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

_____/

PLAINTIFF'S RESPONSE TO DEFENDANTS' AND RELIEF DEFENDANT'S JOINT MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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I. INTRODUCTION

Having defrauded investors out of nearly half a billion dollars, the individual Defendants, with the Relief Defendant they control in tow, now ask this Court to let them escape the consequences of their actions by dismissing the Amended Complaint (DE 119) against them, based on incorrect legal standards, infirm arguments, and an apparent willful misreading of the Amended Complaint.

Defendants claim the promissory notes are not securities – **even though they filed securities offering disclosures for the notes with the Commission, identifying the notes as securities.** Even though they have explicitly and in writing consented to this Court's subject matter jurisdiction, which is based on the notes being securities. (DE 173-1; 176-1; 200-1; 221-1; 255-1; 336-1). And even though three states have already found that the promissory notes are securities.

They also claim that the Amended Complaint's fraud charges lack sufficient detail, even though the Amended Complaint is organized with headings, identifying each misrepresentation and omission, with allegations beneath each heading as to the Defendants, separately and by name. Defendants also make arguments based on alternative theories and facts which read more like defenses than arguments about the sufficiency of allegations. For example, they claim they Commission did not consider whether the Defendants perhaps calculated the loan default rate correctly under industry standards, that the Commission did not consider that perhaps McElhone and Cole received money from Par Funding that did not include investor funds, and more fact arguments that they can present at trial or on summary judgment. Not on a motion to dismiss. Finally, they claim that the charges against them are barred by a statute of limitations. This claim is wrong as well.

The Court should deny the Motion. The Amended Complaint is detailed, the Individual Defendants have shown no confusion about what has been alleged against them, including during the two-day preliminary injunction hearing and the numerous briefs filed concerning the preliminary relief in this case. The Court should deny the Motion and permit this case to move forward.

II. BACKGROUND

The Commission initiated this action on July 24, 2020 against Defendants for violations of the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"). The Commission amended the Complaint to correct the Relief Defendant's name. (DE 119).

The Amended Complaint alleges that the Defendants engaged in a scheme of unregistered, fraudulent securities offerings that raised nearly half a billion dollars from an estimated 1,200 investors nationwide. (DE 119 at ¶ 1). A brief summary of the allegations follows.

Defendants Lisa McElhone and her husband, convicted felon Joseph W. LaForte, a/k/a Joe Mack, a/k/a Joe Macki, a/k/a Joe McElhone, were the primary architects of the scheme. *Id.* McElhone and LaForte, together with Defendants Complete Business Solutions Group, Inc., d/b/a Par Funding ("Par Funding"), Perry Abbonizio, and Joseph Cole Barleta ("Cole") made opportunistic loans from Par Funding to small businesses across America. *Id.*

To fuel the Par Funding loans and enrich themselves, the Defendants operated a scheme wherein they raised investor money through unregistered securities offerings. *Id.* at ¶ 2. From August 2012 until approximately December 2017, Par Funding primarily issued promissory notes and offered them to the investing public directly and through a network of sales agents. *Id.*

This changed in early January 2018, when Par Funding learned it was under investigation by the Pennsylvania Department of Banking and Securities for violating state securities laws through its use of unregistered agents. *Id.* at ¶ 3. In September 2018, Par Funding told the Pennsylvania Securities Regulators it had terminated its agreements with the unregistered sales agents. *Id.* This was only half of the story.

In truth and unbeknownst to the Pennsylvania Securities Regulators, after learning of the investigation Par Funding implemented a new way to fuel its loans – namely, through so-called "Agent Funds" created for the purpose of issuing their own promissory notes, selling the notes to the

investing public through unregistered securities offerings, and funneling investor funds to Par Funding. Par Funding issues its promissory notes to the Agent Funds, paying higher rates of return than what the Agent Funds pay investors under the Agent Funds' notes. Par Funding has more than 40 Agent Funds operating today. *Id.* at ¶ 4.

McElhone and Laforte orchestrate the scheme through Par Funding and McElhone's company, Full Spectrum Processing, Inc., whose employees and officers operated Par Funding. LaForte, Full Spectrum CFO Cole, and Par Funding investment director and partial owner Abbonizio solicit investors to invest in the securities. *Id.* at ¶ 5.

Defendant Dean J. Vagnozzi, through his company ABetterFinancialPlan.com d/b/a A Better Financial Plan, recruited individuals to create the Agent Funds, offering them the opportunity to open a turnkey Agent Fund that issues and sells securities, complete with training, marketing materials, and an "Agent Guide," as well as a Private Placement Memorandum, corporate registration, and offering materials provided by Vagnozzi's attorney. *Id.* at ¶ 6. Vagnozzi manages the Agent Funds through his company ABFP Management Company, LLC, and Abbonizio oversees and coordinates the Agent Funds. *Id.* Vagnozzi and Michael C. Furman each operate Agent Funds. Vagnozzi operates ABFP Income Fund, LLC and ABFP Income Fund 2, L.P., which issue, offer, and sell promissory notes and limited partnership interests to investors. Furman, through his company United Fidelis Group Corp., operates and manages Fidelis Financial Planning LLC, which issues, offers, and sells promissory notes to investors. *Id.* at ¶ 7.

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; (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 Relief Defendant, 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; and (11) a Cease-and-Desist Order and sanctions issued against Abbonizio for violating securities laws in connection with the Par Funding offering. *Id.* at ¶¶ 8.

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 luring investors through a series of misrepresentations and omissions. *Id.* at ¶ 9.

III. STANDARDS ON A MOTION TO DISMISS

A. Rule 12(b)(6)

On a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court must accept as true all facts alleged in the Amended Complaint in the light most favorable to the Commission. *American United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1057 (11th Cir. 2007). All reasonable inferences in the Amended Complaint must be drawn in the Commission's favor. *Ventrassist Pty. Ltd. v. Heartware, Inc.,* 377 F. Supp. 2d 1278, 1285 (S.D. Fla. 2005). "The motion is not a procedure for resolving a contest between the parties about the facts or the substantive merit of the plaintiff's case." *Id.* at 1285. A court considering a Rule 12(b) motion is generally limited to the facts contained in the complaint and attached exhibits, including documents referred to in the complaint that are

central to the claim. *See Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009). Moreover, under the liberal notice pleading standards of Rule 8(a), all the Commission must do is set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." *McMillian v. AMC Mortgage Servs., Inc.*, 560 F. Supp. 2d 1210, 1212 (S.D. Ala. 2008). The Court's inquiry at the motion to dismiss stage still focuses on whether the challenged pleadings "give the defendant fair notice of what the . . . claim is and the grounds on which it rests." *Id.*, quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). "The proper test is whether the complaint 'contains either direct or inferential allegations respecting all material elements necessary to sustain a recovery under some viable legal theory.'" *Id.* at 1213 (citation omitted). The threshold for withstanding a motion to dismiss based on a claim of inadequate pleading is "exceedingly low." *In the Matter of Southeast Banking Corp.*, 69 F.3d 1539, 1551 (11th Cir. 1995).

B. Rule 9(b)

Fed.R.Civ.P. 9(b) requires plaintiffs to plead the circumstances of fraud "with particularity." While requiring more specific facts than in non-fraud cases, Rule 9(b) does not abrogate the concept of notice pleading set forth in Rule 8(a) and a court "must be careful to harmonize the directives of Fed. R. Civ. P. 9(b) with the broader policy of notice pleading." *SEC v. Physicians Guardian Unit Inv. Trust*, 72 F.Supp.2d 1342, 1352 (M.D. Fla. 1999) (denying motion to dismiss on grounds that plaintiff did not plead fraud with enough specificity); *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001). The purpose of Rule 9(b) is to ensure allegations of fraud are specific enough to provide sufficient notice of the acts complained. *SEC v. Ginsburg*, 2000 WL 1299020 at *2 (S.D. Fla. Jan. 10, 2000).. Pleading with particularity under Rule 9(b) does not require the plaintiff to plead "detailed evidentiary matter." *Ross v. A.H. Robins Co.*, 607 F.2d 545, 557 n.20 (2nd Cir. 1979) (reversing dismissal of a private Section 10(b) action). The complaint need only provide a reasonable delineation of the underlying acts and transactions allegedly constituting the fraud. *Anderson v.*

Transglobe Energy Corp., 35 F.Supp.2d 1363, 1369-70 (M.D. Fla. 1999). A complaint may satisfy the particularity requirement by providing facts that answer the "familiar questions of 'who, where, when, why, and how." *SEC v. Digital Lightwave*, 196 F.R.D. 698, 700 (M.D. Fla. 2000).

When judged against these standards, the Amended Complaint easily satisfies Rule 9(b) by pleading who engaged in the fraud, where and when they engaged in the fraud, and how they did it. The Individual Defendants have more than enough information to understand the claims against them and can effectively prepare a responsive pleading and defense. The Court should, therefore, deny, the motion to dismiss the Amended Complaint.

IV. THE INDIVIDUAL DEFENDANTS FAIL TO DEMONSTRATE THE PROMISSORY NOTES ARE NOT SECURITIES

The Amended Complaint alleges that the Defendants offered and sold promissory notes to fuel Par Funding's business of lending money to small businesses, and that investors invested in Par Funding's business. (DE 119 at ¶¶ 1, 2, 4, 11, 41, 44-45, 48). The Defendants and Relief Defendant argue that the Par Funding promissory notes issued prior to December 2017 are not "securities" as contemplated by the Securities and Exchange Acts and, therefore, the Amended Complaint fails to state a plausible claim for relief with respect to these notes.

