UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al.,

Defendants.
_____/

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO AMEND THE COURT'S ORDER TO CLARIFY THAT THE DEFENSE CAN RECEIVE THE DOCUMENTS THEY HAVE PROVIDED TO THE RECEIVER TO PREPARE THEIR DEFENSE

Defendants Lisa McElhone ("L. McElhone"), Joseph Cole ("Cole"), Joseph Laforte J. "Laforte"), and the 2017 L.M.E. Family Trust ("Trust") (collectively, "Defendants"), file this Reply to the Receiver's Response (the "Response") (DE 260), and ask the Court to Deny Defendants' Motion (DE 220) as moot, as the parties have issued discovery, and offers this Reply only to correct the record regarding representations made in the Receiver's Response.

1. **The Defense Agreed at The September 8, 2020 Conference to Table Its Motion (DE 220) and Proceed with Rule 26 Discovery, Rendering It Moot.**

The object of Defendants' Motion was, quite simply, to obtain through the expedited discovery procedure ordered by this Court a copy of the documents that Joseph Cole obtained in his capacity as CFO of Par Funding prior to the entry of the TRO and Order Appointing the Receiver. There was no nefarious plan. There was no effort to obfuscate and, as discussed below, there would have been no need. Cole volunteered every item of information he—and (somehow) the Defendants—are accused improperly of accessing or possessing. Not only did Receiver's

counsel agree to what Defendants requested in the Motion (before reneging on their agreement and lashing out with unnecessary and unfounded accusations), but the parties agreed during the September 8 status conference to table this issue given that merits discovery would soon begin. Discovery has begun. Defendant L. McElhone has requested the very documents at issue in Defendants' motion through the Rule 26 discovery process. The object of Defendants' Motion is now moot, and Defendants are now forced to prepare this Reply to correct the record, again, unnecessarily. *Metropolitan Delivery Corp. v. Teamsters Local Union*, 769, 2020 WL 5027415, at *4 (S.D. Fla. 2020) (claim becomes moot when the controversy between the parties is no longer alive because one party has no further concern in the outcome).

2. Not a Single Defendant Gained Access to Par Funding Information in Violation of a Court Order.

The Receiver ostensibly filed his Response against his better judgment to oblige Defendants' request for "forensic proof before the Court attributes these breaches to [them]." In truth, the Receiver's Response offers a version of the events that labors to cast blame. Despite headings claiming that "the defendants have violated—and continue to violate—these requirements of the Receivership Orders," not a single word of the Receiver's Response or voluminous exhibits suggests any of the Defendants gained unauthorized access to Par Funding's electronic data. Instead, the Response reveals that Mr. Cole's alleged "violation" involved possessing Par Funding data he obtained *before* the Receivership Order issued (at the direction of prior counsel), and that current defense counsel attempted to work with the Receiver to understand the application of these Orders to this information. The remaining allegations of "data breaches" involve inadvertent access which the Receiver could have prevented if he had simply done his job.

Joseph Cole

The Receiver's allegations with respect to Mr. Cole are as follows. First, Mr. Cole possessed "a personal laptop that contained copies of documents belonging to the Receivership entities." (Response at 11) The Receiver does not mention that Mr. Cole downloaded this information at the direction of Par Funding's corporate counsel prior to the entry of the TRO and Receivership Order on July 27, 2020. In fact, the Response says nothing of the origin of this information even though Mr. Cole's acquisition of this information is clearly recited in counsel for Mr. Cole's August 30, 2020 email:

> We have been attempting to negotiate several matters with you for weeks, primarily: … (2) the production to the Receiver of records *obtained by Mr. Cole prior to the entry of the TRO and Receivership Order related to the operation of Par Funding*.

(DE 270-7.) The Response also omits that Mr. Cole's current counsel volunteered this information to the Receiver and coordinated the transfer of Mr. Cole's laptop to the Receiver for the deletion of the data referenced in the Response. Mr. Cole delivered his laptop to the Receiver on August 19, 2020. Why this voluntary disclosure merits mention in the Response, particularly with these omissions, is unclear.

The Receiver then spends pages describing a new online data storage account on a Google Drive for KnewLogic created by Mr. Cole on July 29, 2020 at the request of Par Funding's prior corporate counsel (Response at 11), and QuickBooks files stored on an account called Summit Hosting (Response at 13). The Response states that defense counsel were provided a "link" to the Google Drive and that Mr. Cole "still maintains control over this Google Drive account…" (Response at 12.)

