UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CIV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.
_____/

DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

In accordance with the Court's August 7, 2020 Order [ECF No. 104] requiring a combined response, Defendants Complete Business Solutions Group, Inc., d/b/a Par Funding ("Par Funding"), Lisa McElhone ("Ms. McElhone"), Joseph W. LaForte ("Mr. LaForte"), Joseph Cole Barleta ("Mr. Cole"), Perry S. Abbonizio ("Mr. Abbonizio"), Dean J. Vagnozzi ("Mr. Vagnozzi"), Michael C. Furman ("Mr. Furman"), and Relief Defendant The LME 2017 Family Trust ("Trust") (collectively, "Defendants") jointly move this Court to dismiss the Amended Complaint ("Complaint or Comp.") [ECF No. 119] for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure Rule 12(b)(6) and because the Complaint fails to comport with the heightened standard found in Federal Rule of Civil Procedure Rule 9(b).

I. INTRODUCTION

The SEC's Complaint suffers from myriad deficiencies and is based on allegations that either conflate or abjectly fail to define the roles and conduct of the Defendants in the alleged violations. The SEC asserts eight causes of actions based on securities violations against all

Defendants for allegedly engaging in a fraudulent scheme to raise investor funds through unregistered securities offerings. The result is a group pleading that does not comport with Rule 9(b) and is insufficient as a matter of law. Further, the Complaint: (1) alleges an entire phase of the alleged scheme over which the SEC does not have enforcement authority because the notes at issue are not securities; (2) fails to adequately allege facts to support multiple required elements for a securities fraud claim; (3) constitutes a classic shotgun pleading; and (4) requests relief outside the statute of limitations. Accordingly, the Complaint should be dismissed.

II. SUMMARY OF THE SEC'S ALLEGATIONS

The Commission alleges that Lisa McElhone and her husband, Joseph LaForte, began operating Par Funding in 2011. (Comp. ¶ 11.) "From August 2012 until December 2017," in what the SEC deems "Phase I," Par Funding initially sold "only directly to investors" promissory notes with 12-month terms that granted a security interest to the noteholder in Par Funding's assets, including its accounts receivable. *Id.* at ¶ 49–50, 54. The Commission alleges that "things changed in early January 2018," when Par Funding instead used "Agent Funds" to offer and sell securities. *Id.* at ¶¶ 62–63, 65. The SEC goes on to allege, in conclusory and threadbare assertions, that "*the Defendants*" misrepresented: "(1) the true nature of Par Funding's loan practices; (2) Par Funding's true track record of issuing loans and the default rates of the loans; (3) the safety of investing in Par Funding's loans; (4) LaForte's criminal record, identity, and control of Par Funding; (5) three Cease-and-Desist Orders state securities regulators have entered against Par Funding for violating state securities laws; (6) the true result of the New Jersey Division of Securities' Investigation of Par Funding; (7) the fact that contrary to Par Funding's representations to the Commission in its filings, it diverts investor funds to McElhone and Cole, Par Funding's CFO, and also funnels money to The LME 2017 Family Trust, which is McElhone's family trust; (8) the fact that contrary

to his representations to investors, LaForte has never invested in Par Funding; (9) a Cease-and-Desist Order and sanctions issued against Vagnozzi for violating state securities laws in connection with the Par Funding offering; (10) a Cease-and-Desist Order and sanctions issued against ABFP for violating state securities laws in connection with the Par Funding offering; (11) a Cease-and-Desist Order and sanctions issued against Abbonizio for violating state securities laws in connection with the Par Funding offering." *Id.* at ¶ 8 (emphasis added). Further, the SEC alleges, with no legal basis, that Par Funding "transferred at least $14.3 million, which included investor funds, to the Trust for no legitimate purpose." *Id.* at ¶ 36.

The Commission alleges that Ms. McElhone was the CEO and founder of Par Funding, *id.*, at 16, but tellingly alleges nothing with respect to her involvement in any of the alleged misrepresentations, which comprise the alleged "scheme."[1] The SEC calls Mr. Laforte the *de facto* CEO of Par Funding, *id*. at 17, and confusingly alleges that that he was not identified as part of its management on its website or in its offering materials but did disclose what involvement he had to the investors he had contact with.

The Commission alleges that Messrs. Furman and Vagnozzi operated Agent Funds to raise funds for Par Funding in exchange for commissions, *id.* at ¶¶ 4, 6, 7, and that Mr. Abbonizio "oversees and coordinates" the Agent Funds and "solicits investors." *Id.* at ¶¶ 5–6, 20, 77–80. According to the Complaint, Messrs. Furman and Vagnozzi, through their Agent Funds, engaged in the fraudulent offer and sale of unregistered securities in the form of promissory notes to the investing public while either knowingly or negligently making material misrepresentations and/or omissions. *Id.* at ¶¶ 7–9. According to the Commission, in carrying out those responsibilities Mr.

[1] The SEC distorts Ms. McElhone's role with Par Funding, alleging repeatedly she is its sole employee, *id.* at 11, 15-16, while cryptically acknowledging that Par Funding is operated by Full Spectrum Processing, which the SEC fails to mention had 70 employees who operated Par Funding. *Id.*

Abbonizio made misrepresentations to potential investors—including that Par Funding had a rigorous underwriting process (*e.g., id.* at ¶¶ 155–57, 162–66, 181, 189) and that its merchant loans had a low default rate and were insured (*e.g., id.* at ¶¶ 99, 121, 187, 206).

Yet, when reviewing the Complaint's factual allegations concerning the respective Defendants, which are presumably the culmination of an exhaustive regulatory investigation, the allegations raise far more questions than support for the claims. First, the Complaint alleges an entire phase of the alleged scheme over which the SEC does not have enforcement authority because the notes at issue are not securities. Second, the Complaint impermissibly lumps the defendants together, making it impossible for each respective Defendant to distinguish the alleged conduct ascribed to him from conduct attributable to others. Third, the Commission's claims under the antifraud provisions[2] fail to allege that each respective defendant acted either with the requisite knowledge or intent to deceive, with severe recklessness or negligently when purportedly providing information to investors; or that each defendant understood himself to be participating in a fraudulent scheme. Fourth, the Complaint constitutes an impermissible shotgun pleading that cannot survive the requirement under Rule 9(b). Fifth, the Complaint improperly joins the Trust as a Relief Defendant without sufficiently alleging facts to show that the Trust is a recipient of ill-gotten funds with no legitimate claim to the funds. Sixth, the Complaint requests relief well outside the statute of limitations. For these reasons, the Complaint should be dismissed.

III. STANDARD OF REVIEW: MOTION TO DISMISS UNDER RULE 12(b) and 9(b)

This Court may dismiss the SEC's claims against the Defendants pursuant to Rule 12(b)(6) if it fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true,

[2] Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, are commonly referred to as the "antifraud provisions" of the federal securities laws.

to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted). However, the Court need not accept unsupported conclusions, unwarranted inferences, or sweeping conclusions cast in the form of factual allegation. *See Aldana v. Del Monte Fresh Produce, N.A., Inc*., 416 F.3d 1242, 1253 (11th Cir. 2005) (commending district court "for remembering that some minimal pleading standard does still exist" and finding that "bald assertions" and "unwarranted deductions of facts" are not accepted as true and will not survive a Rule 12(b)(6) motion to dismiss).