A. Par Funding Characterized The Note As A Security, And Therefore It is Characterized As a Security in Court Proceedings

Where, as here, an issuer characterizes a promissory note as a security, it is also characterized as security in Court proceedings. *See SEC v. Lottonet*, 2017 WL 6949289, *10 (S.D. Fla. Mar. 31, 2017) (Report & Recommendation), ("[The issuer's] own characterization of these investments as subject to the federal securities laws is sufficient to characterize them as securities where, as here, there are no countervailing factors that would lead a reasonable person to question this characterization.") (quotation omitted), *adopted* 2017 WL 6989148 (S.D. Fla. Apr. 6, 2017).

Par Funding issued the notes and it characterized the notes as securities and/or subject to the securities laws in both its Commission filings and in the notes themselves. Par Funding characterized the notes as subject to the federal securities laws and in fact filed a Notice of Exempt Offering of Securities on Form D with the Commission. (DE 119 at ¶¶ 235-236). Form D is, as the title of the Form states, notices of exempt *securities* offerings, and thus Par Funding self-identified the notes as securities to the Commission. A set forth in the Amended Complaint, Par Funding identified the notes as securities and claimed an exemption to offer and sell them without registering the offering. *Id.*

Thus, Par Funding characterized the notes as securities and/or subject to the federal securities laws. As set forth above, that characterization extends to Court proceedings as well.

B. Even if Par Funding Had Not Characterized Its Promissory Notes As Securities, The Defendants Fail To Meet Their Burden For Rebutting The Presumption That Promissory Notes Are Securities

1. Promissory Notes Are Presumed To Be Securities Unless The Defendants Demonstrate Otherwise

"The fundamental purpose undergirding the Securities Acts is 'to eliminate serious abuses in a largely unregulated securities market.'" *Reves v. Ernst & Young,* 494 U.S. 56, 60 (1990) (quoting *United Housing Found., Inc. v. Forman,* 421 U.S. 837, 849 (1975)). Congress defined "security" as "sufficiently broad to encompass virtually any instrument that might be sold as an investment." *Id.* at 61. Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act define "security" to include "any note."

Whether a note is a security depends on whether, given "the economic reality" of the transaction, the note functions as an investment. *Reves,* 494 U.S. at 62-65. In *Reves*, the Supreme Court established the test for examining promissory notes to determine whether the note functions as an investment: "The test begins with the language of the statute; because the Securities Acts define 'security' to include 'any note,' ***we begin with a presumption that every note is a security***." *Id.* at 65

(emphasis added). This presumption is rebuttable by the Defendants only if it is demonstrated either that the note is on a list of certain judicially excepted items or that the note bears a "strong resemblance" to an item on that list. *Id.* at 67.

2. The Defendants Have Not Met – And Cannot Meet – Their Burden For Rebutting The Presumption That The Par Funding Promissory Notes Are Securities

a. The Notes Do Not "Fall Squarely" Into An Exempt Category of Notes

The Defendants and Relief Defendant assert that the Par Funding promissory notes were not securities because they meet two of the exempted item categories – namely: (i) short-term notes secured by a lien on a small business or some of its assets; and (ii) short-term notes secured by an assignment of accounts receivable.[1] (Motion at 8-9). These arguments fail.

First, the promissory notes at issue are not loans to businesses in exchange for liens on the assets of those businesses or on those businesses' accounts receivable. Rather, they are investments in Par Funding's business, and they are marketed as investments. (DE 119 at ¶¶ 53, 233, 225, 226, 261, 265). As alleged in the Complaint, the notes were issued to finance Par Funding's purported business of loaning money to small businesses. Investors would receive a set percentage of interest plus the return of principal when the notes matured. (DE 119 at 1, 2, 50). Thus, the notes do not fall within the exceptions the Defendants claim. This same conclusion, based on similar facts and reasoning, was reached in *Wallenbrock*, 2002 WL 35649374, *2, and *SEC v. 1 Global Capital LLC*, 2019 WL 1670799 (S.D. Fla. Feb 8, 2019), in denying the defendant's motions to dismiss.

[1] In explaining why short-term notes secured by an assignment of accounts receivable are exempt, *Reves* explained: "If the note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to *correct for the seller's* cash-flow difficulties, or to advance some other commercial purpose,... the note is less sensibly described as a 'security.' " 494 U.S. at 66 (emphasis added). This type of exempt note is typically "issued directly by a manufacturer [borrower] to the lender; in exchange for funds to cover a cash-flow shortfall, the manufacturer assigns a particular receivable to the lender." *SEC v. J.T. Wallenbrock & Assoc.*, 2002 WL 35649374, *2 (C.D. Cal. Apr. 3, 2002) (denying motion to dismiss; rejecting argument that note fell into exempted category under *Reves*).

Here, the Amended Complaint does not allege any contact whatsoever between the investors and the small businesses borrowing from Par Funding. Instead, the Amended Complaint alleges that ***Par Funding*** offered high-interest loans to small business across America and that Par Funding raised money from investors through the offer and sale of promissory notes "to fuel the Par Funding loans and enrich themselves." (DE 119 at ¶¶ 1, 2, 4, 11, 41, 44-45, 48). Nor does the Amended Complaint allege that the investors received a lien or an assignment of accounts receivable from the small businesses/Par Funding borrowers in exchange for investing in the notes. There is no allegation the promissory notes even indicated who the Par Funding small business borrowers were, much less which of the small business borrowers' assets or receivables secured the notes. Furthermore, there is no allegation that the notes were exchanged for liens, assets, receivables, or any other interest in any particular small business borrower. Nor did they. (DE 28-14 & 28-15, Par Funding Promissory Note).

The Defendants rely solely on an allegation concerning the security agreement that accompanied the promissory notes, which, as the Amended Complaint alleges, grants a security interest to the investor in substantially ***all*** of Par Funding's assets, including but not limited to its accounts receivable. (Amended Complaint, at ¶ 54). The security agreement states that Par Funding "grant[s] a security interest to the investor in ***substantially all of its [Par Funding's] assets***, including, without limitation, its inventory, accounts receivable and general intangibles, to Secured Party…." (DE 28-14 & 28-15, Security Agreements).

The Security Agreement goes on to define "Collateral" as

> [A]ll tangible and intangible personal property **of Debtor [Par Funding]**, wherever located and whether now owned or hereafter acquired, including but not limited to **all** accounts, contract rights, general intangibles, chattel paper, machinery equipment, goods, inventory, fixtures, investment property, letter of credit rights, supporting obligations, books and records, deposit accounts, bank accounts, documents and instruments together with all proceeds thereof.

Id. (emphasis added).

First, Par Funding issued merchant cash advance loans to small businesses in exchange for the borrowers' accounts receivables. (DE 21-3, LaForte Deposition, at 118:3-12). Therefore, even if the notes are secured by "all" of Par Funding's assets, including its accounts receivable, they certainly were not secured by ***a*** lien on a small business borrower of Par Funding or ***an*** assignment of a small business/borrower's accounts receivable. Rather, investor funds were used by Par Funding to fund numerous loans to small businesses so that each investor noteholder obtained a small, fractionalized interest in thousands of the loans. Each merchant cash advance agreement granted Par Funding a security interest in the small business/borrower and its assets and assigned that small business' future accounts receivable to ***Par Funding***. Thus, to the extent the notes were secured, they were secured by ***many*** small assignments of accounts receivable. As such, they do not meet the two exemption categories Defendants claim.

In *1 Global*, the Court rejected precisely the same arguments the Defendants make here, that notes investing in a company that made merchant cash advance loans were not securities under *Reves*. In denying the Defendants' motion to dismiss and finding that the notes did not meet the exemptions for short-term notes secured by a lien on a small business or some of its assets and for short-term notes secured by an assignment of accounts receivable, the Court explained:

> First, even if the MOIs [notes] were secured, they certainly were not secured by ***a*** lien on ***a*** small business or some of ***its*** assets, nor were they secured by ***an*** assignment of accounts receivable. Rather, funds tendered under MOIs were used to fund numerous MCAs so that each noteholder obtained a small, fractionalized interest in up to hundreds of MCAs. Each MCA granted 1 Global a security interest in the business and its assets and assigned the business' future accounts receivable to 1 Global. Thus, to the extent that the MOIs were secured, they were secured by *many* liens on *many* businesses or secured by *multiple* assignments of accounts receivable.

2019 WL 1670799, at *5.

For these same reasons, the Par Funding promissory notes do not fit into the enumerated categories that are not securities under *Reves*.[2]

b. The Notes Do Not Meet Any Of The Factors Under The Family Resemblance Test

Moreover, even if there was surface resemblance to one of the enumerated categories that are "not securities," courts continue the analysis and apply the *Reves* family resemblance test to determine if the note is a security. The Defendants claim the Court should not examine the notes under the family resemblance test because they claim it is crystal clear that the notes fall into an enumerated category of exempt notes. However, even where courts find a note falls into an enumerated category, they apply the family resemblance test to "confirm the wisdom" of their holding. *Wallenbrock*, 2002 WL 35649374, at *3 ("The "judicially created categories" of exceptions to the general rule that notes are securities were purely hypothetical; the categories were not based on specific instruments to which later courts could draw sensible comparisons. Thus, further analysis is required to determine whether a given note is truly of the same type as one of the exceptions…."). "The crucial inquiry, therefore, is the family resemblance factors, not whether the face of the note appears to fall within one of the exception categories. This is consistent with the Court's view that the inquiry must focus on the economic reality of the instrument." *Id.* (citing *Reves*, 494 U.S. at 61).

