testimony of other witnesses that support Mr. Davison's account that Mr. Rybicki was *not* in charge of the content and substance of the marketing materials and offering documents.

The evidence collected by the Commission demonstrates that Mr. Rybicki played no role in drafting the investor documents. When asked about the PPMs, Mr. Davison testified: "[g]enerally speaking, on a transactional basis, I created documents like these with counsel about the time period of 2000—I'm sorry—2011, private placement memorandum generally." Pl. Mot. for TRO, Exh. 4, Davison Tr. at 92. It was Mr. Davison who contacted counsel "to help generate th[e] private placement memorandums," because—according to Davison—Mr. Rybicki did not have the "life experience" to help set up EquiAlt first fund. *Id*. at 99-100. When asked to describe Mr. Rybicki's role, Davison said this: "Barry's job literally was to take our package, go out and see if anybody would carry our product or if met the thresholds that they would put our product on the shelf." *Id.* at 83.

Mr. Davison went on to explain that Mr. Rybicki had "full authorization to provide documents to the prospective investors." *Id*. at 93. Essentially, Mr. Davison is explaining that *he* (along with EquiAlt's legal counsel, Mr. Wassgren) imbued Mr. Rybicki with the "full authorization to provide documents to the investors. As Mr. Davison described it, the "final authority" that Mr. Rybicki had with respect to Fund I was limited to the "framework of the paper that has been provided to us by counsel on a day-to-day basis, yes." *Id.* at 97).[1]

[1] For Fund 2, both the Commission's investigative testimony and its own allegations make clear that another individual named Andre Sears—not Mr. Rybicki—was responsible for Fund 2 sales. Davison testified that Andre Sears was, "on I believe its fund II's private placement. So he raises money for that fund from time to time." *Id*. at 97. Mr. Sears is identified in the Amended Complaint as the "President of Business Development and Marketing," the same title attributed to him in the Fund 2 PPM described by Davison. Def. Rybicki's Mtn. to Diss. Exhibit A (DE 118-1). Denver Stoddart, EquiAlt's controller, said the same: "Andre Sears is like Barry; but he's over like, he gets Fund II investments so to speak; like the middleman between us and the investors." Exh. 1, Stoddart Tr. at 57. The allegations of the Amended Complaint confirm Mr. Sears' role in Fund 2, as all of the false statements therein

Dale Tenhulzen, a sales agent for EquiAlt, corroborates this point. Mr. Tenhulzen testified that he spoke with Mr. Wassgren directly about the PPMs and discussed with Mr. Wassgren how Mr. Tenhulzen would be compensated for selling EquiAlt securities. Tenhulzen Tr. at 27, attached as Exhibit "2". Mr. Tenhulzen testified that he had these conversations with Mr. Wassgren because Mr. Wassgren had informed him "that he wrote the PPM." *Id.* at 30. In short, Mr. Rybicki's alleged authority over the marketing materials and offering documents was limited to whatever Mr. Davison and Mr. Wassgren made available to him.

More importantly, the Commission fails to consider whether Mr. Rybicki had the access, knowledge, and capacity necessary to develop EquiAlt's marketing materials and offering documents. The Commission's evidence suggests otherwise. As previously stated, Mr. Davison testified that Mr. Rybicki did not have access to EquiAlt's accounting software, that Mr. Rybicki had no day-to-day role in the management of the Funds, and that Mr. Rybicki's "job would be to take our packages and offer them to financial advisors to see if they would, you know, carry us a product." Pl. Mot. for TRO, Exh. 4, Davison Tr. at 55, 74, 73. The Commission's evidence demonstrates that Mr. Rybicki did not have access to any of the underlying information necessary to draft, review, or authorize any of the marketing materials or offering documents.