Further, in a complaint alleging fraud, as the SEC's claims, "the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). The particularity requirements of Rule 9(b) apply equally to actions initiated by the SEC. *See, e.g.*, *S.E.C. v. BankAtlantic Bancorp, Inc.*, No. 12-60082-CIV, 2012 WL 1936112, at *7–10 (S.D. Fla. May 29, 2012). This heightened standard is particularly fitting in actions brought by the Commission because it has statutory investigative, pre-suit subpoena power.

Notably, Rule 9(b) serves the important purpose of "alerting defendants to the 'precise misconduct with which they are charged' and protecting defendants 'against spurious charges of immoral and fraudulent behavior.'" *Durham v. Bus. Mgmt. Assoc.*, 847 F.2d 1505, 1511 (11th Cir. 1988). As such, a complaint in a securities action that fails to connect the factual allegations to the substantive elements of each alleged count fails to meet the heightened pleading requirement of Rule 9(b). Further, "[e]ven securities claims without a fraud element must be pled with particularity pursuant to Rule 9(b) when that nonfraud securities claim is alleged to be part of a defendant's fraudulent conduct." *S.E.C. v. Solow*, No. 06-81041-CIV, 2007 WL 917269, at *4 (S.D. Fla. Mar. 23, 2007).

Accordingly, to satisfy the requirements under 9(b), the SEC "must allege: (1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the [p]laintiff; and (4) what the defendants gained by the alleged fraud." *BankAtlantic Bancorp, Inc*., 2012 WL 1936112, at *8 (quoting *Garfield v. NDC Health Corp*., 466 F.3d 1255, 1261 (11th Cir. 2006)). In other words, Rule 9(b) is satisfied if the complaint sufficiently pleads the "who, what, when, where, and how of the allegedly false statements" and then generally alleges the requisite intent. *S.E.C. v. Betta*, No. 09-80803-CIV, 2010 WL 963212, at *4 (S.D. Fla. Mar. 15, 2010) (quoting *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1237 (11th Cir. 2008)).

IV. ARGUMENT

To establish a violation of Section 10(b) and Rule 10b-5, the SEC must prove by a preponderance of the evidence that each respective defendant made "(1) material misrepresentations or materially misleading omissions, (2) in connection with the purchase or sale of securities," and that they "(3) made [them] with scienter." *S.E.C. v. Merch. Capital, LLC*, 483 F.3d 747, 766 n.17 (11th Cir. 2007) (citing *Aaron v. S.E.C.*, 446 U.S. 680, 695, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980)); *S.E.C. v. Zandford*, 535 U.S. 813, 816 n.1 (2002). A complaint alleging claims under Section 10(b) and Rule 10b-5 must satisfy the heightened pleading requirements established under Rule 9(b) of the Federal Rules of Civil Procedure. *S.E.C. v. Strebinger*, 114 F. Supp. 3d 1321, 1329 (N.D. Ga. 2015) (citing *Kammona v. Onteco Corp*., 587 Fed.Appx. 575, 581 (11th Cir. 2014)). To do so, a plaintiff "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Scienter must be found with respect to *each* defendant on *an individual basis. Phillips v. Sci.-Atlanta, Inc.*, 374 F.3d 1015, 1017–18 (11th Cir. 2004).

To show a violation under Section 17(a)(1), "the SEC must prove (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities; (3) made with scienter." *Merch. Capital, LLC*, 483 F.3d at 766 (citing *Aaron*, 446 U.S. at 695). Similarly, to show a violation under Section 17(a)(2) and (3), "the SEC need only show (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities, (3) made with negligence." *Id.*

To satisfy the scienter element for Section 17(a)(1) claims, the SEC must show "either an 'intent to deceive, manipulate or defraud,' or 'severe recklessness.'" *Mizzaro v. Home Depot, Inc.*, 544 F. 3d 1230, 1238 (11th Cir. 2008) (quoting *Bryant v. Avado Brands, Inc.*, 187 F. 3d 1271, 1284 (11th Cir. 1999)); *Aaron v. S.E.C.*, 446 U.S. 680, 701 (1980) (concluding that scienter is a necessary element of a civil enforcement under section 10(b) and Rule 10b-5 of the 1934 Act and Section 17(a)(1) of the 1933 Act). The Eleventh Circuit, however, limits severe recklessness as follows:

> Scienter may be established by a showing of knowing misconduct or severe recklessness. Proof of recklessness requires a showing that the defendant's conduct was an ***extreme departure*** of the standards of ordinary care, which presents a danger of misleading buyers or sellers that ***is either known to the defendant or is so obvious that the actor must have been aware of it***.

Id.; see also Garfield v. NDC Health Corp., 466 F.3d 1255, 1264 (11th Cir. 2006) (emphasis added) ("severe recklessness can be established through deliberate avoidance of 'red flags.'").

As described more fully below, the SEC has failed to meet the standards articulated by Rules 12(b)(6) and 9(b) and, as a result, dismissal of Counts I through VI and VIII of the Complaint is appropriate. *See S.E.C. v. Tambone*, 417 F. Supp. 2d 127, 131 (D. Mass. 2006) (dismissing the SEC's complaint based on fraud after applying Rule 9(b) particularity requirements); *S.E.C. v. Yuen*, 221 F.R.D. 631, 634–36 (C.D. Cal. 2004) (dismissing the SEC's complaint because the SEC

failed to comport with the requirements of Rules 12(b) and 9(b)). While Count VII alleges nonfraud violations of Section 5 of the Securities Acts, it is alleged as part of the alleged fraudulent scheme and similarly fails to meet the requirements under 9(b).

1. <u>The Par Funding Notes issued During "Phase I" Are Not Securities</u>

The SEC has no authority to bring an enforcement action unless the action pertains to the offer or sale of securities. *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1285 (11th Cir. 2007) (citing to *Home Guaranty Ins. Corp. v. Third Fin. Servs., Inc.*, 667 F. Supp. 577, 579 (M.D. Tenn. 1987)) ("To reach the question of an alleged violation of the anti-fraud provisions of the Securities Acts, the transaction at issue must involve a 'security' as defined in the 1934 Act."). As shown below, to the extent this case is based on the period alleged as "Phase I," the Court should dismiss the SEC's entire action regarding any conduct stemming from the alleged offer or sale of promissory notes during Phase I because the notes issued by Par Funding during that time were not securities.