The Receiver argues that when he "*learned of these violations*, he attempted to reach agreement with the Defendants on a process through which the Defendants would return to the

Receiver all copies of any documents and records belonging to the Receivership Entities." (Response at 6.) The Receiver's deliberate use of the passive voice obfuscates the rather important point that he only became aware of Cole's creation of the G-Suite *because counsel for Cole told the Receiver* about the KnewLogic G-Suite in a specific effort to comply with the Receivership Orders. Counsel further provided a link to the Receiver of all of the data on this G-Suite so that the Receiver could immediately access it. In the email disclosing the G-Suite to the Receiver, Cole's counsel acknowledged her oversight in not disclosing this information sooner, noting that she simply forgot about it because of all the litigation that occurred before the preliminary injunction hearing and, just as importantly, that the parties had discussed moving jointly to modify the existing Receivership Orders to clarify their application to this pre-TRO data:

> With respect to the second item on this list, please recall that one of the reasons we have been coordinating the disclosure of the information held by Mr. Cole to you was that everyone, *including you and the Receiver, acknowledged that the orders did not make clear* whether records relating to Par Funding's operations obtained prior to the TRO and the receivership orders violated the scope of the Court's first receivership order. Recall that we even discussed filing a joint motion to amend the receivership order to clarify this issue and permit the defense team to maintain a copy of such records during the litigation.

(DE 260-7) (emphasis added.)

Clearly, no one was "caught." This was no "violation." While the Receiver attempts to distance himself from the August 30 email in a footnote by suggesting the email contains "inaccuracies," he does not attach an email response to counsel's August 30 email stating that counsel's understanding was in any way "inaccurate"—because there was no such response and there was nothing inaccurate about counsel's email. And, even if a misunderstanding existed regarding the application of the Receivership Orders to Mr. Cole's possession of information and QuickBooks data he obtained prior to the TRO, whether he stored it on a laptop or on a Google

Drive, the facts here demonstrate an effort on the part of defense counsel to work with the Receiver, not violate court orders.

The "link" Mr. Cole provided to defense counsel is the same link defense counsel volunteered to the Receiver. And the documents were not accessed by defense counsel.

This unnecessarily adversarial characterization of an oversight is a waste of the Receiver's, this Court's and defense counsel's time and resources. We would like it to stop, and we would like the Receiver to focus on doing his job. Lobbing bombs at defense counsel is not one of them. *See SEC v. Schooler*, No. 3:12-cv-2164-GPC-JMA, 2015 WL 1510949, at *3 (S.D. Cal. Mar. 24, 2015) citing *Sterling v. Stewart*, 158 F.3d 1199, 1201 n. 3 (11th Cir. 1998) (as an officer of the court, the receiver must remain neutral and impartial between the parties and avoid the appearance of impropriety). [1]

Lisa McElhone

The Receiver's Response with respect to Ms. McElhone's tax returns is an exercise in irony. On the one hand, it devotes pages describing its authority to take control of Par Funding's data and, on the other, it seems to argue that "the Defendants are complaining in the Motion the Receiver has not provided the Defendants with … documents Ms. McElhone already has in her possession." Response at 12-13.) Yes—Ms. McElhone has these documents in her possession, but in an effort to work with the Receiver and stay within the parameters of the Receivership orders, counsel for Ms. McElhone "directed her not to touch the drive [containing the returns] and that we would figure out how to proceed." (*Id.*) Counsel for Ms. McElhone made clear to the Receiver that he had not seen the documents and does not maintain a copy of them. (*Id.*) And for this, Ms. McElhone is being accused of violating court orders?

[1] While the *Schooler* decision cites to footnote 3, the relevant discussion in *Stewart* is found at footnote 2.

To make matters worse, counsel for the Receiver knew about the tax returns before the September 1, 2020 email. In mid-August 2020, counsel for Ms. McElhone advised the Receiver's counsel that she had copies of 2017 and 2018 CBSG tax returns. During that telephone call, the Receiver requested more information regarding whether these returns were in paper form or stored electronically. Counsel advised that he would inquire and, on September 1, 2020, wrote the Receiver to advise that he had learned that the tax returns were contained on a single drive with Ms. McElhone's personal tax documents. (DE 260-12.) Counsel for Ms. McElhone suggested that the parties confer about how to disentangle the documents. (*Id.*) This is precisely what counsel is supposed to do. The Receiver did not reply or respond at all to this email.

