

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

**UNITED STATES SECURITIES  
AND EXCHANGE COMMISSION,**

**Plaintiff,**

**v.**

**THE HEARTLAND GROUP VENTURES,  
LLC, et al.,**

**Defendants,**

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**No. 4:21-cv-1310**

**Hon. Reed O'Connor**

**PLAINTIFF’S SUBMISSION CONCERNING DEFENDANT  
RUSTIN BRUNSON’S PRELIMINARY INJUNCTION**

Plaintiff United States Securities and Exchange Commission, pursuant to this Court’s Order, dated December 11, 2021 (ECF No. 45), hereby makes the following submission opposing the “no ‘bad actor’ disqualification” language proposed by defendant Rustin Brunson as part of the preliminary injunction against him (*see* ECF No. 34):

Section 5 of the Securities Act of 1933 (“Securities Act”) requires the registration of all securities offerings, subject to certain exemptions and safe harbors. *SEC v. Freiberg*, No. 2:05-CV-00233PGC, 2007 WL 2692041, at \*14 (D. Utah Sept. 12, 2007); 15 U.S.C. §§ 77e(a) and (c). In addition to a safe harbor contained in Rule 506(b), Rule 506 of Regulation D of the Securities Act contains an exemption in Rule 506(c) that “exempts certain offers and

sales of securities from the registration requirements found under Section 5 of the Securities Act where (i) issuers take reasonable care to ensure that investors are accredited; (ii) where the issuer is not an underwriter; and (iii) where the issuer files a Form D with the SEC.” *SEC v. Complete Bus. Sol. Grp., Inc.*, No. 20-CIV-81205-RAR, 2021 WL 5743108, at \*4 (S.D. Fla. Dec. 2, 2021).

Reflecting the importance of an automatic bar for “bad actors” to prevent unqualified issuers or their affiliates from using such exemptions, Section 926 of the Dodd-Frank Act of 2010 authorized the SEC to add an automatic disqualification provision to Rule 506. *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, § 926, 124 Stat. 1376, 1851 (2010) (codified as amended in 15 U.S.C. § 77d (2012)). On July 10, 2013, the SEC promulgated a procedure to implement the will of Congress while setting forth a process to give relief from the automatic bar where warranted. *See Sec. & Exch. Comm’n, Disqualification of Felons and Other “Bad Actors” from Rule 506 Offerings* (available at <https://www.sec.gov/rules/final/2013/33-9414.pdf>). The “Bad Actor” provisions—adopted as paragraphs (d) and (e) of Rule 506—prevent a securities offering from relying on the registration exemption in Rule 506(c)

and the safe harbor in Rule 506(b) if the issuer or certain covered persons<sup>1</sup> have, among other things, at the time of the proposed sale, certain criminal convictions or court orders entered against them, including orders that “restrain[] or enjoin[] such person[s] from engaging or continuing to engage in any conduct or practice” that involves the purchase or sale of securities. *See* 17 C.F.R. § 230.506(d)(1)(ii)(A).

As an individual, Brunson himself cannot be an issuer of securities, and thus he is not personally eligible to rely on the Regulation D exemptions from registration. If Brunson is a “bad actor” and serving in a covered person capacity in connection with an offering, he could disqualify an issuer wishing to rely on a Regulation D exemption. However, this would not preclude such issuer from conducting a securities offering. In that scenario, the issuer could: (1) choose to register the offering; (2) rely on another non-Regulation D exemption to conduct the offering; (3) seek and receive a waiver to still use a Regulation D exemption as discussed below; or (4) not have Brunson serve in the covered person role.

The 2013 “Bad Actor” amendments to Regulation D contained a provision for the Commission to waive disqualification if it determines that

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<sup>1</sup> The covered persons who may trigger a disqualification for an issuer include its principals (directors, executive officers, managing members), significant owners (more than 20 percent beneficial ownership based on voting power), promoters involved in the offering, and persons compensated for soliciting investors. *See* 17 C.F.R. § 230.506(d)(1).

the disqualified party has shown “good cause” that it is not necessary under the circumstances that the exemptions be denied. *See* 17 C.F.R. § 230.506(d)(2)(ii). Since 2013, the Commission has administered a comprehensive process for an applicant to seek a waiver from disqualification under Rule 506(d)(2)(ii), including requiring the party seeking a waiver to submit a written application to the Commission’s Division of Corporation Finance for the Division’s consideration and analysis. *See Statement on Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D* (Mar. 13, 2015) (available at <https://www.sec.gov/divisions/corpfin/guidance/disqualification-waivers.shtml>). The SEC’s process requires a factual record that relief is appropriate and adequately protects investors. In assessing whether the “bad actor” has shown “good cause,” the Division has identified a number of factors that the written waiver request must address. *Id.* These factors include who was directly responsible for the misconduct, whether the misconduct “involved the offer and sale of securities,” “what remedial measures the party seeking the waiver has taken to address the misconduct,” the “impact on the issuer and third parties” if the waiver is denied, and “how often the applicant has used the relevant exemption in the past, or how they plan to use the exemption in the future.” *Id.* Notably, such an inquiry is based on a factual record to assess whether a waiver is appropriate and best protects public investors in the future.

In addition to the waiver process, issuers may avoid disqualification through Rule 506(d)(2)(ii), which affords courts the authority to order “that disqualification under paragraph (d)(1) of this section should not arise as a consequence of such order, judgment or degree.” 17 C.F.R.

§ 230.506(d)(2)(iii). Defendant Brunson requests this court to order that the entry of the preliminary injunction against him in this matter should not disqualify issuers for whom he is acting as a covered person under the rule from utilizing the exemption in Rule 506(c).