While the Securities and Exchange Acts define "security" to mean "any note," *see* 15 U.S.C. § 77b(a)(1), § 78c(a)(10), not all "notes" should be considered securities for the purposes of these Acts. *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990) ("the phrase 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts"). The Supreme Court in *Reves* set forth a four-factor test referred to as the "family resemblance" test to rebut the presumption that a note is a security. *See S.E.C. v. Levin*, No. 1:12-CV-21917-UU, 2014 WL 11878357, *9 (S.D. Fla. Oct. 6, 2014). The *Reves* Court enumerated a list of notes that expressly are not securities, and so are exempt from the 1933 and 1934 Acts, including two that are pertinent here: (1) short-term notes secured by a lien on a small business or some of its assets; and (2) short-

term notes secured by an assignment of accounts receivable. *See Asset Prot. Plans, Inc. v. Oppenheimer & Co.*, No. 8:11-CV-440-T-23MAP, 2011 WL 2533839, at *2 (M.D. Fla. June 27, 2011).

A note that falls squarely into either of these categories is considered exempt, and a court need not employ the "family resemblance" test. *Id.; Lincoln v. Washington Mut. Bank, N.A.*, No. 07-60273-CIV, 2007 WL 9701069, at *2 (S.D. Fla. Aug. 6, 2007) (concluding that there was no need to further discuss the family resemblance test because the note in question fell into one of the exempt categories); *First Citizens Fed. Sav. & Loan Ass'n v. Worthen Bank & Tr. Co.,* , 919 F.2d 510, 515–16 (9th Cir. 1990) (same). Here, the Par Funding promissory notes fall squarely into two exempt categories.

The promissory notes issued by Par Funding during Phase I are comparable to the short-term notes in *Asset Prot. Plans, Inc.*, 2011 WL 2533839, at *2. In *Asset Prot. Plans, Inc.*, an investment business sold promissory notes that provided that the principal interest would be due on demand by the holder between five and a half months and one year after issuance. *Id.* at *1, 3. To secure the notes, the investment business received guarantees from the relevant parties and a lien over the "present and future personal property, accounts, assets . . . and fixtures of" of each guarantor. *Id.* at *4. The court found that the notes in question were characterized as short-term notes because the holder of the notes could not receive any additional interest by holding the notes any longer than one year. *Id.* at 4. Thus, the court concluded that the notes were similar to "short-term note[s] secured by a lien on a small business or some of its assets." *Id.*

Likewise, the promissory notes at issue here are "short-term notes secured by a lien on a small business or some of its assets." *Reves*, 494 U.S. at 65. The Par Funding Notes generally provide that the interest is paid over twelve months, and then the investor's principal investment

is returned in full to the investor. (Comp. ¶ 53.) The Security Agreement states that Par Funding grants a security interest to the investor in substantially all of Par Funding's assets, including its accounts receivable. *Id.* at ¶ 54. The Middle District court in *Asset Prot. Plans, Inc.* explained that such an instrument that provided for repayment of the principal plus interest at a fixed rate could not reasonably be characterized as a "security" for purposes of federal securities laws. *Id.* at *2. As in *Asset Prot. Plans, Inc.*, the PAR Notes were secured by a lien on Par Funding assets, including its accounts receivable.

Once a court determines that the note in question falls squarely within an exempt category, the court is permitted to end the analysis. *See, e.g., Lincoln v. Washington Mut. Bank, N.A.*, No. 07-60273-CIV, 2007 WL 9701069, at *2 (S.D. Fla. Aug. 6, 2007); *Prochaska & Assocs., Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 798 F. Supp. 1427, 1430 (D. Neb. 1992) (finding that because, the instruments were "short-term note[s] secured by a lien on a small business or its assets" they were not securities, and applied the four-factor test only in the alternative). Accordingly, the Court should find that the PAR notes issued during Phase I fall under the judicial exemption set forth in *Reves*, since they have a short-term duration of 12 months or less and are secured by a lien on Par Funding's assets and accounts receivable.

2. <u>The SEC's Complaint Lumps Defendants Together and Fails to Allege Claims Against Each Defendant with Particularity.</u>

Rule 9(b) does not permit a plaintiff to "merely 'lump' multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'" *Cordova v. Lehman Bros., Inc.*, 526 F. Supp. 2d 1305, 1312–13 (S.D. Fla. 2007), *order aff'd in part, vacated in part sub nom. Puterman v. Lehman Bros., Inc.*, 332 F. App'x 549 (11th Cir. 2009) (quotations and citations omitted).

From the outset of the Complaint, the Commission impermissibly lumps allegations against all Defendants together. As examples, the Commission alleges:

1) "To fuel the Par Funding loans and enrich themselves, **the Defendants** operate a scheme wherein they raise investor money through unregistered securities offerings." (Comp. ¶ 2) (emphasis added);

2) "The fraudulent scheme operates behind multiple veils of secrecy built of **the Defendants'** lies to conceal: (1) the true nature of Par Funding's loan practices . . . (11) a Cease-and-Desist Order and sanctions issued against Abbonizio for violating state securities laws in connection with the Par Funding offering." (Comp. ¶ 8) (emphasis added);

3) "These lies, and the scheme **the Defendants** employ to perpetuate them in the unregistered securities offerings, form the basis of this action. Each Defendant plays a critical and substantial role in the fraudulent scheme to misrepresent and conceal the truth. Each individual Defendant solicits investors to purchase securities – either through an Agent Fund or directly from Par Funding – by scheming and lying. And it continues to this day." (Comp. ¶ 9) (emphasis added); and

4) However, **the Defendants** have failed to disclose [the Pennsylvania and New Jersey Orders] while touting Par Funding. (Comp. ¶ 230).

Clearly, these allegations do not satisfy Rule 9(b)'s heightened pleading requirement. By lumping defendants together, no defendant is able to delineate which conduct is being ascribed to him or her from that attributable to others. *See Durham*, 847 F.2d at 1511.

3. <u>The SEC Has Failed to Establish That Defendants Violated the Antifraud Provisions of the Federal Securities Laws.</u>

First, the Commission's 58-page Complaint fails to sufficiently allege that any of the defendants acted with scienter, which "constitutes an important and necessary element [of both Sections 17(a)(1) and 10(b)] securities fraud violations." *Betta*, 2011 WL 4369012, at *9. The Supreme Court explained that scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n. 12 (1976). The SEC must establish that "a defendant made a material misstatement, not merely innocently or negligently, but with *an*

intent to deceive." *Merck & Co., Inc. v. Reynolds,* 559 U.S. 633, 649 (emphasis in original). This standard requires courts to consider "plausible opposing inferences." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 323 (2007); *Betta*, 2011 WL 4369012, at *9.[3]

i. Par Funding, Ms. McElhone, Mr. LaForte, and Mr. Cole

The Complaint compiles a laundry list of conclusory allegations without identifying the "who, what, when, where, and how of the allegedly false statements," specifically, the maker of the statement, how it is materially false, how the speaker knows the statement to be false, and whether the speaker acted with the requisite scienter or, at minimum, negligence in connection with the statement. Examples abound.