Mr. Rybicki also did not have the knowledge and capacity to develop EquiAlt's marketing materials and offering documents on his own. Mr. Davison acknowledged as much when he testified that he (Mr. Davison) came up with the idea of raising money for the Funds through PPMs, that he hired Mr. Wassgren to provide legal advice on all matters related to the

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related to Fund 2 are attributable to Mr. Sears. *See* Amend. Compl. ¶ 69 (alleging that EquiAlt's President of Business Development and Marketing made false statements to investors related to management fees); Amend. Compl. ¶79 (referencing false statements made to Fund 2 investors regarding its purported registration with the Commission "since 2009"); *see* Investor James Conley Decl. ¶¶ 8, 20 (representations that the Fund was registered since 2009 were made by Andre Sears, who sold EquiAlt's Fund 2 securities to Mr. Conley.) Thus, it stands to reason that since Mr. Rybicki did not draft the PPMs for Fund I, then *a fortiori* he did not draft offering materials for Fund 2, which was created for Mr. Sears' sales and marketing team.

Funds, and that that he did not think that Mr. Rybicki had the "life experience" to develop such a concept. *Id*. at 99, 107, 100. Moreover, as Mr. Rybicki is not a lawyer, it stands to reason that he would rely on Mr. Wassgren's advice with respect to the marketing materials and offering documents Mr. Wassgren (and Mr. Davison) created.

3. Mr. Rybicki Relied on Counsel When Dealing with Third-Party Sales Agents

The Commission alleges that Mr. Rybicki aided and abetted the primary violations of Section 15(a) of the Exchange Act by providing substantial assistance to unlicensed sales agents knowing or in extremely reckless disregard of the fact that they were not registered. Pl. Mot. for TRO at 35. The Commission's allegations in this regard are undermined by evidence that Mr. Rybicki's interactions with third-party sales agents were guided by advice he received from EquiAlt's legal counsel, Mr. Wassgren. Mr. Wassgren repeatedly advised Mr. Rybicki and third-party sales agents that unregistered agents could receive a marketing fee or finders' fee in return for selling EquiAlt securities. Affidavit of James Gray, ¶¶ 10-12, attached as Exhibit "3". Dale Tenhulzen, a former sales agent for EquiAlt, testified that Mr. Wassgren had told him that he did not need a license to legally sell and get paid for the sale of these securities. Exh. 2, Tenhulzen Tr. at 28.

Another EquiAlt sales agent, John Friedrichsen, received the same advice from Mr. Wassgren. When he first began selling debentures for EquiAlt, Mr. Friedrichsen was advised by Mr. Rybicki that Mr. Wassgren had advised him that they did not need to be registered to sell EquiAlt Funds. Affidavit of John Friedrichsen, ¶ 8., attached as Exhibit "4". After Davison and Wassgren created EquiAlt's REIT Fund, Mr. Friedrichsen wondered whether he could receive commissions for selling the REIT Fund and, at Mr. Rybicki's suggestion, called Mr. Wassgren to inquire. *Id.* at ¶ 10. During the call, Mr. Wassgren, who "knew I [Friedrichsen] was a sales agent

for EquiAlt Funds… explained that financial agents needed to acquire a Series 7 license to sell debentures for the REIT Fund." *Id.* at ¶¶ 11-13. Mr. Friedrichsen therefore "understood him to mean that a Series 7 license was necessary to sell the REIT Fund, but not the other EquiAlt Funds." *Id.* at ¶ 13. Having relied on the advice of counsel with respect to whether unregistered sales agents could sell debentures for the Funds, Mr. Rybicki did not have the scienter to believe his actions were wrong with counsel guiding him every step of the way. *See SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d 1275, 1307 (S.D. Fla. 2008).[2]

4. <u>Mr. Rybicki Did Not Improperly Take Cash Distributions.</u>

The Commission re-alleges that Mr. Rybicki misappropriated millions of dollars from the Funds for his personal benefit by "pa[ying] [himself] millions from EquiAlt companies . . ." Amend. Compl. ¶ 1, 2, 5, 51. As Mr. Rybicki argued in his motion to dismiss the initial complaint, (DE 118 at 8), this allegation is replete with inconsistencies and conclusory statements. The Commission still does not provide any factual support for this allegation, but instead presumes once again that Mr. Rybicki received improper cash distributions by virtue of his association with Mr. Davison.