The notes at issue here do not meet the "family resemblance" test. Defendants do not claim otherwise, and a brief review shows the wisdom of that concession. Family resemblance depends on four factors: (1) the motivation for entering the transaction; (2) the plan of distribution; (3) the

[2] The Defendants claim *Asset Protection Plans, Inc. v. Oppenheimer & Co., Inc.*, Case No. 11-cv-440, 2011 WL 2533839 (M.D. Fla. June 27, 2011), involved notes similar to the Par Funding notes and were found to not be securities. In that case, a single firm made short-term loans evidenced by promissory notes to six NFL prospects to cover their expenses until they received NFL player salaries. The loans were secured by the prospect's potential signing bonus and were guaranteed by the prospect's agent. The court found that based on the fact that the loans were to the prospects for personal expenses and were guarantee by the firm serving as the players' agent, the notes were, or were similar to, notes in consumer financing, short-term notes secured by a lien on a small business, and short-term notes secured by an assignment of accounts receivables. The facts here—hundreds of investors collectively investing millions of dollars to fund a business enterprise—are completely different. Defendants point to no case holding notes similar to Par Funding's to be "non-securities" under *Reves*, while cases examining similar notes compel rejection of their argument.

reasonable expectations of the investing public; and (4) whether there are any risk reducing factors that would make application of the securities laws unnecessary. *Reves*, 494 U.S. at 66-68. The more these factors suggest that the more a note is like a security, the more likely that it is a security.

All four factors support the finding that the notes are securities. As to the first factor, the Court examines the motivations that would prompt a reasonable buyer and seller to enter into the transaction. *Id.* at 66. "If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a 'security.' *Id.* Thus, in *Reeves* the "motivations" factor was satisfied because the issuer sold notes to raise capital for its general business operations and purchasers bought them to earn "a profit in the form of interest." *Id.* at 68-69; *accord*, *1 Global*, 2019 WL 1670799, at *6; *Wallenbrock*, 2002 WL 35649374, *4. Therefore, the first factor supports a finding that the notes are securities because Par Funding sold the notes to fuel its merchant cash advance loan business, and enrich itself and its principals (DE 119 at ¶¶ 1, 2, 48-50), while investors would have been motivated by the "high single digit" or "low double digit" rate of return that Par Funding offered. (DE 119 at ¶¶ 49-50).

The second factor requires that the court determine whether there was "common trading for speculation or investment" on the notes. *Reves*, 494 U.S. at 66. The offer and sale of the notes to a "broad segment of the public" is sufficient to establish this element. *See id.* at 68 ("common trading" factor satisfied when issuer offered notes over extended period to 23,000 people and notes were held by more than 1,600 people when issuer filed for bankruptcy); *Wright v. Downs*, 972 F.2d 350, at *3 (6th Cir. July 17, 1992 (unpublished) (notes sold to 200 investors constituted broad segment). Here, the Amended Complaint alleges Defendants sold the notes to investors throughout the United States, with Par Funding hiring sales agents to locate and solicit investors. (DE 119 at ¶¶ 1, 48-61). By 2017, Par Funding had raised more than $90 million from investors through the offer and sale of the

notes. *Id.* By February 2019, Par Funding had raised no less than $227 million from 488 investors in at least a dozen states. *Id.* at ¶ 235. Thus, this factor supports finding the notes are securities.

Under the third factor, the Court examines "the reasonable expectations of the investing public," with the Court considering "instruments to be 'securities' on the basis of such public expectations, even where an economic analysis of the circumstances of the particular transaction might suggest that the instruments are not 'securities' as used in that transaction." *Reves,* 494 U.S. at 66. Where the notes are characterized by the originator as "investments" and there are no "countervailing factors" that would lead a reasonable person to question this characterization, "it would be reasonable for a prospective purchaser to take the [originator] at its word." *Id.* at 69; *see SEC v. J.T. Wallenbrock*, 313 F.3d 532, 539 (9th Cir. 2002) (third factor satisfied even though issuer did not describe the notes as an investment: "a reasonable investor sending funds to Wallenbrock for a guaranteed return of 20% and an automatic rollover every three months would expect that the funds were an investment, not a short-term loan"); *McNabb v. SEC*, 298 F.3d 1126, 1129, 1132 (9th Cir. 2002) (affirming Commission's finding that reasonable investor would view notes as an investment; notes bore 11% to 17% interest, payable monthly, with terms ranging from 17 months to six years). Here, there was substantial unrebutted evidence admitted during the preliminary injunction hearing showing that Defendants themselves characterized the notes as an investment.[3] Moreover, as in *Wallenbrock and McNabb*, reasonable investors sending money to Par Funding for one-year in

[3] During the relevant time period, Defendants characterized Par Funding notes as "investments" when soliciting investors. DE 116 at ¶¶ 96, 98, 100, 105, 110; DE 177-42 at ¶¶ 1-5 (investor declaration that Defendant LaForte pitched the notes to her 2016 as an investment to fuel Par Funding's loan business); DE 177-39 at ¶¶ 1-8 (investor declaration that Defendants Vagnozzi and Abbonizio pitched the notes to him in 2016 as a low-risk investment); DE 177-43 at ¶¶ 1-9; (DE 41-10 at ¶¶ 1-5 (soliciting investor to use retirement funds to invest in Par Funding). During the solicitation, investors were shown a menu of "investment options," reflecting higher rates of return based on a higher investor contributions. (DE 177-39 at pdf page 8). Investors were told it was a safe and low-risk investment. (DE 177-42, 177-39, 177-43 at ¶¶ 1-7, DE 116 at ¶¶ 58-59; DE 41-10 at ¶¶ 1-3 & 8). Investors were told they were investing in Par Funding, which would pay them monthly interest rates on the investment. (DE 41-10 at ¶¶ 1-4 & 10; DE 177-39; DE 116 at ¶ 215; DE 41-10 at ¶ 8). The Par Funding notes were marketed as a "Merchant Cash Investment". (DE 41-10 at pdf pg 29/127). The Par Funding notes were advertised as having a high monthly interest rate on the investment. (DE 41-10 at ¶ 10, pdf p 29-30).

exchange for a high single- or low double-digit rate of return would expect that they were making an investment.

Thus, the third factor supports a finding that the Par Funding promissory notes are securities.

The fourth factor weighs strongly in favor of finding the notes to be securities since there is no allegation that the notes were insured, and the Amended Complaint alleges that investor funds were not protected by insurance (DE 116 at ¶ 207), and the Defendants have not identified any other regulatory agency to protect investors' interests. 494 U.S. at 67. While Pennsylvania, New Jersey, and Texas state securities regulators have brought actions, the Par Funding offering spanned states throughout the United States (DE 116 at ¶ 1), and *Reves* was specifically concerned that there be some "*federal* regulation." 494 U.S. at 69 (emphasis added).

Thus, each family resemblance factor weighs against an argument that the notes are not securities.

V. THE AMENDED COMPLAINT IS NOT A "SHOTGUN" PLEADING

Next, the Individual Defendants argue that the Court should dismiss the Amended Complaint because it is a "shotgun" pleading. In support, they point to three allegations in the Introduction section where the Commission is giving an overview of the case.

Shotgun pleadings as those "calculated to confuse the 'enemy,' and the court, so that theories for relief not provided by law and which can prejudice an opponent's case, especially before the jury, can be masked, are flatly forbidden by the [spirit], if not the [letter], of these rules." *T.D.S. Inc. v. Shelby Mut. Ins. Co.,* 760 F.2d 1520, 1544 n.14 (11th Cir. 1985) (Tjoflat, J., dissenting), *quoted in Weiland v. Palm Beach Cnty. Sherriff's Office*, 792 F.3d 1313, 1320 (11th Cir. 2015). Thus, "[a] dismissal under Rules 8(a)(2) and 10(b) is appropriate where it is *virtually impossible* to know which allegations of fact are intended to support which claim(s) for relief." *Weiland*, 792 F.3d at 1325 (quotation omitted and emphasis in original). No such "virtual impossibility" exists in this case. The

factual allegations against each party are clear. The Amended Complaint includes headings identifying sections of the pleading that relate to each of the misrepresentations and omissions, and under each heading the Amended Complaint identifies the Defendants who made the misrepresentation or omission, and includes allegations about each Defendant's misrepresentations and omissions. The same is done with respect to the unregistered offer and sale of the securities allegations. Therefore, dismissal for a shotgun pleading is inappropriate. *SEC v. PV Enterprises, Inc.*, 2016 WL 8808697 (S.D. Fla. June 28, 2016) (denying motion to dismiss on shotgun pleading grounds because the complaint included allegations about each defendant).