1. Par Funding's Loan Practices

With respect to alleged misrepresentations regarding Par Funding's "loan practices," or more accurately stated, its merchant cash advance practices, the Complaint cites no specific allegations that Par Funding, or anyone whose knowledge would be imputed to Par Funding, had authority over the alleged statements or knowledge of their falsity. Notably, the Complaint is devoid of any specific allegations that Ms. McElhone made or authorized any such statements, or that she knew such representations or written materials contained material misrepresentations, omissions, or were part of a deceptive scheme.[4]

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[3] District courts have differed as to whether *Tellabs* applies to SEC enforcement actions. *See, e.g., S.E.C. v. Mannion*, 789 F. Supp. 2d 1321, 1334 (N.D. Ga. 2011), compare with *S.E.C. v. Glob. Dev. & Envtl. Res., Inc.*, No. 8:08-CV-993-T-27MAP, 2008 WL 11338454, at *6 (M.D. Fla. Nov. 26, 2008). The undersigned counsel has not located any cases in which the Eleventh Circuit Court of Appeal has addressed this issue. As a result, *Betta* stands as the most persuasive authority within the Southern District of Florida.

[4] Indeed, even a cursory review of the Complaint makes clear that Ms. McElhone's appearance in it is limited to empty references to her title with absolutely no reference to her involvement in the day-to day operations or the direction or implementation of its policies. She is not alleged to have made any of the statements alleged in the complaint regarding loan practices, default rates, insurance—none of it. And, given the absence of any allegation that she was involved in operating the business, there is nothing in the Complaint that suggests she would have made any such statements with knowledge of their falsity or that she could have done so with the intent to further a fraudulent scheme. *Stevens v. InPhonic, Inc.*, 662 F. Supp. 2d 105, 120 (D.D.C. 2009)(noting that several Circuits have found that alleging that a defendant, as a corporate officer in a company, "should have known" of misleading or fraudulently-made statements based on that person's position with the company is not enough, by itself, to infer scienter); *In re Immune Response*

Instead, the Complaint attributes the alleged misstatements regarding loan practices to Messrs. Abbonizio and Vagnozzi, neither of whose conduct is attributable to Par Funding. *See Thompson v. SendTec, Inc.*, No. 06-61327-CIV, 2007 WL 9700594, at *6 (S.D. Fla. June 12, 2007) (finding that plaintiff failed to plead how individual defendants were corporate directors or officers of the corporate entity, and thus, could not impute the scienter of the individual defendant onto the corporate defendant). Moreover, many of the alleged misrepresentations regarding the underwriting process attributed to Messrs. Abbonizio and Vagnozzi—those indicating that the underwriting process was the "coupe de grace" "exceptional," "exemplary," and the like—constitute mere puffery and opinions "deemed immaterial by a broad spectrum of federal courts." *City of Monroe Employees Retirement Sys. v. Bridgestone Corp.*, 399 F.3d 651, 671 (6th Cir. 2005) ("Statements describing a product in terms of "quality" or "best" or benefitting from "aggressive marketing" are too squishy, too untethered to anything measurable, to communicate anything that a reasonable person would deem important to a securities investment decision.");. *Solow*, No. 06-81041-CIV, 2008 WL 11333854, at *6) (noting that jury instruction for materiality in an SEC enforcement action "conveyed the concept that 'puffing' is not material.")[5] Certainly, the Complaint never alleges that Par Funding or anyone suggested that on-site inspections were done for every merchant applicant, or that they were always completed in 48-72 hours. A reasonable investor would not attach significance to Par Funding's decision not to inspect businesses with which it has a prior relationship or where the size of the deal would not warrant the expense of a physical inspection. With respect to the claim about "merchant liaisons" (Comp., ¶184), the

Securities Litigation, 375 F.Supp.2d 983, 1028-1029 (S.D. Cal. 2005) (refusing to attribute actionable misrepresentations to corporate officers because there was no allegation that they "either participated in the day-to-day corporate activities or had a special relationship with the corporation, such as participation in preparing or communicating group information at particular times.").

[5] This same reasoning would apply to Mr. Laforte's alleged representation that "Par Funding is the most profitable cash advance company in the United States and maybe in the world." (Comp. ¶ 220.) This form of marketing is too untethered to anything measurable to be material.

Complaint is silent as to who made the representation, how it was made, or how the maker knew it was false or made it with scienter.

2. Loan Default Rates

The SEC claims that Messrs. Laforte, Abbonizio, Furman, and Vagnozzi made false and misleading claims to investors regarding the loan default rate for the MCA transactions. (Comp. ¶¶ 185-203.) However, the SEC's allegation of falsity is based solely on *its* preference for a method of calculating a default rate over the method used by Par Funding. (Comp. ¶ 148.) The SEC does not allege that the loan default rate analysis used by Par Funding was contrary to industry standard, nor does it allege that there is even an industry standard for the loan default rate. The SEC also does not allege that the percentage of defaults allegedly reported to investors was false based on Par Funding's method of calculating the default rate, or that it represented a particular method to investors. Rather, the SEC alleges that Par Funding's loan default rate was calculated "differently"—presumably from the method the SEC used. But the SEC's preference for its method over Par Funding's does not prove falsity or scienter. *Lloyd v. CVB Fin. Corp.*, 2012 WL 12883522, at *20-21, 26 (C.D. Cal. Jan 12, 2012) (dismissing complaint because plaintiffs did not allege adequate facts to show that defendants' method of calculating loan loss reserves were false or misleading simply because they differed from the method used by plaintiffs.). Moreover, as to Messrs. Abbonizio, Furman, and Vagnozzi, the Complaint fails to allege how they would even know the statements were false, as they did not work at Par Funding and there is no allegation that they had access to information regarding: (1) Par Funding's actual default rate, or (2) how it was calculated.

3. Insurance on Merchant Fund Advances

The SEC alleges that, "[i]n the brochure Par Funding distributes to potential investors through the Agent Funds, Par Funding claims to offer insurance . . . that protects Par Funding in case of a default or non-payment." (Comp. ¶ 204.) First, the Complaint does not identify the maker of the alleged statement. There is no allegation regarding who drafted or had authority over the statement, the brochure the statements appeared in, or the merchants whose payments it intended to cover. The lack of specificity regarding who is alleged to have made each purported misstatement is particularly fatal to the SEC's 10(b) claims. Under *Janus Capital Group, Inc. v. First Derivative Trader*s, 564 U.S. 135, 142-43 (2011), no defendant can be liable for any alleged misstatements that are not attributable to him, or over which he has no ultimate authority.

Moreover, the allegations of the Complaint *do not support the SEC's claim that the alleged representation was false*. At a minimum, the allegation does not sufficiently meet the heightened pleading requirement of Rule 9(b) to support its falsity. For example, the SEC does not allege that Par Funding *did not obtain insurance* to cover non-payment by a merchant, or that the insurance it obtained would not protect Par Funding in case of non-payment by a merchant. Instead, it alleges that the claim is false because "Par Funding *did not offer small businesses* insurance on the Loans, and thus investor funds were not protected by insurance." Comp. ¶ 207. The SEC's characterization reflects a fundamental misunderstanding of the alleged representation made in the brochure, which, logically speaking, would not require merchants to be advised that Par Funding obtained insurance to cover their failure to pay. Any such insurance would involve an agreement between Par Funding and the insurance carrier to cover nonpayment by the merchant. Because this insurance would neither be *offered to* nor necessarily even disclosed to the merchants, the SEC's theory of falsity crumbles.