There are several reasons why Mr. Rybicki could not have taken cash distributions with the knowledge and scienter that the distributions were improper. First, as previously set forth *supra*, Mr. Rybicki did not exercise any degree of control over the general affairs and specific corporate policies of EquiAlt or the Funds, as that responsibility lay solely with Mr. Davison. In addition to Mr. Rybicki's limited role in EquiAlt's day-to-day affairs, Mr. Rybicki did not have

[2] Mr. Rybicki's lack of scienter regarding the use of unregistered sales agents is also evident given the way he handled the new REIT Fund. First, he directed sales agents to speak directly with Mr. Wassgren to avoid having them run afoul of what he then understood to be the rules they needed to follow. *See* Exhibit 3, Gray Aff. ¶¶ 10-12; Exhibit 4, Friedrichsen Aff. ¶¶10-12. Moreover, after receiving this advice, he did not allow unregistered sales agents to sell the REIT Fund. *Id.* Consequently, the SEC did not charge Mr. Rybicki with aiding and abetting unregistered sales agents to sell the EquiAlt REIT Funds because no unregistered sales agents sold REIT securities.

access to, nor any authority over, EquiAlt's bank accounts, as again, that authority and access was exclusive to Mr. Davison. *See* Pl. Mot. for TRO, Exh. 4, Davison Tr. at 76 (Mr. Rybicki "technically reports to me.") Finally, the Commission even acknowledges in its own Amended Complaint that Mr. Davison—not Mr. Rybicki—"personally controlled the accounting, finances, bank accounts, and real estate strategy." Amend. Compl. ¶10; *see also* Stoddard Tr. at 50 (Davison made strategic decisions for the funds).

The Commission's allegations and evidence demonstrate that the authority to decide the amount, the time, and the place for receipt of a cash distribution from EquiAlt resided with Mr. Davison, not Mr. Rybicki. Amend. Compl. ¶ 10; Pl. Mot. for TRO, Exh. 4, Davison Tr. at 54, 55, 74. By alleging that Mr. Rybicki somehow directed, caused, or authorized these distributions with knowledge that they were improper, or much less did so with an "intent to deceive, manipulate or defraud," the Commission improperly imputes allegations against Mr. Davison to Mr. Rybicki. *See Aaron v. S.E.C.*, 446 U.S. 680, 685-86 (1980).

5. <u>Mr. Rybicki Did Not Make the Alleged Specific Misrepresentations Alleged</u>

Under Rule 10b-5, 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." *Capital Corp. v First Derivative Traders*, 564 U.S. 135, 142 (2011). More than one person or entity may have authority over a statement and therefore may be considered the maker of a false statement or responsible for a material omission. *City of Pontiac Gen. Emps' Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012) ("It is not inconsistent with *Janus Capital* to presume that multiple people in a single corporation have the joint authority to 'make' an SEC filing, such that 'a misstatement has more than one 'maker.' ") (quoting *City of*

Roseville Emps.' Ret. Sys. v. EnergySolutions, Inc., 814 F. Supp. 2d 395, 417 n.9 (S.D.N.Y. 2011)).

The amended Complaint alleges that Mr. Rybicki made the following material misrepresentations:

- Rybicki misrepresented to investors that 90% of their funds would be invested in real estate. Amend. Compl. ¶ 58.
- Rybicki had knowledge of the information concerning the funds real estate investments, liquidity and revenues generated by the funds' real estate holdings. *Id.* at ¶ 59.
- Funds paid EquiAlt a discount fee or difference in list sale price for particular property and the ultimate purchase price paid by fund to acquire property. *Id.* at ¶ 60.
- Rybicki was reckless in not knowing funds were paying undisclosed discount fees to EquiAlt. Rybicki received a profit and loss statement in 2017 which reported EquiAlt had generated discount fee income for Fund 1, and therefore, was privy to financial information about the nature and amount of undisclosed fees. *Id.* at ¶ 61.
- Rybicki's signed subscription agreements that said no commission payments would be paid and that Rybicki determined if these would be paid. *Id.* at ¶ 64.
- As early as 2014, Davison and EquiAlt's accountants provided Rybicki with copies of the Funds' financial statements highlighting the Funds' financial results, financial position, investment interest paid to investors and cash flows. *Id.* at ¶ 66.
- Numerous email communications between EquiAlt's accountant and Rybicki indicate that Rybicki was informed about a wide range of financial matters relating to the Funds, such as transfers of money among the Funds, distributions to investors, commission payments, and redemptions. *Id.* at ¶ 67.
- Rybicki was involved in the daily financial operations and activities, including important matters such as ensuring that the Funds had adequate capital to cover redemptions. *Id.* at ¶ 68.
- Investors for Fund 2 were told management fees were not being paid. *Id.* at ¶69.