VI. THE AMENDED COMPLAINT STATES CAUSES OF ACTION UNDER SECURITIES ACT SECTION 17(A) AND EXCHANGE ACT SECTION 10(B)

To allege claims under Section 17(a)(1)-(3) of the Securities Act and Section 10(b) and Rule 10b-5(a)-(c) of the Exchange Act, the Commission must demonstrate: (1) a device, scheme, artifice to defraud; a material misrepresentation or omission; or an act, practice, or course of business which would operate as a fraud or deceit; (2) in the offer of or in connection with the purchase or sale of a security; and (3) in interstate commerce. *SEC v. Chemical Trust*, 2000 WL 33231600 at *9 (S.D. Fla. Dec. 19, 2000). For claims under Section 17(a)(1) and Rule 10b-5, the Commission must also allege facts supporting scienter. The Commission need only demonstrate negligence for claims under Sections 17(a)(2) and (3). *Aaron v. SEC*, 446 U.S. 680, 697 (1980). The Commission does not have to allege or prove investor reliance, proximate causation, or damages. *SEC v. K.W. Brown and Company,* 555 F.Supp.2d 1275, 1303 (S.D. Fla. 2007) As set forth immediately below, the Amended Complaint states fraud claims against each of them.

A. The Amended Complaint States Claims Under Section 17(a)(2) of the Securities Act and Section 10(b) and Rule 10b-5(b)-5(b) Against Each Individual Defendant

1. As To LaForte

a. Misrepresentations and Omissions

Truthful statements can be misleading when someone omits to state a material fact without which the truthful statement, based on the circumstances, becomes misleading. Securities Act § 17(a)(2); 17 C.F.R. § 240.10b-5(b) (in the context of Rule 10b-5). "[I]f a [speaker] chooses to make a statement on a subject, having chosen to speak, the company is obligated to make a full and fair disclosure." *Harvey M. Jasper Retirement Trust v. Ivax Corp.*, 920 F. Supp. 1260, 1267 (S.D. Fla. 1995) (citing *Dominick v. Dixie Natl Life Ins. Co.*, 809 F. 2d 1559, 1571 (11th Cir. 1987)).

The Amended Complaint alleges that LaForte is the trustee of Defendant Full Spectrum Processing, which operates Par Funding, and that he ran Par Funding's day to day operations and acted as its *de facto* CEO (*Id.* at 11, 17, 40, 43). The Amended Complaint alleges numerous misrepresentations or omissions by LaForte – any *one* of which is sufficient to state a claim against him.

Misrepresentation That He Invested His Own Money In Par Funding. Section IV(G)(8) of the Amended Complaint. On November 21, 2019 LaForte told an audience of more than 300 investors and potential investors that he had invested his own money in Par Funding. *Id.* at ¶¶ 95, 100-103, 244, 245. However, LaForte never invested any money in Par Funding. *Id.* at ¶¶ 244-245.

Omission of His Criminal History. Section IV(G)(4). The Amended Complaint alleges that LaForte touted himself while failing to disclose his criminal history. During a November 21, 2019 sales dinner, LaForte told the audience of 300 investors that he had started Par Funding eight years prior and that it is now probably the most profitable cash advance company in the United States. *Id.* at ¶¶ 102-103. Moreover, the Par Funding website directed investors to a Forbes Council online

profile LaForte wrote about himself, in which he touts himself as "one of the small business industry's most distinguished and accomplished leaders." *Id.* at ¶ 213. LaForte also has videos posted online holding himself out as a "financial expert" for Par Funding. *Id.* However, he did not tell investors he started Par Funding shortly after his release from prison and that he was a two-time convict for grand larceny and money laundering. *Id.* at ¶¶ 1, 11, 17, 18, 40, 213, 214.

Additionally, the Amended Complaint alleges that LaForte was claiming to be someone else and using aliases with Par Funding investors. *Id.* at ¶¶ 213-214. He uses an alias at Par Funding, with email address joemack@parfunding.com and a business card for his other alias, Joe Macki so that investors will not google his name and discover his criminal history. *Id.*

Misleading Statements and Omissions about Par Funding's Success and Loan Default Rate. Section IV(G)(2). The Amended Complaint alleges that LaForte touted Par Funding's 1% loan default rate to potential investors. *Id.* at ¶¶ 185-186. For example, in Summer 2018, LaForte met with at least one investor in Maryland and pitched the Par Funding investment to her, telling her that Par Funding's loan default rate was only 1%. *Id.* On November 21, 2019, LaForte told an audience of 300 investors during a sales dinner that Par Funding is probably one of the most profitable cash advance companies in the U.S. and maybe the world. *Id.* at ¶ 102. In truth, by November 21, 2019, Par Funding had filed more than 1,000 lawsuits, in Philadelphia alone, against small businesses for defaulted cash advance loans, seeking more than $145 million in missed loan payments. *Id.* at ¶ 198. Similarly, in July 2020, LaForte touted a 1% default rate on the Par Funding loans in a solicitation meeting with undercover individuals posing as potential investors. *Id.* at ¶ 201. However, by July 2020, Par Funding had filed at least 2,000 lawsuits seeking about $300 million in missed payments from small business owners on Loans Par Funding alleges are in default. *Id.* An analysis of these lawsuits reveals that Par Funding's loan default rate is as high as 10%. *Id.* at ¶ 194.

The Defendants argue that the Commission fails to allege that the way Par Funding calculated its loan default rate was flawed. (Motion at 14). This argument is wrong. The Commission is alleging misrepresentations about the loan rate because LaForte (and others, as set forth below) touted a 1% loan default rate when in reality they were litigating thousands of lawsuits for defaulted loans seeking millions in missed payments. This made the 1% default rate representation misleading. Investors did not know the full story and furthermore, the 1% default rate did not include all loans that were not being paid in full, which also made the blanket statements about the 1% default rate misleading.

Misleading Statements and Omissions About Par Funding's Success And Regulatory History. Section IV(G)(5). The Amended Complaint also alleges that LaForte touted Par Funding's success, while failing to disclose its regulatory history. On November 21, 2019, LaForte told an audience of 300 investors during a sales dinner that Par Funding is probably one of the most profitable cash advance companies in the U.S. and maybe the world. *Id.* at ¶¶ 101, 102, 220. LaForte did not disclose that Par Funding had twice been sanctioned for violating state securities laws. *Id.* at ¶ 227. In November 2018, the Pennsylvania Securities Regulators filed a Consent Agreement and Order against Par Funding for violating the Pennsylvania Securities Act prohibiting the use of unregistered sales agents in the offer and sale of securities, and fined Par Funding $499,000 (the "Pennsylvania Order"). *Id.* at ¶ 228. In December 2018, the New Jersey Bureau of Securities issued a Cease-and-Desist Order against Par Funding based on its offer and sale of unregistered securities (the "New Jersey Order"). *Id.* at ¶ 229. Both of these Orders were in effect when LaForte touted Par Funding on November 21, 2019. *Id.* at ¶¶ 228-230.

Misrepresentations About Par Funding's Insurance. Section IV(G)(3). On June 5, 2018, LaForte also told a potential investor in Maryland that if a merchant defaulted on his loan, Par Funding had insurance to back up investor funds, thus reassuring the investor that her investment was safe and

secure. *Id.* at ¶ 205. This was false; Par Funding did not offer small businesses insurance on the loans, and thus investor funds were not protected by insurance. *Id.* at ¶ 207.

Thus, there are four misrepresentations or omissions alleged against LaForte, any *one* of which is sufficient to state a claim under Section 17(a) and Rule 10b-5.

b. *Materiality*

Materiality is a mixed question of fact and law, anda court should not dismiss a complaint on the grounds that statements or omissions are immaterial unless they "are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance." *Ganino v. Citizens Utilities Co*., 228 F.3d 154, 162 (2d Cir. 2000); *In re Unicapital Corp. Sec. Litig*., 149 F. Supp. 2d 1353, 1364 (S.D. Fla. 2001) (declining to dismiss complaint on materiality grounds). The test for materiality is an objective one—whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action. *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1323 (11th Cir. 1982). A statement or omission is material where "there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable shareholder as having significantly altered the 'total mix of information available.'" *SEC v. DCI Telecommunications, Inc*., 122 F.Supp.2d 495, 498 (S.D.N.Y. 2000) (quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 232 (1988)). Under these standards governing materiality, the Commission has more than satisfied its light burden.

Investors would certainly want to know about LaForte's criminal background and "Joe Mack's" true identify. *See United States v. Hatfield*, 724 F.Supp. 2d 321, 328 (E.D.N.Y. 2010) ("It is well-settled that information impugning management's integrity is material to shareholders."). A reasonable investor would have wanted to know LaForte was running the day-to-day operations and controlling Par Funding, and that he was a convicted felon. *Id.* at ¶¶ 17-18, 43.

The failure to disclose the prior state regulatory actions against Par Funding is a material omission. *See SEC v. Merchant Capital, LLC* 483 F.3d 747, 771 (11th Cir. 2007) (finding clear error where district court failed to find omission material because "[t]he existence of a state cease and desist order against identical instruments is clearly relevant to a reasonable investor, who is naturally interested in whether management is following the law in marketing the securities").

The misrepresentations and omissions about the loan default rate, the loans being insured, and the underwriting process are material. As the Amended Complaint alleges, LaForte explained to potential investors the importance of the underwriting process. *Id.* at ¶ 146. Because they were investing in a company that was in the business of making loans and LaForte told them the insurance ensured the safety of the investment, any reasonable investor would have wanted to know the truth about the loan default rate and that insurance was not offered to borrowers. Thus, the Commission has alleged facts supporting materiality.

c. Scienter

The element of scienter requires "a showing of 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)). Circumstantial evidence is sufficient to support a strong inference of scienter. *See In re Scientific Atlanta, Inc. Securities Litigation*, 754 F.Supp.2d 1339, 1361 (N.D. Ga. 2010). Furthermore, the Eleventh Circuit permits the aggregation of factual allegations to infer scienter. *Phillips v. Scientific–Atlanta, Inc.*, 374 F.3d 1015, 1017 (11th Cir. 2004). Moreover, issues of scienter are highly fact-specific, rendering such determinations most appropriate for the trier of fact. *Merchant Capital*, 483 F.3d at 766.