Even if the statement were false or misleading, even in the light most favorable to the SEC, a reasonable inference can be drawn from the Complaint that Par Funding, Ms. McElhone, and Messrs. Laforte and Cole would not have prepared a brochure distributed by the Agent Funds. *See Metro. Transportation Auth. Defined Benefit Pension Plan Master Tr. v. Welbilt, Inc.*, No. 8:18-cv-3007-T-30AEP, 2020 WL 905591, *4 (M.D. Fla. Feb. 6, 2020) (In deciding a motion to dismiss, court may consider other inferences that may be drawn from the allegations). There certainly is no allegation that they did. Moreover, the SEC fails to allege how Messrs. Abbonizio, Furman, and Vagnozzi, would know whether Par Funding obtained the insurance or what the insurance coverage entailed because they did not work at Par Funding and there is no allegation that they had access to this information.

4. Payments to Ms. McElhone and Mr. Cole

The SEC's allegation that Par Funding made misrepresentations in SEC filings about McElhone and Cole's receipt of funds represents yet another example of its failure to understand Par Funding's operation and cash flows before filing this case. The SEC alleges that Par Funding made two false filings with the Commission regarding how investor funds would be used. Both filings—the first, a Form D Notice of Exempt Securities Offerings filed in August and the second, an amended Form D notice filed in April 2020—disclosed investor proceeds raised by Par Funding through 2019. (Comp. ¶¶ 235-236.) According to the SEC, the representations made in these filings "that Cole and McElhone would not receive any of the gross proceeds of the securities offering are false." (*Id.* at ¶ 239.)

However, the SEC's allegations fail to adequately specify whether the payments to Ms. McElhone and Mr. Cole represented *gross proceeds* of the offering—in other words, funds deposited by investors—rather than other funds generated by Par Funding's legitimate merchant

cash advance business. This is particularly true given the allegations of the Complaint that Par Funding advanced at least $600 million to merchants and charged "interest" to the merchants they funded (Comp. at ¶¶ 44-46), which obviously generated revenues for Par Funding. *Cordova*, 526 F.Supp.2d at 1319 (S.D. Fla. 2007), *rev'd on other grounds*, 332 Fed.Appx. 549 (11th Cir. 2009) (dismissing complaint alleging securities fraud for failure to satisfy Rule 9(b)'s particularity requirement with respect to the allegation of commingled investor funds after finding that "the allegations are insufficient to show Defendants had a duty to correct any statement attributable to Defendants regarding the segregation of funds."). The SEC's conclusory allegations do not meet the requirements of Rule 9(b) given the reasonable inference that can be drawn from the Complaint that these transfers were made from Par Funding revenues, and not gross proceeds of the of the offering. The SEC cannot simply freeze, for example, the funds from an account without making a reasonable effort to segregate ill-gotten gains from legitimate proceeds. *S.E.C. v. McGinn*, No. 10-CV-457, 2012 WL 1142516 at *5 (N.D.N.Y. Apr. 4, 2012) (assessing various accounts and finding that where illegitimate funds were commingled with legitimate funds, the two categories were severable and limited amount of asset freeze only to the amount of the illegitimate funds).

Notably, the SEC did not allege in its Complaint that Par Funding promised to segregate investor funds from other funds generated by the business. Consequently, the SEC's theory that the mere transfer of funds from an account in which both were held rendered the statements in the Commission filings false is simply inadequate. At a minimum, the SEC would have to allege with more specificity the amounts (of each) held in Par Funding's accounts at the time of the alleged transfers. Also, because no representation regarding the segregation of funds was made to investors, the allegations do not support a finding that the statements made in the Commission filings were false or made with a high degree of scienter.

5. Other Misrepresentations Alleged in the Complaint

The SEC's allegations regarding Par Funding's regulatory history do not constitute actionable material misrepresentations and omissions. (Comp. ¶ 220.) To begin with, the SEC's laundry list of statements made by Messrs. Abbonizio, Vagnozzi, Furman and Gissas are not attributable to PAR Funding. Under *Janus Capital Group, Inc.*, 564 U.S. at 142–43, no defendant can be liable for any alleged misstatements that are not attributable to him, or over which he has no ultimate authority. Here, the SEC is attempting to attribute statements made by third-parties, none of whom owned, managed, or were even employed by Par Funding, to the company. Even before the Supreme Court's decision in *Janus*, courts found that corporations generally were not liable for statements made by third parties on their behalf. *See Raab v. General Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993).

Moreover, Mr. LaForte's statements as alleged do not constitute material misstatements or omissions. An omission is material for purposes of a securities fraud claim if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32. Here, the SEC's theory is that Mr. LaForte's statements touting Par Funding's success as a profitable cash advance company are made materially misleading by omission because he failed to disclose that Par Funding "has twice been sanctioned for violating the securities laws."

Notably, the SEC does not allege, because it cannot, that Par Funding's cash advance business operations were *not* profitable. *Fries v. N. Oil & Gas, Inc.*, 285 F. Supp. 3d 706, 719 (S.D.N.Y. 2018) (omitted mismanagement or uncharged criminal conduct is sufficiently material when a defendant makes a statement that can be understood, by a reasonable investor, to deny that

the illegal conduct is occurring). Nor does it argue that Par Funding had an independent duty to make this disclosure—because it did not. "[T]he securities laws do not impose a general duty to disclose corporate mismanagement or uncharged criminal conduct . . . a duty to disclose uncharged criminal conduct does arise if it is necessary to ensure that a corporation's statements are not misleading." *MAZ Partners LP v. First Choice Healthcare Solutions, Inc.*, No. 6:19-cv-619-Orl-40LRH, 2019 WL 5394011, *16 (M.D. Fla. Oct. 26, 2019) (quoting *In re Sanofi Sec. Litig.*, 155 F. Supp. 3d 386, 403 (S.D.NY 2016)) ("Allegations that defendants concealed corporate mismanagement or uncharged criminal conduct are not actionable unless the non-disclosures render other statements by defendants misleading.").

Instead, the SEC makes the specious argument that Par Funding's regulatory history renders a representation regarding its profitability misleading by omission. However, absent some evidence that a material reason for its success was the use of the improper business practices which led to those sanctions, the omission is not material. *Fries*, 285 F. Supp. 3d at 719 (omitted mismanagement or uncharged criminal conduct is sufficiently connected to defendants' existing disclosures when a corporation puts the reasons for its success at issue, but fails to disclose that a material source of its success is the use of improper or illegal business practices).

ii. Allegations Specific to Furman and Vagnozzi

The Commission's allegations that Messrs. Furman and Vagnozzi violated Counts I, II, III, and IV center on their making oral misrepresentations to investors and providing them with Par Funding brochures or materials containing falsehoods. The Complaint, however, is devoid of *any* specific allegations—outside of the impermissibly group pleading addressed above—that Messrs. Furman or Vagnozzi *knew* such representations or written materials contained material misrepresentations, omissions, or were some part of deceptive scheme. Put differently, the

Complaint is fatally flawed because it does not allege that Messrs. Furman and Vagnozzi, individually, made a specific material misstatement, not merely innocently or negligently, but with "*an intent to deceive*" or that he acted with severe recklessness. *Merck & Co., Inc.*, 559 U.S. at 649 (emphasis in original).

