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 REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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") file this Reply In Support of their Joint Motion to Dismiss the Amended Complaint ("Amended Complaint or Am. Comp.").

1. **The Par Funding Notes issued During "Phase I" Are Not Securities**

In its Response, the SEC argues Defendants cannot meet their burden of rebutting the presumption that the Par Funding promissory notes issued during "Phase I" were securities. The SEC claims, as a threshold matter, that Defendants are bound by Par Funding's own characterization of the notes as securities. Alternately, the SEC also argues that Defendants have failed to show the notes fall into an exempt category of notes or otherwise pass the "family

resemblance" test articulated by the Supreme Court in *Reves v Ernst & Young*. The SEC is wrong on both counts.

a. Par Funding's Form D is not relevant to whether the "Phase I" promissory notes are securities.

The SEC argues that Par Funding self-identified the promissory notes as securities by filing a Notice of Exempt Offering of Securities on Form D, and that Par Funding's characterization of the notes should bind Defendants. *See* Response at 6–7. The SEC is mistaken. Defendants' argument for dismissal focuses on the notes issued by Par Funding during "Phase I," which the SEC separately defined in the Amended Complaint to include *only* the offerings made between August 2012 and December 2017. *See* Am. Compl. at ¶ 49. However, Par Funding filed the referenced Form D in February 2019 (and an amended Form D in April 2020), *see id*. at ¶¶ 235–36, which was *after* Phase I and *after* Par Funding is alleged to have transformed its offerings through the use of Agent Funds. Thus, the Form D has no bearing on the proper characterization of Phase I notes.

b. Defendants have shown the "Phase I" promissory notes fall into exempt categories of notes.

i. Exempt Notes

The SEC first argues the notes are not short-term notes secured by a lien on a small business or some of its assets, or by an assignment of accounts receivable. *See* Response at 8–11. The SEC submits, in summary, that because each MCA merchant would grant Par Funding a security interest in the merchant's assets and assign Par Funding its future accounts receivable, and because Par Funding would grant noteholders a security interest in Par Funding's own assets and accounts receivable, each noteholder would obtain only a small, fractionalized interest in many loans. In other words, according to the SEC, the notes fall outside the exempt categories because, "to the

extent the notes were secured, they were secured by many small assignments of accounts receivable." *Id.* at 10.

To support the distinction the SEC advances, the SEC relies upon and quotes from the court's ruling in *SEC v. 1 Global Capital, LLC*, Case No. 18-CIV-61991, 2012 WL 1670799 (S.D. Fla. Feb. 8, 2019). However, the SEC may be unaware that in a subsequent, pending class action litigation brought by 1 Global's investors, another federal court in the Southern District of Florida found collateral estoppel did not apply to the 1 Global ruling, considered the arguments anew, and disagreed that this part of the inquiry was as clear-cut as the 1 Global court had made it out to be. Specifically, while Bankruptcy Court Judge Robert A. Mark denied dismissal of the class action complaint and found the notes at issue in that case did not fall within an exempt category, he stated that "I don't fully agree that the exception may be limited to notes that are secured by the assets of only a single business." He reasoned, "I can see that you could have a commercial transaction where a business that's loaning money needs a source of funding, and in exchange for the funding, offers specific security interests in [] the loans that that particular business is making." *See* Exhibit 1 (transcript of May 26, 2020 motion to dismiss hearing in *Foster v. Ruderman*, 18-01438-RAM (Bankr. S.D. Fla.)).

Judge Mark found the scenario he contemplated was not before the court in the case before him, in part, because the plaintiffs had alleged that 1 Global had total discretion as to how to use investor funds (i.e., the company was not required to use investor funds for the MCA component of its business, and thus at least a portion of the funds was not secured), and the rate of return on the notes at issue fluctuated based on 1 Global's success in its overall operations.

That is not the case here: According to the Amended Complaint, the Phase 1 noteholders held short-term notes secured by an assignment of substantially all of Par Funding's assets

(including its accounts receivable), and those noteholders were provided fixed rate returns in exchange for the funding they provided — funding that the noteholders understood Par Funding would use to advance MCA loans.

The SEC emphasizes that the Amended Complaint does not allege any contact between the noteholders and the MCA merchants, nor does the Amended Complaint allege that noteholders even understood which merchants would receive funding. Given that the "economic reality" of the transaction controls, however, these alleged circumstances should not bear on whether the notes fall within an exempt category; the "reality" is that noteholders obtained a lien and security interest in "substantially all" of Par Funding's assets and accounts receivable, including the merchant assets and accounts receivable that had been assigned to Par Funding. This is true regardless of how allegedly "small" or "fractionalized" those interests were, and regardless of the noteholders' level of interaction with merchants.

ii. The "Family Resemblance" Test

The SEC next argues that Par Funding's promissory notes do not meet any of the factors of the "family resemblance" test. As noted in the Motion, the Court is not required to apply the family resemblance test if it determines the notes fall within an exemption, which they do. *See, e.g., Lincoln v. Washington Mut. Bank, N.A.,* Case No. 07-CIV-60273, 2007 WL 9701069, *2 (S.D. Fla. Aug. 6, 2007) ("Since the note in contention is a mortgage note for a home there is no need to further discuss the family resemblance test."). In any event, the SEC's application of the test is unreliable. As with the SEC's misplaced reliance on the Form D filed by Par Funding, the SEC at times ignores the relevant Phase I time period. *See, e.g.*, Response at 12–13 (citing the Amended Complaint's allegations about amounts Par Funding had raised by 2019 to show why

the second factor of the test allegedly supports a finding that the notes are not securities, even though Phase I extended only through 2017).