Finally, the Court should reject the Individual Defendants' argument that the Commission must plead scienter with particularity. Rule 9(b) explicitly provides that "malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The Private Securities Litigation

Reform Act's heightened pleading standard for scienter does not apply to actions brought by the SEC, which "need only allege scienter generally." *SEC v. Betta,* 2010 WL 963212 at *n. 5 (S.D. Fla. March 15, 2010) (citations and quotations omitted).

Under the proper legal framework, the Amended Complaint easily pleads LaForte's scienter. The Amended Complaint alleges that LaForte runs Par Funding's day to day operations, acts as the *de facto* CEO of Par Funding and Full Spectrum, which operates Par Funding, serves as the Director of Sales of Par Funding, supervises the Full Spectrum employees who operate Par Funding, supervises the underwriting employees, and decides which loans Par Funding will approve and fund. He also signs the loans on behalf of Par Funding. DE 119 at ¶¶ 17, 43. He had securities licenses and worked in the securities industry. *Id.* at ¶ 18. LaForte and McElhone controlled Par Funding and did control it on the day the Complaint was filed. *Id.* at ¶¶ 1, 40. These facts support a finding that LaForte, at a minimum, knew or was severely reckless in not knowing that the loans did not include an insurance component, that the loans he was approving had resulted in thousands of lawsuits for defaulted loan payments, and that the losses from the loans he approved at the company he controlled were in the hundreds of millions of dollars. These same facts support a showing that LaForte knew he himself was controlling Par Funding – a fact he allegedly concealed from investors. Similarly, LaForte was convicted and served time in prison for his own crimes. *Id.* at ¶¶ 17-18. These allegations support a finding that he knew about his own criminal history – facts he allegedly concealed from investors. Further support of scienter is apparent in the allegation that LaForte used aliases with investors because he knew if investors googled his real name they would learn about this criminal history. *Id.* at ¶¶ 214. Finally, the Amended Complaint alleges generally that LaForte engaged in his fraudulent conduct knowingly or recklessly. *Id.* at ¶¶ 269, 272, 275, 278.

As such, the Amended Complaint adequately pleads scienter as to LaForte for a claim under Rule 10b-5(b) of the Exchange Act. Since the Commission has pled adequate facts showing scienter,

the lower standard of negligence applicable to Securities Act § 17(a)(2) is also adequately pled. Moreover, negligence is also generally alleged against LaForte in the Section 17(a)(2) count. *Id.* at ¶ 218.

Thus, as set forth above, LaForte's arguments that the Commission did not plead a fraud claim against him under Rule 10b-5 of the Exchange Act and Section 17(a)(2) of the Securities Act are wrong. Not only are the relevant facts alleged, as set forth above, they are alleged with particularity as to Who engaged in the fraud: LaForte; What he did: he made misrepresentations and omissions to investors, which are clearly alleged - under headings identifying each topic of misrepresentation or omission, and in allegations identifying LaForte by name; Where he made the misrepresentations and omissions: at a sales event or meeting; When: the date or approximate time period, including conduct that was ongoing at the time of the filing (identified in present tense in the Amended Complaint); and How: whether in writing, posting online, saying it in a video, or saying it orally.

2. <u>As to Cole</u>

1. Misrepresentations and Omissions

The Amended Complaint alleges that Cole served as Par Funding's CFO (*Id.* at ¶¶ 19 & 37). The Amended Complaint alleges that he made several misleading statements and omissions, any one of which is sufficient to state a claim under Rule 10b-5(b) and Section 17(a)(2).

Misleading Statements and Omissions About LaForte. Section IV(G)(4). The Amended Complaint alleges that Cole has solicited investors by touting the experience of Par Funding's management team while failing to disclose LaForte's criminal history, despite knowing LaForte has been convicted of crimes involving dishonesty. *Id.* at ¶ 215. For example, in Fall 2017, Cole solicited a potential investor to invest in Par Funding, promising up to 15% monthly interest payments. *Id.* Cole told the investor that Par Funding was successful and touted Par Funding's experienced

management team. *Id.* Cole did not disclose that the management team was led by a convicted felon. *Id.*

Finally, the Amended Complaint alleges that Cole signed an April 2020 Form D for Par Funding that was filed with the Commission and that fails to identify LaForte in Item 3 of the form requiring the disclosure of "Related Persons." The accompanying instructions direct that "Related Persons" include the issuers executive officers and persons "performing similar functions" and to provide any clarification needed to make the information supplied not misleading. Here, LaForte is identified as the President of Par Funding, runs the day-to-day operations, and he functions as an executive officer of Par Funding. Nonetheless, Cole did not disclose LaForte's involvement in its Commission filings. *Id.* at ¶ 219.

False Statements About the McElhone and Cole's Receipt of Funds. Section IV(G)(7). The Amended Complaint alleges that Cole signed Par Funding's 2020 Notice of Exempt Offering of Securities on Form D filed with the Commission (the "2020 Form D" or "Amended Form D"). The Amended Complaint alleges the Amended Form D falsely states that Par Funding: (1) did not pay McElhone or Cole any of the gross proceeds from the securities offering; and (2) did not pay any commissions. *Id.* at ¶¶ 235-243. It also alleges that the amended Form D again omits LaForte's involvement in Par Funding. *Id.* at ¶¶ 218-219.

On April 28, 2020, Par Funding filed an amended Form D with the Commission that was signed by Cole. *Id.* at ¶¶ 236 & 238. This amended Form D changes a previous Par Funding filing with the Commission by increasing the total amount sold to investors through the Par Funding securities offering. *Id.* at ¶ 237. This filing states that Par Funding has paid no finders' fees and commissions, and that none of the gross proceeds of the offering has been or is proposed to be used for payments to executive officers or others listed in the filing's related persons section, which includes McElhone and Cole (but not LaForte). *Id.* at ¶¶ 218, 238.

The Amended Complaint alleges that the representations in the amended Form D Cole signed are false and omit material information. Specifically, it alleges that the representations that Cole and McElhone had not received any of the gross proceeds of the securities offering are false. *Id.* at ¶ 239. McElhone received at least $11.3 million from the offering between July 2015 and October 2019. *Id.* at ¶ 240. As for Cole, Par Funding transferred funds, *which included investor funds*, to companies in which Cole has an ownership interest or otherwise receives financial benefits: $1.8 million to ALB Management between July 2019 and October 2019; about $4.9 million to Beta Abigail between July 2016 and April 2019; and about $9.5 million to New Field Ventures, LLC between February 2017 and November 2019. *Id.* at ¶ 240. As of the time of filing the Complaint, Cole had recently admitted to an undercover investor that Par Funding paid him through his consulting companies. *Id.* at ¶¶ 241-242.

The Amended Complaint also alleges the amended Form D Cole signed also falsely represents that Par Funding did not pay any commissions. It alleges that Par Funding had paid so-called finders' fees of at least $3.6 million plus an addition $1 million in payments labeled as "commissions" from July 2015 to February 2020. *Id.* at ¶ 243.

b. Materiality

Cole's alleged misrepresentations and omissions concern the use of investor funds and LaForte's criminal history, which as explained above is important information any reasonable investor would want to know, and therefore it is material. Further supporting the importance of this detail is the fact that Form D explicitly requires the disclosure of the identity of anyone acting as an officer. *Id.* at ¶ 218.

Misrepresentations regarding the use of investors' funds are material. *SEC v. Cochran*, 214 F.3d 1261, 1268 (10th Cir. 2000); *SEC v. Research Automation Corp.*,585 F.2d 31, 35-36 (2d Cir. 1978). Par Funding's use of investor funds and gross proceeds from the securities offering, including

whether they were being used to line the pockets of McElhone and Cole to the collective tune of more than $15 millionand/or being used to pay commissions is information a reasonable investor would want to know and is explicitly required to be disclosed on Form D. *Id.* at¶¶ 240-242. . Any reasonable investor would have wanted to know that Par Funding was making these payments to Cole and McElhone, and that Par Funding was filing false Forms D with the Commission.

c. Scienter

On the Rule 10b-5(b) charge, the Commission, as permitted, alleges generally that Cole acted knowingly or recklessly (DE 116 at ¶ 272). Additionally, the Amended Complaint alleges facts demonstrating Cole's culpable state of mind. As for Cole's misrepresentations and omissions about LaForte's criminal history, the Amended Complaint alleges that Cole knew LaForte had been convicted of crimes involving dishonesty. DE 116 at ¶ 215. The Amended Complaint also include allegations concerning Cole's efforts to help conceal LaForte's true identify, *id.* at ¶ 214, which also shows that Cole acted with scienter when he failed to disclose LaForte's criminal history to investors.