Indeed, it is telling that there are no allegations that either had any knowledge that what he purportedly told or gave to anyone was false, misleading, or contained omissions in the Complaint's sections entitled "The Fraudulent Par Funding Securities Offering Scheme" (Comp. ¶ 40) and "Material Misrepresentations and Omissions in Connection with The Par Funding, ABFP, United Fidelis, and Retirement Evolution Offerings." (Comp. ¶ 154). The Complaint further fails to allege that their "conduct was an extreme departure of the standards of ordinary care, which presents a danger of misleading buyers or sellers that is either known to [him] or is so obvious that [he] must have been aware of it." *S.E.C. v. Monterosso*, 756 F.3d 1326, 1335 (11th Cir. 2014).

As examples, these sections of the Complaint assert the following allegations that beg for answers to Mr. Furman and Mr. Vagnozzi's italicized questions:

1) "Defendant Furman also solicited investors to purchase Par Funding Notes. For example, in November 2017 Furman met with potential investors at his firm, United Fidelis, in West Palm Beach, Florida, and recommended the Par Funding investment." (Comp. ¶ 58);

- *When recommending the Par Funding investment, how does Mr. Furman know that Par Funding was purportedly engaged in a scheme?*

2) "Furman told the potential investors that Par Funding made loans to small businesses and charged 36% interest on the loans. Furman distributed Par Funding marketing materials, including a brochure, and touted Par Funding's management expertise and its thorough due diligence in selecting borrowers. Furman also emphasized to the investors that their money would be safe and secure because the default rates on the Loans were 1% or less." (Comp. ¶ 59);

• *How does Mr. Furman know that any information that he told or provided potential investors was supposedly false or misleading? He did not work at Par Funding. (Comp. ¶ 29).*

3) "Furman told the potential investors that the percentage of interest Par Funding would pay on its Notes would depend on the amount invested. He told them the higher the investment amount, the higher the interest rate and thus the return. He explained to the potential investors that if they invested $300,000-$400,000, Par Funding promised to pay the investors an annual return of 12.5% in monthly installments over one year. Furman provided the potential investors with offering materials, including the Par Funding Note." (Comp. ¶ 60);

• *Again, how does Mr. Furman know that any information that he told or provided potential investors was purportedly false or misleading?*

4) "As recently has April 2020, Vagnozzi hosted a Zoom call geared toward recruiting people to start Agent Funds to raise money for Par Funding. Vagnozzi led the call in which he explained that he wanted to teach people how to be 'finders' and not unregistered broker-dealers so that would not get into 'any trouble.' He goes on to talk about Par Funding, describing it as one of the best MCA lenders you can find, touts the 1% default rate, and says you can get commissions and 'you will make money.'" (Compl. ¶ 72);

- *What is wrong with attempting to get Agent Funds to comply with the federal securities laws? And how did Vagnozzi know that statements about Par Funding were supposedly false or misleading?*

5) "Attendees were given a one-page flyer describing four investment opportunities, one of which was MCAs. The flyer described the MCA investment opportunity has having a 2% default rate and offering between 10-14% returns with principal returned in 1, 2, or 3 years." (Compl. ¶ 96);

- *Again, how did Vagnozzi know that Par Funding's default rates allegedly were false and misleading?*

6) "Vagnozzi told the attendees that '[w]e have stock market alternative investments that are secure…' and that an investment in Par Funding does not have 'too much risk' and the investment is 'knocking it out of the park.'" (Compl. ¶98);

- *These statements are mere puffery.*

7) "A mere two weeks later, Vagnozzi and Furman forwarded investors a dramatically different message purporting to be **from Par Funding** that states "Over the past several months, Par Funding, like many other companies across the globe, has been severely impacted by the Coronavirus pandemic." **Par Funding goes on to say** it has "been forced to close our physical offices" and that "virtually all of [Par Funding's Loan

borrowers] have called seeking a moratorium on payments and other restructured payment terms." (Comp. ¶ 126) (emphasis added);

• *How do Messrs. Furman or Vagnozzi know that any information from Par Funding was purportedly false or misleading?*

8) "In this same email message Vagnozzi goes on to discourage investors from filing a lawsuit against Par Funding and tells investors his attorney is working to restructure the investments so payments to investors can resume." (Compl. ¶ 131);

9) In April 2020, Furman emailed investors an email message he claimed was **from Par Funding** indicating that if investors do not accept an offering to replace their current promissory notes with "Exchange Notes" offering significantly less interest and over a longer period of time, then Par Funding would file for bankruptcy. (Comp. ¶ 132) (emphasis added).

• *How do Messrs. Furman or Vagnozzi know that any information from Par Funding was purportedly false or misleading? What is false or misleading about discussing potential default scenarios?*

10) "In a Par Funding brochure that Furman, Abbonizio, and Vagnozzi distribute to potential investors, Par Funding details its supposedly rigorous underwriting process to approve merchant loans, calling it "Exceptional Underwriting Rigor." (Comp. ¶ 158).

• *How do Messrs. Furman or Vagnozzi know that the Par Funding brochure is allegedly false or misleading?*

11) Likewise, on the United Fidelis website, Furman and United Fidelis tout a 1.2% default rate for the "MCA investment" they offer. (Comp. ¶ 191);

• *How does Mr. Furman know that the default rate is purportedly inaccurate?*

12) In Fall 2017, Furman gave a Florida investor a Par Funding brochure claiming that Par Funding had provided "more than $220 million in business funding" since its inception in 2012. (Comp. ¶ 195);

• *How does Mr. Furman know that the Par Funding brochure is supposedly false or misleading?*

13) However, by August 2017, Par Funding had filed more than 240 lawsuits against small businesses for defaulting on their Loans, seeking more than $20 million in missed Loan payments. (Comp. ¶ 196); and

• *How do Messrs. Furman or Vagnozzi know how many lawsuits Par Funding filed against small businesses for defaulting on their loans?*

14) Furman has misrepresented the New Jersey Order to at least one potential investor while soliciting her for the Par Funding investment through Fidelis. For example, on June 16, 2019, Furman told an undercover individual posing as an investor that the state of New Jersey had "retracted" its action against Par Funding and had said Par Funding was "good" and did not need to pay a fine or have any penalties. (Comp. ¶ 233).

• *At the time, how was Mr. Furman aware that the information he told an undercover posing as an investor about the New Jersey Order was allgedly inaccurate?*

Clearly, the Complaint fails to adequately plead the requisite element of scienter in Counts I, II, III, and IV.