Instead, the Receiver, or his counsel, decided to unnecessarily air this non-issue with the Court in its Response. Odder still, because the Receiver refused to even respond to the email invitation to cooperatively extract the Receivership documents from the drive, counsel for Ms. McElhone is now forced to make a discovery request for tax returns she has in her possession. To this day, counsel for Ms. McElhone is still waiting for the Receiver to respond to his September 1, 2020 email and arrange an agreed-upon procedure to separate Ms. McElhone's tax documents from the Receivership entity tax documents.

3. The Google-Suite Access the Receiver Complains of by Former Employees Could Easily Have Been Avoided.

The Receiver devotes pages of its Response unnecessarily reciting its authority to administer and manage the Receivership Entities' business affairs, which includes, among other things, its authority to take custody and control of Receivership Entity records and documents. (Response at 3-5, citing DE 36, 141.) Its description, however, omits two important details, both of which are critical to the issue before this Court: (1) FSP managed a number of Non-Receivership Entities ("NREs") over which the Receiver has no control or authority; and (2) the Receiver failed

to advise the former employees it now alleges gained "unauthorized access" of its authority and what they could and could not do. Just as importantly, the Receiver failed to take the necessary steps to assume immediate control of the G-Suite platform used by Par, FSP and the NREs.

Allegations of "unauthorized access" presuppose, in this case, erroneously, notice to the parties allegedly engaged in this conduct. Data breaches suggest access by an individual who had no access to the data; but in this case, the employees were given this access by the companies to do their jobs. (Exhibit 1, Declaration of G. Campos defining "data breach," ¶¶ 19-20.) One would assume that the Receiver, before sending employees of the Receivership Entities home after taking control of the Receivership Entities, would advise them that a Receivership was in place and what that meant. This is, after all, a duty imposed on the Receiver in the Order:

> Additionally, the Receiver shall promptly give notice of his appointment to all known officers, directors, agents, employees, shareholders, creditors, debtors, managers, and general and limited partners of each Receivership Entity, as the Receiver deems necessary or advisable to effectuate the operation of the receivership.

(DE 36, ¶ 6.) It is also commonly done, immediately, after a receiver assumes control of a receivership entity. (Exhibit 1, ¶¶15-16.) Beyond providing this notice, the receiver evidently should have assumed immediate control of the network. (*Id.*, ¶11.) The Receiver's failure to do this for weeks after assuming control of the Receivership Entities was "unusual." (*Id.,* ¶14.)

Consequently, when the Receiver argues that former Par Funding employees accessed the Par Funding G-Suite after the Court established the Receivership (Response at 7), the characterization reflects a fundamental misunderstanding of the events that transpired after the Receiver took possession of Par Funding's offices, and the understandable confusion that ensued, in part, because the Receiver did not do his job. A bit of background is necessary here.

CBSG / Par Funding was created from just an idea at a table in 2012. Over the next eight years, the founders of Par Funding built a substantial company which paid millions of dollars in

interest to investors and funded thousands of small businesses across the country which were unable to obtain short-term and almost instantaneous funding elsewhere. For eight years, the founders of Par Funding carefully maintained all the books and records of the company, including tax filings. The records were maintained on computers, in cloud servers (the "G-Suite") and backed up on individual computers. In fact, the G-Suite set up by Par Funding personnel can be set to automatically back up files an employee is working on.[2]

The founders of Par Funding had many other businesses, aside from Par Funding, but those records were also maintained on Full Spectrum Processing's ("FSP") platforms on the G-Suite. Part of FSP's business operations was providing back office administrative work for companies that had nothing to do with the Par and CBSG.

On July 27, after the Court issued an Order appointing a Receiver, the Receiver took control of Par Funding's and FSP's offices in Philadelphia with the assistance of the FBI. (Exhibit 2, Declaration of Margaret Clemons, ¶¶ 5-7.) However, as the Receiver's Response makes clear, the Receivership only extends to certain enumerated entities. (DE 260, n 1.) There are over 20 other companies operated by the founders of Par Funding that are *not* Receivership entities that the Receiver has no lawful authority or control over.[3]

Consequently, in the ensuing days, Par Funding and FSP's owners and employees were unsure about how to continue to operate these non-receivership entities. (Exhibit 2, ¶¶ 8-9.) Neither the Receiver nor the agents who took control of the businesses made clear to the employees what their status was, or whether they could continue to access their emails or work documents

[2] Several examples of this can be clearly seen in Exhibit 3 to the Receiver's Response. Many of the items of "access" cited by the Receiver are simply efforts by the system to back-up files, which occurs on or about every 180 seconds. (*See, e.g.,* lines 7-13; 21-22, 23-25, 34-40, 41-63.)