As for Cole's misrepresentations and omissions on the amended Form D Cole signed, the Amended Complaint alleges that Cole served as CFO of Par Funding, either directly or through Full Spectrum, from at least 2017 until the date the Complaint was filed. *Id.* at ¶ 19. It alleges that he, personally and through his other companies, received offering proceeds and then he himself signed a form claiming he himself did not receive funds. *Id.* at ¶¶ 240-242. Obviously, when he signed the Form D, he knew or was severely reckless in not knowing that the statement that he had not received proceeds was false. As for the failure on that same Form D to disclose LaForte's involvement as a Related Person, Cole attended sales events with LaForte by no later than November 2019 where LaForte was introduced to investors as the President of Par Funding. *Id.* at ¶¶ 101-104. LaForte ran Par Funding's day-to-day operation and was *de facto* CEO with hiring and firing authority, while Cole was serving as the CFO. These facts plausibly support a finding that Cole knew or was reckless

in not knowing that LaForte was acting as an officer or director of Par Funding, or was performing similar functions. *Id.* at 218.

Thus, the Amended Complaint includes the general allegation that Cole acted knowingly or recklessly, and also includes allegations supporting scienter. Because the allegations support scienter, they also support the lower state of negligence – which is also generally alleged against Cole in the Section 17(a)(2) count. *Id.* at ¶ 218.

As set forth above, Cole's arguments that the Commission did not plead a fraud claim against him under Rule 10b-5 of the Exchange Act and Section 17(a)(2) of the Securities Act are wrong. Not only are the relevant facts alleged, they are alleged with particularity as to Who engaged in the fraud: Cole; What he did: made misrepresentations and omissions to investors, which are clearly alleged - under headings identifying each topic of misrepresentation or omission, and in allegations identifying Cole by name; Where he made the misrepresentations and omissions: either directly to an investor or on a Form D; When: the dates or approximate time periods for each misrepresentation and omission; and How: either verbally or in writing. Accordingly, and as set forth above, Cole's arguments that the Commission did not plead a fraud claim against him under Rule 10b-5 of the Exchange Act and Section 17(a)(2) of the Securities Act are wrong.

3. As to Abbonizio

a. Misrepresentations and Omissions

The Amended Complaint alleges that Abbonizio was Par Funding's investment director as well as a partial owner, and that Abbonizio claims to be an owner, managing partner, and founder of Par Funding. DE 116 at ¶¶ 5 ,20, 121, 154-157, 162-165, 181, 189, 217, 265.

Misrepresentations About Par Funding's Underwriting Process. Section IV(G)(1). The Amended Complaint alleges that Abbonizio touted Par Funding's underwriting process at a November 2019 sales dinner seminar, telling 300 investors that Par Funding had "rigorous standards"

and "the best underwriting in the industry." *Id.* at ¶ 163. In August 2019, Abbonizio told potential investors that during a solicitation event that Par Funding does on-site inspections of the borrowers 100% of the time before approving loans. *Id.* at ¶ 164. On January 7, 2020, Abbonizio described the underwriting group to a potential investor as "the key to our whole investment thesis," and went on to explain that the investment in Par Funding is "only compelling if you have confidence that whatever you give, $50,000 or $5 million, that we are going to do an exemplary job of putting your hard earned money in the hands of suitable companies that can meet their daily obligation to pay us back." *Id.* at ¶ 156. During this same meeting, he touted Par Funding's "exemplary track record of underwriting" and that they take more time and were more vigilant in the process. *Id.* at ¶ 157.

These representations were false. The underwriting was not stringent, on-site inspections were not always done, and loans were approved in less than 48 hours. *Id.* at ¶¶ 165-167, 181-184.

Misrepresentations About Par Funding's Loan Default Rate. Section IV(G)(2). On November 21, 2019, Abbonizio falsely told potential investors that Par Funding had a "less than 1 percent" default rate. *Id.* at ¶¶ 98-100, 188-189. However, by November 2019, Par Funding had filed more than 1,000 lawsuits, in Philadelphia alone, against small businesses for defaulted Loans, seeking more than $145 million in missed Loan payments. *Id.* at ¶ 198. In August 2019, Abbonizio told a group of 12 potential Par Funding investors during a sales dinner in Wildwood, Florida that Par Funding had a low default rate of 1 percent. *Id.* at ¶¶ 121, 197. However, by August 2019, Par Funding had filed more than 800 lawsuits against small businesses for defaulted Loans, seeking more than $100 million in missed Loan payments. *Id.* On January 7, 2020, Abbonizio met with an undercover individual posing as an investor and told her that Par Funding issues bad loans 1 percent of the time. *Id.* at ¶ 187. He further explained to this same investor on that same day that that the defaults are "one percent of $500 million." *Id.* at ¶¶ 197, 198, 200, 201. However, when Abbonizio touted Par Funding's low default rates to the undercover individual 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. In July 2020, Abbonizio touted the 1 percent default rate in a solicitation meeting with undercover individuals posing as investors. *Id.* at ¶ 201. However, at that time Par Funding had filed at least 2,000 lawsuits seeking about $300 million in missed payments from small business owners on Loans Par Funding alleges are in default. *Id.* The 1% default rate was false or misleading. *Id.* at ¶¶ 202, 203, 193, 194. An analysis of these lawsuits reveals that Par Funding's loan default rate is as high as 10%. *Id.* at ¶ 194.

Misrepresentations About Par Funding's Insurance. Section IV(G)(3). During the August 2019 sales dinner, Abbonizio falsely told potential investors that Par Funding had insurance on its merchant loans. *Id.* at ¶¶ 121, 206-207.

Misrepresentations and Omissions About LaForte. Section IV(G)(4). **Abbonizio** touted Par Funding's management, while failing to disclose LaForte's criminal history and concealing LaForte's involvement and concealing his own regulatory history. *Id.* at ¶¶ 216, 217, 262-267. For example, at the August 2019 sales dinner, Abbonizio touted Par Funding's "great team," while failing to disclose that the team leader – LaForte – is a convicted felon. *Id.* at ¶ 217. Abbonizio also concealed LaForte's identity from investors. For example, when an undercover individual posing as an investor asked Abbonizio who the founders of Par Funding are, Abbonizio responded: "There's basically five of us," naming as one of the five "Joe McElhone," which is yet another alias for Joseph LaForte used to conceal his identify from investors. *Id.*

b. Materiality

As set forth above, the misleading statements about the loan default rates, LaForte's criminal history, the insurance, and the underwriting are material. Abbonizio himself states the underwriting was the most important part of the investment. *Id.* at ¶¶ 156-157.

c. Scienter

On the Rule 10b-5(b) charge, the Commission alleges that Abbonizio acted knowingly or recklessly (DE 116 at ¶ 272). The Amended Complaint alleges that Abbonizio was an owner, founder, director, and manager of Par Funding. DE 116 at ¶¶ 5, 20, 121, 265). As for disclosures and omissions concerning LaForte's criminal history, the Amended Complaint alleges that Abbonizio claims to have founded Par Funding with LaForte, that he introduced LaForte to potential investors as the President of Par Funding, and that he was an owner of Par Funding. As for underwriting and the loan default rate, the Amended Complaint alleges Abbonizio claimed these were critical parts of the business, and necessary to Par Funding's success. As an owner of the company – which was in the business of only doing one thing – making loans, the allegations support that Abbonizio acted, at a minimum, recklessly in making false representations about these topics to investors.

Thus, as set forth above, Abbonizio's arguments that the Commission did not plead a fraud claim against him under Rule 10b-5 of the Exchange Act and Section 17(a)(2) of the Securities Act are wrong. Not only are the relevant facts alleged, as set forth above, they are alleged with particularity as to Who engaged in the fraud: Abbonizio; What he did: he made misrepresentations and omissions to investors, which are clearly alleged - under headings identifying each topic of misrepresentation or omission, and in allegations identifying Abbonizio by name; Where he made the misrepresentations and omissions: during meetings with investors and sales dinners with investors; When: the dates or approximate time periods for each misrepresentation and omission; and How: verbally. Accordingly, and as set forth above, Abbonizio's arguments that the Commission did not plead a fraud claim against him under Rule 10b-5 of the Exchange Act and Section 17(a)(2) of the Securities Act are wrong.

4. As to Vagnozzi

Misrepresentations and Omissions about Vagnozzi's Regulatory History. Section IV(G)(9). The Amended Complaint alleges that while soliciting investors for the Par Funding investment through ABFP, Vagnozzi touts his financial and business acumen and his success through ABFP, but fails to disclose his regulatory history. *Id.* at ¶ 246. For example, at the November 2019 solicitation dinner, Vagnozzi touts his "proven track record," how investors have never missed a payment, and how well ABPF does for its investors. *Id.* at ¶ 247. At this same dinner, Vagnozzi told the audience of investors: "What I'm doing is legal, but most financial advisors don't have a set of you-know-what's to drop that license so they can do what I'm doing." *Id.* at ¶ 248. In truth, just months before making this representation to potential investors, the Pennsylvania Securities Regulators sanctioned Vagnozzi for violating state securities laws. *Id.* at ¶ 249. Vagnozzi has testified under oath that ABFP is his alter ego. While playing up his supposed investment success, including success through the Par Funding investment, Vagnozzi fails to disclose to investors the fact that he settled a regulatory action with the state of Pennsylvania in May 2019 ordering him to pay a $490,000 fine based on his sales of the Par Funding investment in violation of state law. *Id.* at ¶ 250. Understanding that investors would want to know of unlawful activity when deciding with whom to invest, Vagnozzi publishes an article on the ABFP website addressing the issue head-on. And lying about it. *Id.* at ¶ 251. Specifically, on the ABFP website, Vagnozzi has an article published entitled "What's the Catch? By Dean Vagnozzi." In it, he tells potential investors:

> I have never had a criminal record in my life and I am very confident that there never will be. In fact, to the best of my knowledge, the only law that I think I ever broke was a speeding ticket that I received on the New Jersey Turnpike back when I was in my early 20's. That is about the only misdemeanor that I have ever been a part of.