Moreover, for Counts V and VI, the SEC has failed to plead with sufficient particularity that Messrs. Furman and Vagnozzi were negligent when they purportedly made material misrepresentations and omissions in connection with the use of Agent Funds. (Comp. ¶¶ 134-141.) The Complaint alleges that Messrs. Furman and Vagnozzi engaged in certain representations based on information provided to them by a licensed attorney. Specifically, paragraph 133 of the Complaint alleges:

> In April 2020, Vagnozzi and Furman emailed investors a video **created on about April 18, 2020, in which Vagnozzi and his attorney – the same attorney who created the turnkey Agent Funds** – tell investors that the attorney reviewed Par Funding's financials and Par Funding is insolvent. Vagnozzi reassures investors he believes Par Funding will rebound, and then Vagnozzi and the attorney recommend that investors not to file lawsuits against Par Funding for defaulting on the promissory notes but to instead accept Exchange Notes through which the investors would receive lower investment returns than they were promised in the promissory notes they had purchased from ABFP and the Agent Funds.

Id. It is not unreasonable (and, thus, cannot support a finding of negligence) to rely on a video in which an attorney recommends, as Messrs. Furman and Vagnozzi allegedly did, to accept the Exchange Notes. At bottom, the Complaint does not assert with any particularity that any

Defendant acted with negligence in connection with the use of Agent Funds. The Court should, as a result, also dismiss Counts V and VI of the Complaint.[6]

iii. Allegations Specific to Mr. Abbonizio

The Commission failed to allege that Mr. Abbonizio made any representation with the intent to deceive or with severe recklessness, or that he understood himself to be participating in a fraudulent scheme. Several examples are illustrative, though by no means exhaustive. Regarding Par Funding's underwriting process, the Commission alleges in part that:

> "In August 2019, Abbonizio told other potential investors during another solicitation event that Par Funding does an on-site inspection of small businesses 100% of the time before approving any Loan. The representations about Par Funding's underwriting process are false. In truth, the underwriting process was not stringent."

Comp. at ¶¶ 164–66.

These excerpted allegations from the Complaint precede the Commission's account of several occasions on which Par Funding allegedly made loans to small businesses without conducting on-site inspections. *See id.* at ¶¶ 170–73. But the Commission does not allege any basis for believing that Mr. Abbonizio was aware that his representations to potential investors were inaccurate. He is not alleged to have been in possession of contrary information, nor is he alleged to have been somehow involved in the on-site inspection process such that he should have known. Thus, even accepting all the Commission's allegations as true, a "plausible opposing inference" to be drawn from the Complaint is that Mr. Abbonizio actually believed, albeit incorrectly, that Par Funding's underwriting process was rigorous.

As another example, regarding the default rate on merchant loans, the Commission alleges in part that:

[6] The remaining allegations as to Mr. Furman do not allege that he made material misrepresentations or omissions to the investing public. *See* Complaint ¶¶ 7, 29, 30, 31, 109-114, 143, and 144.

> "When Abbonizio touted Par Funding's low default rates to an Undercover posing as a potential investor in January 2020, Par Funding had filed more than 1,200 lawsuits seeking more than $150 million in missed payments on defaulted Loans."

Id. at ¶ 200.

However, the Commission does not allege that Mr. Abbonizio was aware of Par Funding's recovery efforts or how the individual merchant defaults underlying those efforts may have been impacting the overall default rate on an aggregated basis—information that can hardly be considered "so obvious that [Mr. Abbonizio] must have been aware of it." Nor does the Commission allege that Mr. Abbonizio was in possession of any other information that contradicted his representations to potential investors about the default rate. Thus, as currently pleaded, the collective allegations in the Complaint are not sufficient to raise a strong inference that Mr. Abbonizio acted with scienter.

Accordingly, as currently pleaded, the collective allegations in the Complaint are insufficient to raise a strong inference that defendants acted with scienter, and as such the claims against each respective defendant in Counts I through IV should be dismissed. *See S.E.C. v. Roanoke Tech. Corp.*, No. 05-CIV-01880, 2006 WL 2470329 (M.D. Fla. Aug. 24, 2006) (dismissing complaint alleging securities fraud violations where the SEC failed to satisfy the pleading requirements for scienter).

4. The SEC Has Failed to Establish That Ms. McElhone Violated the Exchange Act as a "Control Person."

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*, 544 F.3d at 1237 (quoting *Theoharous v. Fong*, 256

F.3d 1219,1227 (11th Cir. 2001)). "The legislative purpose in enacting a control person liability provision was to prevent people and entities from using straw parties, subsidiaries, or other agents acting on their behalf to accomplish ends that would be forbidden directly by the securities laws." *Dusek v. JPMorgan Chase & Co.*, 132 F.Supp.3d 1330, 1351–52 (M.D. Fla. 2015) (quoting *Laperriere v. Vesta Ins. Grp., Inc.*, 526 F.3d 715, 721 (11th Cir. 2008)).

First, as explained herein, the Complaint fails to allege with a primary violation of the Securities laws against Par Funding. Second, the Complaint is devoid of any facts to support a reasonable inference that Ms. McElhone controlled the general affairs of Par Funding. In fact, the SEC alleges that Mr. Laforte controlled the day-to-day affairs of the business. Comp. ¶¶ 17, 43. The Complaint is nearly silent as to Ms. McElhone and alleges nothing to suggest that she exercised this authority or control over the company. While Ms. McElhone held the title of CEO, "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. Aug. 31, 2004). Consequently, Count VIII should be dismissed as to Ms. McElhone under Rule 12(b)(6) for failure to state a claim.

5. The Commission's Complaint Constitutes an Impermissible Shotgun Pleading

In addition to the foregoing, the Commission's claims against each defendant for violations of the antifraud provisions contained in Counts I-VII do not state with particularity which specific allegations apply to which specific count. Instead, the Complaint states in Counts I through VI that "[t]he Commission repeats and realleges paragraphs 1 through 267 of this Complaint." (Comp. ¶¶ 268, 271, 274, 277, 280, 281, and 286). The Eleventh Circuit has held that this represents a "shotgun pleading" in the context of securities cases where fraud is alleged. *See Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2001); *Ferrell v. Durbin*,

311 Fed. App'x 253, 259 (11th Cir. 2009) (unpublished decision). Specifically, "[s]hotgun pleadings are those [like the instant Complaint] that incorporate every antecedent allegation by reference into each subsequent claim for relief or affirmative defense." *Wagner*, 464 F.3d at 1279 (citing *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) (per curiam)).

In *Wagner*, the plaintiff did not weave the specific allegations against the defendant into the fraud counts, but rather simply realleged and incorporated by reference the factual allegations into the substantive counts. The *Wagner* court was troubled that the defendants were left "to wonder which prior paragraphs support the elements of the fraud claim." 464 F.3d at 1279. The court further stated that while the allegations were very extensive and specific, structurally there was a "lack of connection between the substantive count and the factual predicates [and]…plaintiffs ha[d] not connected their facts to their claims in a manner sufficient to satisfy Rule 9(b)." *Id*.