As explained *supra* in subsection "A," the Commission's allegations that Mr. Rybicki drafted or had authority over the statements the PPMs is undermined and contradicted by other evidence in the record which demonstrates that Mr. Davison and Mr. Wassgren, not Mr. Rybicki, drafted and had authority over the PPMs. It is further undermined by the testimony of Mr. Davison and Ms. Stoddart that Mr. Rybicki's role was limited to sales and marketing, and that he had no access and *no reason* to review EquiAlt financials. Knowing this, the Commission amended its complaint to reference a handful of emails over a nine-year period where Mr.

Rybicki was copied, with attachments that they do not allege he reviewed, much less commented on. They also reference in the Amended Complaint an email where Mr. Rybicki discusses "getting ahead of redemptions" to suggest that he was "involved in matters concerning the Funds' daily financial operations." *Id.* at ¶68. [3] But the email does not provide any evidence that Mr. Rybicki had access to EquiAlt's financial documents, and the testimony of Denver Stoddart and Brian Davison make clear that his role was limited to sales and marketing. In light of Rybicki's limited role, and in light of the reasonable inference from the Amended Complaint that EquiAlt actually used investor deposits to amass substantial real estate and cash holdings of at least $145 million, there is an insufficient basis to find that Rybicki had knowledge of or was severely reckless in not knowing about EquiAlt's use of funds.[4]

[3] The Commission also references this email and another, at ¶ 78, in which Mr. Rybicki discusses raising liquidity in the Funds before redeeming an investor's money. But "the fact that an investor's returns on his or her investments in a business operation are dependent on future investors investing in the entity does not per se make the entity a Ponzi scheme. The key issue is whether the business operation is legitimate." *Jobin v. Ripley (In re M & L Bus. Machine Co.)*, 198 B.R. 800, 810 n. 4 (D.Colo.1996) (overturning bankruptcy court's decision that investor had "culpable knowledge" that debtor was operating a Ponzi scheme based on statement by debtor "his check would not be 'valid until they both obtained another investor to fill this contract and then also generated the necessary equipment and shipment and so forth to live up to their terms with the user.) The Commission's own description of this case makes clear that EquiAlt purchased at least $145 million worth of real estate. *See* Compl. ¶ 6 (Notably, this allegation was removed from the Amended Complaint.) Based on EquiAlt's substantial holdings and the absence of evidence that Rybicki knew about a shortfall, the Commission's allegations do not establish scienter as to Rybicki.

[4] The Commission also is unlikely to establish that Mr. Rybicki violated the Exchange Act as a "Control Person" of EquiAlt. In order to establish derivative liability under § 20(a) of the Exchange Act, a plaintiff must allege that: (1) the controlled person committed a primary violation of the Exchange Act; (2) the defendant had the power to control the general affairs of the primary violator; and (3) the defendant "had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in primary liability." *Mizzaro v. Home Depot, Inc.*, 544 F. 3d 1230, 1237 (11th Cir. 2008). As explained herein, the evidence does not support a finding that Mr. Rybicki had the power to control the general affairs of EquiAlt. To the contrary, the allegations make clear that Mr. Davison not only owned the Funds, but also owned, formed, and served as CEO of EquiAlt in Tampa, Florida, which managed the day-to-day affairs of the Funds. Amend. Compl. ¶¶ 10, 12, 14. Rybicki, on the other hand, resided across the country in Phoenix, Arizona, and "communicated with investors and executed debentures and subscription agreements with investors." *Id.* at ¶¶ 4, 11. While Rybicki held the title of Managing Director and President of Arizona Operations, "title alone does not suffice to create control person liability" under Section 20(a) of the Exchange Act. *Wafra Leasing Crop., 1999-A-1 v. Prime Capital Corp.*, No. 01 C 4314, 2004 WL 1977572, at *8 (N.D.Ill. August 31, 2004).