Id. at ¶ 252. In truth, in 2019 Vagnozzi was sanctioned by the Pennsylvania Securities Regulators for violating the federal securities laws; and in February 2020 the Texas Securities Regulators filed a

claim against ABFP for fraud in connection with the Par Funding offering, which remains pending. *Id.* at ¶ 253. Even after the Commission filed a Consent Order against Vagnozzi for his violation of the federal securities laws on July 14, 2020, Vagnozzi continues to publish the "What's the Catch?" article on the ABFP website. *Id.* at ¶ 254. None of Vagnozzi's regulatory history is disclosed to investors. Instead, Vagnozzi tells potential investors a traffic law is the only law he has ever violated. *Id.* at ¶ 255. As recently as July 23, 2020, the ABFP website homepage includes a photo of Vagnozzi standing with individuals with the caption "A Team You Can Trust." This caption is a hyperlink that takes the reader to a page that reads "About Dean Vagnozzi." This page includes details about Vagnozzi's successes and career path. *Id.* at ¶ 256. There is no mention of his regulatory history or the sanctions levied against him for violating securities laws in connection with the offer and sale of Par Funding securities. *Id.* at ¶ 257.

Misrepresentations and Omissions About Par Funding's Regulatory History. Section IV(G)(5). The Amended Complaint alleges that Vagnozzi touts Par Funding's purported success, but omits its regulatory history. *Id.* at ¶¶ 222-225, 227, 230. For example, in a 6-minute video, Vagnozzi tells potential investors he would like to introduce them to "one of the best merchant cash advance lenders that you can find" and characterizes it as "highly profitable." *Id.* at ¶ 222. The video is widely distributed; it is posted on the Vimeo pages of ABFP and Vagnozzi, was posted on the ABFP Income Fund website until at least April 17, 2020, emailed to potential investors, and shown during sales pitches. *Id.* at ¶ 223. On the ABFP Facebook page, Vagnozzi characterizes "our MCA Fund" as [sic] "Best investment you can find." *Id.* at ¶ 224. In early 2020, Vagnozzi described the investment in Par Funding to an undercover posing as a potential investor as "like the crack-cocaine" of investments ABFP offers, adding "[a] check every month." *Id.* at ¶ 225.

b. Materiality

Vagnozzi's omission of his, ABFP, and Par Funding's regulatory histories are material. As discussed above, the fact that there have been regulatory actions for violations of the laws against an issuer, the company an investor is considering investing in, and/or the person selling the investment is something any reasonable investor would want to know. The fact that the regulatory actions concerned the Par Funding offering is clearly something any reasonable investor would have wanted to know.

c. Scienter

On the Rule 10b-5(b) charge, the Commission alleges that Vagnozzi acted knowingly or recklessly (DE 116 at ¶ 272). The Amended Complaint also alleges facts from which scienter could be determined. For example, the regulatory actions Vagnozzi failed to disclose were about him and ABFP, the company he owned, which actions he clearly knew about. Further, the Amended Complaint alleges that Vagnozzi was working as a sales agent/finder for Par Funding beginning in 2016 through December 2017, when he created the new structure for Par Funding to sell its notes through Vagnozzi's company, ABFP and other agent investment firms, and that he continued selling Par Funding notes through ABFP until the Commission filed its Complaint in this case. The Amended Complaint alleges that he was engaging in this conduct, as well as training sales agents to sell Par Funding notes during the time of the regulatory actions against Par Funding. It further alleges that he touted the success of Par Funding during the time of the regulatory actions and after them. This is more than sufficient.[4]

[4] Vagnozzi admitted in his deposition testimony knowing about both the regulatory actions and LaForte's criminal record. If he is now arguing that the Commission should file a Second Amended Complaint alleging these facts, it seems this would do nothing but cause further delay in litigating this case. Further, such an amendment is unnecessary as the Commission alleged Vagnozzi acted knowingly or recklessly in connection with the Rule 10b-5(b) violation and also alleged facts supporting this.

On the 17(a)(2) count, which requires negligence, the Commission alleged Vagnozzi acted, at a minimum, negligently.

5. <u>As to Furman</u>

a. Misrepresentations

Misrepresentations About New Jersey Order. Section IV(G)(6). The Amended Complaint alleges that Furman made misrepresentations to investors about the New Jersey regulatory action against Par Funding. 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. *Id.* at ¶ 233. This is false. New Jersey did not retract its Order. *Id.* at ¶ 225.

b. Materiality

As set forth above, any reasonable investor would have wanted to know that Par Funding was the subject of an action filed by New Jersey regulators for violating the securities laws in connection with the Par Funding offering. Any reasonable investor would have wanted to know that the New Jersey regulators had not retracted their action or said that Par Funding was good.

c. Scienter

The Commission alleged that Furman acted knowingly or recklessly in connection with the Rule 10b-5(b) charge, and negligently with respect to the Section 17(a)(2) charge. As set forth above, pleading mindset generally is sufficient under the explicit language of Rule 9(b). Furthermore, the Amended Complaint alleges that Furman was in the business of selling Par Notes through his companies and that the New Jersey Order remained in effect when Furman made the false representation. These facts support that Furman acting knowingly or, at a minimum, recklessly in representing that the New Jersey Order was retracted and that the New Jersey regulators found that Par Funding's practices were good.

6. As to Par Funding

a. Misrepresentations and Omissions

The primary violation against Par Funding serves as the basis for some of the claims against McElhone, and therefore we address the allegations against Par Funding here before moving on to McElhone in the section immediately following.

As set forth above, the Amended Complaint alleges misrepresentations and omissions by LaForte, Cole, and Abbonizio. The Amended Complaint alleges they are owners, officers, and/or directors of Par Funding (DE 116 at ¶¶ 1, 5, 17, 19, 20, 37, 40, 121). Thus, contrary to the Individual Defendants' assertion, LaForte, Cole, and Abbonizio's scienter is imputed to Par Funding. *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1096 n.16 (2d Cir. 1972); *In re Sunbeam Sec. Litig.*, 89 F. Supp 2d 1326, 1340 (S.D. Fla. 1999).

In addition to being liable for the misrepresentations and omissions of LaForte, Cole, and Abbonizio, Par Funding also distributed marketing materials that made false representations about Par Funding having insurance and engaging in rigorous underwriting that included an on-site inspection. (DE 116 at ¶¶ 158-161, 165-180, 182-184, 204, 210). Par Funding distributed this brochure to potential investors through Abbonizio, an owner and director, and also through Par Funding's Agent Funds. (*Id.* at ¶¶ 158, 204). As set forth above, the Amended Complaint also alleges that Par Funding filed false Forms D with the Commission.

These allegations more than adequately allege conduct attributable to Par Funding. The Defendants' reliance on *Thompson v. SendTec, Inc.*, No. 06-61327-CIV, 2007 WL 9700594, at *6 (S.D. Fla. June 12, 2007), is misplaced. In *Thompson*, the complaint failed to allege facts demonstrating the scienter of any officer or director of the corporate defendant. In stark contrast, here the Amended Complaint alleges conduct by LaForte, Cole, and Abbonizio, who are officers, owners

and/or directors of Par Funding, and alleges that McElhone was President and CEO of Par Funding with ultimate authority for Par Funding's decisions and conduct.

The Individual Defendants incorrectly claim that a brochure relating to insurance coverage cannot serve as the basis for a claim against Par Funding because the Amended Complaint fails to allege who drafted it. This is incorrect. First, to the extent Defendants are relying on *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), that case applies only to the Commission's claims under Rule 10b-5(b) and does not impact the claims under Section 17(a)(2) of the Securities Act. *See SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 796 (11th Cir. 2015). With respect to Rule 10b-5(b), Par Funding is clearly a "maker"—"the entity with ultimate authority" over a Par Funding brochure—as contemplated by *Janus*. 564 U.S. at 144.

7. <u>As to McElhone</u>

As set forth in the Amended Complaint and as fully briefed previously in this case in the TRO Motion and related hearings, McElhone is alleged to have controlled Par Funding and Full Spectrum. The Amended Complaint alleges that she was the President, CEO, and sole employee of Par Funding, had control over Par Funding, had ultimate authority for its decisions and practices, and was the Trustee and Grantor of the 2017 LME Family Trust that owns Par Funding. (DE 116 at 11 & 42). As such, McElhone is responsible for Par Funding's securities law violations. The allegations support a finding that she knew or was reckless in not knowing that the statements in the Par Funding brochure, in Par Funding's Forms D, and in the articles published on Par Funding's website were false. Thus, she can be held liable for Par Funding's violations. DE 116 at 213, 214, 235-243.

The only charge requiring that the person held liable is the "maker" is Rule 10b-5(b). The "maker" is "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Janus*, 131 S.Ct. at 2302. More than one person or entity may have authority over a statement and therefore may be considered the maker of a false statement or

responsible for a material omission. *SEC v. Lottonet*, 2017 WL 6949289 (S.D. Fla. Mar. 31, 2017) (finding company and CEO liable for statements in company marketing materials because CEO had authority for company decisions). As set forth above, the Amended Complaint alleges that McElhone had authority for Par Funding's decisions and that she was its sole employee, CEO, President, and owned the Trust that owns Full Spectrum, which operates Par Funding. McElhone and LaForte allegedly controlled Par Funding and Full Spectrum.