Courts in this district have dismissed Commission complaints for failing to comply with the *Wagner* mandates. In *SEC v. Solow*, the Commission filed a lengthy, very detailed complaint against a single defendant. *Solow*, 2007 WL 917269, at *3.The Honorable Donald M. Middlebrooks dismissed the Commission's complaint because the Commission had simply realleged and reincorporated the factual allegations of the complaint, but failed to "state with particularity which specific allegations apply to which specific count, thereby impeding [d]efendant's ability to discern the exact nature of the complaint against him." *Id.* at *3. Hence, notwithstanding the fact that Solow was the *only* defendant in the referenced case, the court still determined that simply realleging and reincorporating dozens and dozens of factual allegations is insufficient to meet the strictures of Rule 9(b). *Id*. ("Plaintiff's claim does not satisfy Rule 9(b) as currently plead.").

The deficiencies that make the Complaint an impermissible shotgun pleading as to Counts I through VI also require that Count VII be dismissed or replead. The SEC incorporated into Count VII all 267 paragraphs from the background section. However, it is improper to include paragraphs alleging fraudulent conduct into counts, such as Count VII alleging Section 5 violations, that do not themselves allege fraud. *See S.E.C. v. Levin*, No. 12-21917, 2013 WL 594736, *9 (S.D. Fla. Feb. 14, 2013)(directing SEC to strike "impertinent, fraud-related factual allegations" from a Section 5 count because, by incorporating all factual allegations into the count "it superfluously links the allegations of fraudulent conduct with the allegations of selling unregistered securities").

Here, the Commission's Complaint has totally ignored the Eleventh Circuit's holding in *Wagner* and the guidance it received from Judge Middlebrooks. Unlike *Solow*, which involved only one defendant, there are multiple co-defendants in the instant matter, making the "shotgun pleading" even more problematic for each defendant. Accordingly, the Court should dismiss Counts I-VII for failing to meet Rule 9(b)'s heightened pleading requirements.

6. The SEC Failed to Plead Sufficient Facts to Allege that the Trust is a Proper Relief Defendant.

A relief defendant is an individual or entity with "no ownership interest in the property that is the subject of the litigation but may be joined in the lawsuit to aid the recovery of relief." *S.E.C. v. Founding Partners Capital Mgmt.*, 639 F. Supp. 2d 1291, 1295 (M.D. Fla. 2009) (citing to *S.E.C. v. Cavanagh*, 445 F.3d 105, 109 n. 7 (2d Cir. 2006)). Though a relief defendant is not accused of any wrongdoing, "a federal court may order equitable relief against such where that person (1) has received ill-gotten funds, and (2) does not have a legitimate claim to those funds." *S.E.C. v. Chemical Trust*, No. 00-8015-CIV, 2000 WL 33231600 (S.D. Fla. Dec. 19, 2000) (citing to *S.E.C. v. Cherif*, 933 F.2d 403, 414 n. 11 (7th Cir. 1991). Further, "[e]ven securities claims without a fraud element must be pled with particularity pursuant to Rule 9(b) when that nonfraud

securities claim is alleged to be part of a defendant's fraudulent conduct." *Solow*, 2007 WL 917269, at *4 (S.D. Fla. 2007). Thus, because the SEC is alleging that Par Funding funneled investor dollars into the Trust, the SEC must plead sufficient allegations with particularity to satisfy both components of the two-part test. *See generally S.E.C. v. Founding Partners Capital Mgmt.*, 639 F. Supp. 2d 1291, 1294 (M.D. Fla. 2009) (finding that, "the Complaint fails to specifically identify factual contentions against [the company]" to demonstrate how the company qualified as a relief defendant); *accord Janvey v. Adams*, 588 F.3d 831 (5th Cir. 2009).

The SEC alleges that "between July 2018 and September 2018, Par Funding transferred at least $14.3 million, which included investor funds, to the Trust." ¶ 36. The SEC's allegation fails to pass muster under Rule 9(b)'s heightened particularity standard. The SEC is strictly prohibited from joining the Trust as a relief defendant without factual support that investor funds were diverted into the Trust. *See Founding Partners Capital Mg.*, 639 F. Supp. 2d at 1295 ("such a sue-first-and-sort-out-the-facts-later-approach is [not] compatible with the Federal Rules or fundamental fairness). The mere recital that Par Funding "funnels money to the LME 2017 Family Trust" is a conclusory allegation, and without more, is an insufficient attempt to support a claim for equitable relief. (Comp., ¶ 8.) *See Wimbley v. Doyon Sec. Servs., LLC*, No. 14-20935, 2014 WL 4376148, at *1 (S.D. Fla. Sept. 4, 2014) ("A complaint cannot rest on "naked assertion[s] devoid of further factual enhancement."). As stated in Section IV.3(i), *infra*, this is particularly true here given the reasonable inference that can be drawn from the Complaint that these transfers were made from Par Funding revenues, and not gross proceeds of the of the offering. Just as the SEC cannot simply freeze funds from an account without making a reasonable effort to segregate ill-gotten gains from legitimate proceeds, *McGinn*, 2012 WL 1142516 at *5, it cannot merely allege in conclusory fashion as it does in the Complaint that the Par Funding transferred funds—

some of which possibly may have been investor funds—to the Trust, and expect that to be enough where their basis for the claim and freezing of Trust assets, is someone else's alleged fraud. Thankfully, Rule 9(b) requires more. *See Solow*, 2007 WL 917269, at *4 (S.D. Fla. 2007).

Accordingly, the Trust is not properly named as a Relief Defendant and should not be subject to any future disgorgement order[7] seeking to recover the Trust's assets.

7. The SEC's Claims are Time Barred.

Much of the SEC's claims are time barred because they are based on conduct that occurred as long as nine years ago, which is outside the five-year statute of limitations period set forth in 28 U.S.C. § 2462. For SEC enforcement actions that seek civil penalties, this "five-year clock begins to tick [] when a defendant's allegedly fraudulent conduct occurs." *Gabelli v. S.E.C.*, 568 U.S. 442, 448 (2013). And, because "[d]isgorgement in the securities-enforcement context is a 'penalty' within the meaning of § 2462, disgorgement actions must be commenced within five years of the date the claim accrues." *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). Consequently, any non-equitable remedies, including penalties and disgorgement, requested by the SEC for conduct arising prior to July 24, 2015, which is five years prior to the date of the Complaint, must be denied.

V. CONCLUSION

For the reasons above, the SEC's claims against Defendants Complete Business Solutions Group, Inc., d/b/a Par Funding, Lisa McElhone, Joseph W. LaForte, Joseph Cole Barleta, Perry S. Abbonizio, Dean J. Vagnozzi, Michael C. Furman, and Relief Defendant The LME 2017 Family Trust should be dismissed.

Dated: November 2, 2020

Respectfully submitted,

[7] Additionally, the disgorgement amount, if any, is limited to the ill-gotten gains less the payouts, less the "legitimate" profits. *See S.E.C. v. Better Life Club of America*, 995 F. Supp. 167, 180 n. 20 (D.D.C. 1998).

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