[3] The Receiver was aware of this. In fact, counsel for the Defendants contacted the Receiver to set up a "protocol to separate these non-receivership entities from the G-Suite," which the Receiver agreed was necessary. (DE 220-2, at 1-2.)

remotely. (*Id.*) Many believed that they were still employed and continued working as before, albeit remotely. (*Id.*) During this period, Fox Rothschild, who still represented both Par Funding and the individual Defendants, did not send any emails or communications to Par Funding employees containing or addressing the Receivership Order.

This confusion could have been avoided. Had the Receiver notified employees when it took over Par Funding and FSP's offices of their status and the need to segregate the non-receivership entities from the G-Suite, they likely would not have accessed their work accounts remotely. Alternatively, arrangements could have been made to segregate Receivership Entity data on the G-Suite from NRE data on the G-Suite. (Exhibit 1, ¶ 12.) The exhibits to the Receiver's Response do not segregate Receivership Entity data from NRE data, making it unclear whether the data accessed was Receivership Entity or NRE data. (Exhibit 1, ¶¶ 21-22.) It is unclear why this information was redacted from the exhibits.[4]

As for Aida Lau, the Receiver alleges she accessed the G-Suite to download Par Funding information between July 29 and August 12, 2020. (Response at 6-7; Exhibit 1, ¶18.) It must be noted that Ms. Lau is not a party to this action and was never represented by undersigned counsel. As a former accounting manager for FSP, Ms. Lau understood Par Funding's finances and graciously agreed to provide declarations to defense counsel in advance of the preliminary injunction hearing. For her trouble, she was interviewed repeatedly by the Receiver, accused of wrongdoing and threatened by counsel for the Receiver that the FBI was going to question her and seize her laptop. In the final analysis, however, Ms. Lau is alleged to have used her own FSP

[4] Others employees, such as Jamie McElhone, who worked exclusively for Par Funding, checked their emails because, as defense counsel explained in an email to the Receiver, "In the wake of the TRO, merchants were emailing Jamie seeking information regarding re-load requests, questions about their account status and all manner of related questions." (DE 220-2, at 2.) Jamie McElhone did not respond, but instead took screen shots of the emails to preserve the emails, which counsel offered to produce to the Receiver. (*Id.*)

access to download data without knowing she could not do so. Indeed, the first and only time the Receiver provided notice to Ms. Lau that she could not access and would have to return Par Funding data to the Receiver was on August 17, when the Receiver sent her a copy of docket entry 159. (Exhibit 2, ¶ 17, referencing Exhibit 3, Receiver's email to Lau.) Consequently, it is not only unfair to characterize Ms. Lau's alleged access to the G-Suite during this period as a breach, it should be noted that this could have been prevented if the Receiver had given her notice of the Receivership Order sooner or cut off access to former employees. (Exhibit 2, ¶¶ 11-16 20.)

4. Defendants' Request for Documents Was a Discovery Request—for Documents.

The Receiver states in his Response that "It should be noted the Defendants never served the Receiver with a Request for Production." (Response at 2). In fact, Defendants made a specific request for documents from the Receiver and served that request via email. (DE 220-1.) The TRO permitted the parties to serve discovery while the SEC's request for a preliminary injunction was pending. (DE 42.) The Order made clear that service of discovery requests could be made by e-mail—in other words, in the manner made by defense counsel to the Receiver—and that responses should be provided in two days. (*Id.*) It also should be noted that the Receiver agreed to draft a stipulation and protective order to produce these documents to the Defendants (DE 220-2).

If defense counsel "never served the Receiver with a Request for Production," what can be made of the Receiver's agreement to produce these documents pursuant to a protective order? If the Defendants' discovery request is an attempt to obfuscate their violations of the Receivership Orders, as the Receiver suggests in his Response, then why did the Receiver agree to produce documents? Defendants ask that this Court admonish the Receiver to avoid creating controversy where none exists, and to instead focus on preserving and protecting the assets of the companies the Defendants worked so hard to build.

Respectfully submitted,

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