The Amended Complaint also charges McElhone and LaForte under Section 20(a) of the Exchange Act, which makes a person "who, directly or indirectly, controls any person liable under any provision of [the act] or of any rule or regulation thereunder ... liable jointly and severally with ... such controlled person." 15 U.S.C. § 78t(a). To plead a violation under Section 20(a), the Commission must allege "that (1) the defendant had the power to control the general affairs of the primary violator, and (2) the defendant had the power to control the specific corporate policy that resulted in the primary violation." *Laperriere v. Vesta Ins. Group, Inc*., 526 F.3d 715, 723 (11th Cir. 2008); *Brown v. Enstar Group, Inc*., 84 F.3d 393, 396 (11th Cir. 1996). "The plaintiff must also establish that the controlled person violated the securities laws." *Brown*, 84 F.3d at 396-97. A controlling person is liable if he or she "acted recklessly in failing to do what he could have done to prevent the violation." *Id.* However, it is the defendant's burden to "prove that it did not act in bad faith or with a recklessness that equates to inducing the acts constituting a securities law violation." *Laperriere*, 526 F.3d at 722. The Amended Complaint alleges violations by Par Funding, as set forth above, and alleges that McElhone and LaForte were control persons, and that they acted recklessly. No more is required at the pleading stage.

B. The Amended Complaint States Claims Under Section 17(a)(1) and (3) of the Securities Act and Section 10(b) and Rules 10b-5(b)-5(a) and (c) Against Each Individual Defendant

Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c) prohibit any person from employing "any device, scheme, or artifice to defraud" or engaging in any "act, practice, or course of business" which operates as a fraud or deceit, in connection with the purchase or sale of a security. Similarly, Sections 17(a)(1) and (a)(3) of the Securities Act prohibit any person from, in the offer or sale of a security, employing "any device, scheme, or artifice to defraud" or engaging in any "transaction, practice, or course of business" which operates as a fraud or deceit. Scienter is required for Rules 10b-5(a) and (c) and Section 17(a)(1), whereas negligence is sufficient for Section 17(a)(3). *Aaron*, 446 U.S. at 691, 697.

The language of these provisions is "expansive" and they "capture a wide range of conduct." *Lorenzo v. SEC*, 139 S. Ct. 1094, 1101-02 (2019). In *Lorenzo*, the Supreme Court held that knowingly disseminating a false statement to investors with the intent to deceive can violate Rules 10b-5(a) and (c) and Section 17(a)(1), even if the defendant is not a "maker" of the statement for purposes of Rule 10b-5(b), as that term was defined in *Janus*. The Court rejected Lorenzo's arguments that each subsection of Rule 10b-5 "should be read as governing different, mutually exclusive, spheres of conduct" and that all conduct relating to false statements must be charged under Rule 10b-5(b) (or, by extension, Section 17(a)(2)). *Id*. at 1102-03. Rather, the Court emphasized, there is "considerable overlap among the subsections of" Rule 10b-5 and Section 17(a), and thus the same underlying conduct may establish a violation of more than one subsection. *Id.* at 1102 (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983), for the proposition that "it is hardly a novel proposition that" different portions of the securities laws "prohibit some of the same conduct"). Lorenzo also governs interpretation of Section 17(a)(3). *SEC v. Malouf,* 933 F.3d 1248, 1260 (10th Cir. 2019).

Contrary to the Individual Defendants' argument, none of the four Securities Act or Exchange Act sections at issue require McElhone or any other Individual Defendant to have personally made a

misrepresentation or omission. *SEC v. Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014) ("Monterosso and Vargas are liable under section 17(a), section 10(b), and Rule 10b-5, because they made 'deceptive contributions to an overall fraudulent scheme' . . . The operative language of section 17(a) does not require a defendant to 'make' a statement in order to be liable . . . Likewise, subsections (a) and (c) of Rule 10b-5 'are not so restricted' as subsection (b), because they are not limited to 'the making of an untrue statement of a material fact.'") (citations omitted); *Fried v. Stiefel Labs., Inc.*, 814 F.3d 1288, 1294-95 (11th Cir. 2016) ("Rule 10b-5(a) and (c) 'are not so restricted' as Rule 10b-5(b) because they do not require making statements").

Here, as set forth above, the Amended Complaint alleges that LaForte, McElhone, Cole, Abbonizio, Vagnozzi and Furman employed deceptive devices, including making materially false statements and omissions, in connection with, and in the offer and sale of the Notes, and that they obtained millions of dollars in proceeds from investors. First, as set forth in detail above, each of the Individual Defendants made materially false or misleading statements to investors. Par Funding's marketing materials also contained the false statements about the underwriting process and insurance. Additionally, the alleged facts support a finding that McElhone, LaForte and Cole actively and intentionally concealed from investors both LaForte's true involvement and control of Par Funding and his extensive criminal background. DE 116 at 213-219 (false Forms D that omitted LaForte and articles on Par Funding's website touting LaForte's expertise); and at 158 & 204 (Par Funding brochure); 213-219.

The Amended Complaint alleges facts showing Par Funding, LaForte, McElhone, Cole, Abbonizio and Vagnozzi coordinated an effort, for more than two years, employed the deceptive device of the fund model to perpetuate the fraud. Par Funding could no longer rely on using finders, in light of the Pennsylvania Order and the New Jersey Order, yet continued to offer CBSG Notes and the Investment Firm promissory notes in the same manner as has been done through the finders

without disclosing the existence of the regulatory orders. Each of these proposed defendants participated in the development and/or continued use of the Investment Firms, allowing CBSG to continue to fraudulently raise investor funds.

The Amended Complaint alleges McElhone and LaForte orchestrated the scheme through Par Funding and McElhone's company, Full Spectrum Processing, Inc., whose employees and officers operate Par Funding. (DE 116 at ¶ 5). The Amended Complaint alleges that the Defendants violated these provisions of the federal securities laws knowingly or recklessly, or with negligence, as each violation requires (DE 119 at 269, 275, 278, 284), and as set forth above, the alleged facts support this.

In addition to direct liability, the Amended Complaint clearly alleges facts sufficient to demonstrate the second element of a Section 20(a) claim. It alleges that McElhone: controlled Par Funding with her husband LaForte; is the President of Par Funding; is the signatory on Par Funding's bank accounts; is the owner of Full Spectrum, the company that operates Par Funding; and had ultimate authority over Par Funding. (DE 116 at 11, 15, 16, 40 & 42). Thus, the Commission has adequately plead its claim under Section 20(a). "[W]hether a person is a 'controlling person' is a fact-intensive inquiry, and generally should not be resolved in a motion to dismiss." *In re Scottish Re Grp. Sec. Litig.*, 524 F. Supp. 2d 370, 401 (S.D.N.Y. 2007) (quoting *CompuDyne Corp. v. Shane*, 453 F. Supp. 2d 807, 829 (S.D.N.Y. 2006)).

V.. THE STATUTE OF LIMITATIONS DOES NOT BAR THE CLAIMS

The Individual Defendants briefly argue that the Commission cannot recover penalties and disgorgement for "conduct" prior to July 24, 2015. The Commission does not dispute that the Court may only penalize violations that occurred within five years of the filing of the complaint and award disgorgement for ill-gotten gains received within that period. However, Defendants are wrong when they attempt to link the statute of limitations to "conduct." To the contrary, 28 U.S.C. § 2462 is tied

to the accrual of a "claim," which occurs when all the elements of a cause of action exist. *Gabelli v. SEC*, 568 U.S. 442, 448 (2013) the Commission's claims accrue when it "has a *complete* and present cause of action") (emphasis added). Thus, the Court may impose a penalty for any violation where at least one of the elements occurs within the limitations period. Similarly, the Court may award disgorgement for ill-gotten gains a defendant received within five years of the filing of the complaint. Moreover, Counts (Section V of the Amended Complaint) state the time periods for each Count as to each Defendant, and identify periods from July 2015 and later – *i.e.*, within the statute of limitations. Thus, there is nothing for the Court to consider dismissing at this point, and the limitations issues are better addressed in the context of jury instructions and the verdict form.

Finally, as to the Relief Defendant, its arguments are wrong. A relief defendant is not accused of wrongdoing, but a federal court may order equitable relief against such a person where that person (1) has received ill-gotten funds, and (2) does not have a legitimate claim to those funds. *SEC v. Cavanagh,* 445 F.3d 105, 109 n. 7 (2d Cir. 2006); *SEC v. Natural Diamonds Investment Co.*, 2019 WL 2583863, at * 5 (S.D. Fla. Jun. 11, 2019). The Amended Complaint alleges that [b]etween July 2018 and September 2018, Par Funding transferred at least $14.3 million, which included investor funds, to the LME Trust for no legitimate purpose." (DE 119 at ¶ 36). Thus, the Amended Complaint sufficiently alleges facts for identifying LME Trust as a Relief Defendant and seeking disgorgement of any ill-gotten gains.

VI. CONCLUSION

For all the foregoing reasons, the Court should deny the Individual Defendants' and Relief Defendant's joint motion to dismiss.

December 1, 2020

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 1, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Amie Riggle Berlin
Amie Riggle Berlin, Esq.