D. The Commission Cannot Show That There is A Reasonable Likelihood That the Alleged Wrongs Will Be Repeated.

Even if the Commission were to demonstrate a prima facie case of previous violations of the federal securities laws, it is not entitled to injunctive relief because it cannot prove that there is any likelihood—much less a reasonable one—that Mr. Rybicki will commit these violations again. *See S.E.C. v. Calvo*, 378 F.3d 1211, 1216 (11th Cir. 2004). The Court considers several factors in analyzing whether a wrong will be repeated: (1) "egregiousness of the defendant's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved, the sincerity of the defendant's assurances against future violations; (4) the defendant's recognition of the wrongful nature of the conduct; (5) and the likelihood that the defendant's occupation will present opportunities for future violations." *Id.* (quoting *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1322 (11th Cir.1982) (internal citations omitted). Most of these factors weigh against the entry of an injunction in this case.

1. Egregiousness of the Defendant's Actions.

While Mr. Rybicki does not deny that the allegations of the Amended Complaint are serious, for the reasons explained below, the Commission cannot demonstrate that *his actions* were egregious. At every turn, Mr. Rybicki acted at the direction of Mr. Davison and Mr. Wassgren. For example, while the Commission alleges the Defendants engaged in a Ponzi scheme, there is no dispute that: (1) Mr. Davison and Mr. Wassgren set up EquiAlt and prepared the initial offering documents which the Commission now alleges contained misleading statements; (2) Rybicki had nothing to do with EquiAlt's use of investor funds to purchase, refurbish or rent real estate; (2) the Funds actually purchased real estate valued at nearly $150 million; (3) Rybicki did not manage the day-to-day operation of the Funds; (4) Rybicki had no control over the accounts from which Ponzi payments or allegedly "improper" distributions were

made. Despite these uncontroverted facts, the Commission wishes to hold Mr. Rybicki responsible for Ponzi payments he did not make and could not have authorized, and the use of investor Funds over which Mr. Rybicki had no knowledge, access, or control.

2. Isolated or Recurrent Nature of the Infraction.

This is the only factor Mr. Rybicki agrees weighs in favor of a preliminary injunction. As alleged in the Amended Complaint, the conduct occurred over a nine-year period. Nevertheless, the record is replete with examples of Mr. Rybicki's efforts to comply with the law based on his own beliefs as well as advice he received from counsel. As explained below, once Mr. Rybicki became aware—after retaining new counsel—that EquiAlt's sales needed to be registered with the Commission to sell all of Equialt's funds (not just for the REIT), Mr. Rybicki immediately directed the sales staff to stop processing any and all new investor submissions. Affidavit of Christos Anastasopolous, ¶¶ 6-8, attached as Exhibit "6". Mr. Rybicki addressed the sales staff *before* the Commission filed its complaint and before Mr. Rybicki could have known that there was any pending action against EquiAlt.

In contrast with Mr. Davison, who was alleged to have misused assets belonging to EquiAlt for his own purposes, including the use of a Manhattan condominium, there are no allegations that Mr. Rybicki misused EquiAlt assets. In fact, despite Mr. Rybicki's various titles as "Vice President" and "President"—whichever titles Mr. Davison decided to assign to him—Mr. Rybicki insisted on paying the full rental price every time he stayed at an EquiAlt property. *See* Receipts for Blue Waters II, attached as Exhibit "5"; *see also* Amend. Compl. ¶ 24 (referencing Relief Defendant Blue Waters TI, LLC). In other words, while the infractions alleged by the Commission may have occurred over a nine-year period, Mr. Rybicki demonstrated his efforts to do the right thing, time and again, when no one was looking.

3. The Degree of Scienter Involved.

First, the Commission fails to show that Mr. Rybicki had the requisite scienter—either by knowing or being severely reckless in not knowing—that EquiAlt was a Ponzi scheme.