The SEC is unaware of an instance in which a Court has exercised such authority in an action brought by the SEC itself, and there is no basis for doing so here.<sup>2</sup> Notably, Defendant Brunson does not argue, nor can he persuasively argue, that the SEC has not stated a viable claim against him for misconduct that directly involved the offer and sale of securities, including for violating the antifraud provisions of Section 17(a)(2) and (a)(3) of the Securities Exchange Act of 1934. In this regard, in its Complaint, the SEC alleges that Defendant Brunson, among other things:

- Failed to disclose in the Debt Fund III PPM, which he drafted, that funds of Debt Fund III investors would be, and were, used to make Ponzi payments to Debt Fund I, II, and III investors, and misrepresented that Debt Fund III notes “will be serviced from the

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<sup>2</sup> This provision was considered in an administrative hearing, *In the Matter of Lonny S. Bernath*, SEC Release No. 993, 2016 WL 1319539, at \*4-5 (April 4, 2016) (order of finality issued May 20, 2016). In that proceeding, the administrative law judge determined not to advise the Commission that the disqualification should not arise as a consequence of the order.

proceeds of revenues generated by [Heartland] from its ownership in the oil and gas interests” (ECF No. 1, ¶¶ 94, 96-98, 130);

- Misrepresented in the Debt Fund III PPM well production, oil and gas operator identity, and years of operator experience (¶¶ 94, 100);
- Failed to disclose the majority ownership and control of The Heartland Group Ventures, LLC by Defendant James Ikey—who had been convicted of wire fraud in connection with a mortgage fraud scheme—in the Debt Fund III and Equity Fund II PPMs and in the ongoing Equity Fund I offering (¶¶ 92, 94-95, 104-105).

These are serious allegations of Defendant Brunson’s repeated misrepresentations and omissions to Heartland’s investors.

Defendant Brunson also cannot persuasively argue that the SEC has not stated a viable claim against him for offering and selling securities in contravention of Sections 5(a) and (c) of the Securities Act in offerings that sought to – but failed to properly – rely on the Rule 506(c) exemption to registration. Absent a showing of good cause that is entirely lacking here, disqualifying future securities issuers, for whom Brunson expects to serve in a covered person capacity, from relying on the Rule 506(c) exemption is therefore particularly appropriate, given that the SEC’s Complaint alleges that his misconduct involved the misapplication of that very exemption in connection with three securities offerings. (ECF No. 1, ¶¶ 92, 103, 108, 123, 125-127).

Here, the SEC has determined that Defendant Brunson’s conduct was sufficiently serious that a temporary restraining order was necessary. It met the standard for obtaining a temporary restraining order. Under these

circumstances, making a determination that no disqualification should result would be contrary to the public interest and leave investors at risk during the pendency of the action. It would be manifestly inequitable and unjustified for Brunson to be instantly exempted from the “bad actor” designation at the inception of this litigation without having made any showing or otherwise demonstrated an entitlement to a waiver.

WHEREFORE, Plaintiff United States Securities and Exchange Commission respectfully requests that the Court enter the proposed preliminary injunction order attached as Exhibit 1 to the SEC’s Agreed Motion for Preliminary Injunction Against Defendant Rustin Brunson (ECF No. 34-1); decline to include the additional “bad actor” language proposed by Brunson; and grant such other and further relief as this Court deems just and proper.

Dated: December 13, 2021

Respectfully submitted,

**UNITED STATES SECURITIES  
AND EXCHANGE COMMISSION**

By: /s/ Jonathan S. Polish  
Jonathan S. Polish

Jonathan S. Polish (IL Bar No. 6237890)  
Stephanie L. Reinhart (IL Bar No. 6287179)  
**UNITED STATES SECURITIES  
AND EXCHANGE COMMISSION**  
175 W. Jackson Blvd., Suite 1450  
Chicago, Illinois 60604

(312) 353-6884 (Polish)  
PolishJ@SEC.gov  
(312) 886-9899 (Reinhart)  
ReinhartS@SEC.gov

Keefe Bernstein (Texas Bar No. 24006839)

**UNITED STATES SECURITIES  
AND EXCHANGE COMMISSION**

801 Cherry Street, Suite 1900  
Fort Worth, Texas 76102  
(817) 900-2607  
BernsteinK@sec.gov



**CERTIFICATE OF SERVICE**

On December 13, 2021, I caused the foregoing filing to be transmitted to the following attorneys and *pro se* defendants by email and the email address reflected below.

/s/ Jonathan S. Polish

Theodore M. Grannatt ([tgrannatt@mccarter.com](mailto:tgrannatt@mccarter.com))  
Joseph C. Donahue ([jdonahue@mccarter.com](mailto:jdonahue@mccarter.com))  
McCarter & English  
(attorneys for Defendants Muratore and Pearsey)

Alex More ([amore@ccsb.com](mailto:amore@ccsb.com))  
Carrington Coleman  
(attorney for Defendant Brunson)

Kevin Edmundson ([Kevin@eswpllc.com](mailto:Kevin@eswpllc.com))  
Jesse Weiss ([Jesse@eswpllc.com](mailto:Jesse@eswpllc.com))  
Edmundson Shelton Weiss PLLC  
(attorney for Sahota Defendants)

Deborah Williamson ([dwilliamson@dykema.com](mailto:dwilliamson@dykema.com))  
Danielle Rushing ([drushing@dykema.com](mailto:drushing@dykema.com))  
(Receiver and attorney for Receiver)

James Ikey ([James.ikeyrcg@gmail.com](mailto:James.ikeyrcg@gmail.com))  
(defendant James Ikey)