Rather, the testimony of Mr. Davison and Ms. Stoddart (EquiAlt's Controller of Accounting) contradicts the Commission's conclusory assertions. As set forth *supra*, Mr. Rybicki had neither access nor authority over any of EquiAlt's bank accounts or financials and was not involved in the day-to-day management of the Funds. Indeed, Ms. Stoddart, a licensed CPA who had access to all of EquiAlt's financial records, testified that she did not even know there was a shortfall:

> Q: "But based on your access to the funds' financials, you can't tell me at the present time whether the funds are generating or losing money?
>
> A: I'll have to look into QuickBooks." And know you say generating and losing, is it -- are you referring to the net income or the operating income?
>
> Q: Net income.
>
> A: I have to look on QuickBooks definitely.
>
> Q What about historically? How have the funds performed historically over the last five years, if you know?
>
> A: I'll have to refer to QuickBooks.

Exh. 1, Stoddart Tr. at 68-69. Mr. Davison testified that while he (and Ms. Stoddart) had access to Quickbooks, Mr. Rybicki did not. Mot. for TRO, Exh. 4, Davison Tr. at 54-55. If Ms. Stoddart, a licensed CPA who worked in EquiAlt's Tampa, Florida office, whose job it was to review financials, did not know whether EquiAlt was making or losing money, how was Mr. Rybicki – whose job it was to "literally" "take [EquiAlt's] package," *id.* at 83, to a sales team, who lived a continent away in Arizona and who, according to both Davison and Stoddart, did not have access to these financials—supposed to know?

Second, the Commission failed to cite to any evidence that Mr. Rybicki possessed the requisite scienter to misappropriate investor funds. The evidence developed by the Commission during its investigation demonstrates that Mr. Rybicki did not have access to, or control over, any of EquiAlt's bank accounts or finances, and did not manage its day-to-day operations in Tampa, Florida. It is, therefore, inconceivable that Mr. Rybicki—with no access to or control over EquiAlt's finances—could have even known that a distribution—which based on the Commission's own allegations, could only have been authorized by Mr. Davison—would have been improper.

Third, Mr. Rybicki did not possess the requisite scienter regarding any of the misrepresentations alleged by the Commission. EquiAlt retained the services of Paul Wassgren in virtually all aspects of EquiAlt's business operations and entrusted him with ensuring EquiAlt complied with securities laws. l. Mot. for TRO, Exh. 4, Davison Tr. at 99, 107, 100; Mot. for Leave to Retain Counsel (DE 121) at 4. As stated *supra,* Mr. Wassgren prepared EquiAlt's marketing materials to investors aware of the purpose for which these materials would be disseminated and used, vetted and participated in approving EquiAlt's PPMs; and provided legal advice to EquiAlt as to the legality of paying commissions to unregistered sales agents for the sale of debentures. And naturally, Mr. Rybicki relied on Mr. Wassgren's approval and assurances regarding EquiAlt's activities; *see* Exhibit 3, Gray Aff.; Exhibit 4, Friedrichsen Aff. Mr. Rybicki will be able to establish an advice of counsel defense, or he will at least demonstrate that he acted in good faith and without scienter. *See SEC v. Huff*, 758 F. Supp. 2d 1288, 1348-49 (S.D. Fla. 2010); *see also Markowski v. SEC*, 34 F.3d 99, 104-05 (2d Cir. 1994).

Finally, Mr. Rybicki's actions throughout the alleged period demonstrated that he sought to do the right thing when no one was watching; these actions are inconsistent with the allegations

that Mr. Rybicki had the requisite scienter. For example, as previously stated, Mr. Rybicki did not misuse EquiAlt's assets for his own personal benefit, but instead paid rent whenever he stayed at an EquiAlt property. Also as previously stated, Mr. Rybicki directed sales agents to speak with Mr. Wassgren when they had questions regarding the legal requirements for selling EquiAlt Funds. And, notably, Mr. Rybicki halted the sale of funds—before the Commission filed its action—when he was advised that the continued sales might violate the law. Exhibit 4, Friedrichsen Aff.¶¶ 14-15; Exhibit 6, Anastasopolous Aff. ¶¶ 6-8.

His desire to do the right thing continues to this day. Recently, Mr. Rybicki noticed that one of his accounts, a personal Comerica bank account with a substantial amount of cash on deposit, was unfrozen notwithstanding this Court's order. Even though he had not received his periodic check for expenses and was falling behind on paying his bills, Mr. Rybicki's first instinct was to advise the undersigned to alert the Commission and the Receiver that the account had somehow been unfrozen.

This case presents a sad example of Commission overreach; Mr. Rybicki has been improperly alleged to be wrongdoer based on the alleged actions of others despite his efforts to seek legal guidance and do things the right way. At a minimum, the Commission has not and cannot demonstrate the extraordinary and drastic remedy of a preliminary injunction as to him.

4. Mr. Rybicki Immediately Directed Sales Agents and BR Support Staff to Stop Selling EquiAlt Debentures When He Realized They Needed to Be Registered.

Mr. Rybicki's actions demonstrate the sincerity of his assurances against future violations and his recognition of the wrongful nature of the conduct. As explained herein, Mr. Rybicki relied on the advice of Mr. Wassgren with respect to whether sales agents needed to be registered with the Commission to sell Equialt debentures. After meeting with new counsel, Mr. Rybicki learned that the advice he received from Mr. Wassgren was faulty and that sales agents did in

fact need to be registered before selling EquiAlt Fund debentures.[5] Mr. Rybicki immediately took steps to cease any improper conduct as soon as he learned that the advice upon which he relied was faulty. He notified both his sales agents and staff and directed them to stop selling and processing EquiAlt Fund debentures immediately. Exhibit 4, Friedrichsen Aff. ¶¶ 14-15; Exhibit 6, Anastasopolous Aff. ¶¶ 6-8. He took these steps before the Commission filed its action. Exhibit 6, Anastasopolous Aff. ¶¶ 6-8. Mr. Rybicki's actions in this regarding establish that he follows the law and poses no danger of repeated conduct.

5. Mr. Rybicki's Current Occupation Presents No Opportunities for Future Violations.

First, as referenced in Section D.4, *supra*, through his actions, Mr. Rybicki has repeatedly made clear that when provided with the appropriate legal advice, he follows the law. Additionally, Mr. Rybicki is no longer employed in the securities industry, but is instead working with his family to develop a pool servicing company. Affidavit of Rosemarie Rybicki, attached as Exhibit "7". Mr. Rybicki is working full time—ten hours per day—to restart his life and help his family develop this business. *Id.* ¶ 5. Mr. Rybicki participated in a training program and is now an employee for the family's pool servicing business. *Id.* ¶ 4. Because the business is relatively new, Mrs. Rybicki does not expect the business to generate profits until October 2020. *Id.* ¶ 3. Accordingly, Mr. Rybicki's current occupation and future plans have absolutely no relationship to the securities industry and offer no opportunities for future

[5] There is other evidence in the record supporting the notion that Mr. Wassgren provided faulty legal advice to Mr. Rybicki. Recently, the Court granted a motion by the Receiver to hire counsel to explore a lawsuit against Mr. Wassgren and his law firms, Fox Rothschild, LLP and DLA Piper, LLP for damages caused to EquiAlt based on bad legal advice provided by Mr. Wassgren. (Order, DE 127). In its Motion, the Receiver explained that the services Wassgren provided included "included forming Receivership Entities, drafting documents used to solicit investors, and providing advice concerning registration requirements and other matters. The lawyers represented EquiAlt and the funds it created on a continuous basis from their inception and were involved in almost every aspect of EquiAlt's business." Mot. for Leave to Retain Counsel (DE 121) at 4. The Receiver asked this Court for leave to hire a law firm on a contingency matter because he "believes the law firms could have liability to the Receivership in connection with these activities." *Id.*

securities violations. With no reasonable likelihood of future violations under these circumstances, the Commission's preliminary injunction motion against Mr. Rybicki must be denied.

III. CONCLUSION

For the foregoing reasons, the Court should deny the Commission's Motion for a Preliminary Injunction.

Respectfully submitted,

July 24, 2020

/s/ Adam S. Fels
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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 24th day of July, 2020.

/s/ Adam S. Fels