Moreover, the SEC fails to acknowledge "risk-reducing factors" and other countervailing considerations, including that the funds Par Funding received from noteholders were collateralized. *See Asset Protection Plans, Inc. v. Oppenheimer & Co., Inc*., Case No. 11-CIV-00440, 2011 2533839, *5 (M.D. Fla. June 27, 2011). And while the SEC includes a lengthy string citation of instances in which Defendants referred to the notes as "investments," "casual semantics fail to govern over applicable law in distinguishing a loan from a security." *Id*. at *4. After all, "[i]n one sense every lender of money is an investor since he places his money at risk in anticipation of a profit in the form of interest." *Id*. at *3 (internal citation and quotation marks omitted).

2. <u>The SEC's Complaint Is A Shotgun Pleading.</u>

The SEC fails to heed the Eleventh Circuit's holding in *Wagner* that admonishes "shotgun pleadings [which] incorporate every antecedent allegation by reference into each subsequent claim for relief or affirmative defense." *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2006). Nor does the SEC address the point made in both *Wagner* and *Solow* that the factual allegations must be properly linked to the causes of actions to put the Defendants on notice of the claims against them. *Wagner*, 464 F.3d at 1278; *S.E.C. v. Solow*, No. 06-81041 CIV, 2007 WL 917269, at *3 (S.D. Fla. Mar. 23, 2007).

While the SEC argues in its Response that "[t]he Amended Complaint includes headings identifying sections of the pleading that relate to each of the misrepresentations and omissions…" bold headings do not relieve the SEC of its burden to put the defendants on notice as to what allegation specifically against them gives rise to each cause of action. *See Dressler v. U.S. Dep't*

of Educ., No. 2:18-CV-311-FTM-99CM, 2019 WL 130348, at *3 (M.D. Fla. Jan. 8, 2019) (dismissing plaintiff's complaint as an impermissible shotgun pleading because "the allegations that follow each heading generally lump the defendants together, which fails to place each defendant on notice of what allegations specifically against them give rise to each cause of action"). Were the SEC's Complaint as clear as it suggests, it would not have had to break out the allegations relating to each defendant as it did in its Response to clarify which of them relate to which defendant. *Wagner* demands more than a few headings and a brief explanation in the SEC's Response referencing *some* of the allegations as to each Defendant. Leaving the Complaint as is will require the Defendants and this Court to sift through its Complaint to assemble the jigsaw puzzle of claims and allegations. The Defendants and the Court should not have to jump back and forth through 267 paragraphs and dozens of pages to determine what factual allegation supports what claim, and which factual allegation is attributable to what defendant. *See S.E.C. v. Levin*, No. 12-21917-CIV, 2013 WL 594736, at *9 (S.D. Fla. Feb. 14, 2013) (requiring the SEC to re-plead its complaint because the SEC failed to specify which misstatements and omissions were the basis of the fraud allegations in each respective count as to each defendant).

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

a. Alleged Misrepresentations

In a Section of its Amended Complaint entitled "Material Misrepresentations and Omissions in Connection with the Par Funding, ABFP, United Fidelis and Retirement Evolution Offerings," the SEC lays out the various misrepresentations it suggests violate the securities laws, each of which the Defendants addressed in their Motion to Dismiss. Rather than addressing these arguments, however, the SEC largely ignores or recasts the arguments raised in the Motion to Dismiss. Failure to respond to arguments regarding particular claims in a motion to dismiss is a

sufficient basis to dismiss such claims as abandoned or by default. *See Hooper v. City of Montgomery*, 482 F. Supp. 2d 1330, 1334 (M.D. Ala. 2007) (dismissing claims as abandoned where the plaintiff failed to respond to the defendant's arguments concerning the dismissal of those claims) (citing *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk S. Ry. Co.*, 209 F. Supp. 2d 1301, 1324 (N.D. Ga. 2001) ("When a party fails to respond to an argument or otherwise address a claim, the Court deems such argument or claim abandoned.").

1. Par Funding's Loan Practices[1]

In paragraphs 154 - 184, the SEC alleges that Par Funding made material misrepresentations regarding its loan practices. Notably, the SEC acknowledges through its silence that its Complaint does not allege 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. The SEC is also conspicuously silent regarding the fact that the alleged statements 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). A reasonable investor would not attach significance to Par Funding's decision not to inspect businesses with which it had a prior relationship or where the size of the deal would not warrant the expense of a physical inspection.

2. Loan Default Rates

Rather than address its failure to properly allege this claim, the SEC argues that the Defendants simply cannot argue their position on a motion to dismiss. The SEC is wrong. The

[1] The Amended Complaint refers to these statements interchangeably as misrepresentations regarding "loan practices" (¶8) and "rigorous underwriting" (¶¶154-184). For simplicity, Defendants will identify them as statements regarding "loan practices."

SEC must properly allege that the alleged misrepresentations regarding the alleged loan default rates were materially false, and it cannot simply make up its own version of the truth in doing so. The SEC does not allege that the default rate method used by Par Funding was materially misleading. Instead, it argues that an analysis it conjures up on its own, based on information that would have been publicly available to investors—lawsuits—yields a rate different than that used by Par Funding. The SEC does not allege, for example, whether or what percentage of the lawsuits it uses to calculate its version of the default rate were filed after Par Funding had already recovered its principal from the merchants. In short, alleging that Par Funding's loan default rate was calculated "differently" than the SEC's preferred method does not prove falsity or scienter. *Lloyd v. CVB Fin. Corp.*, No. CV-10-06256, 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.).

3. Insurance on Merchant Fund Advances

The SEC engages in a bit of word play to overcome the deficiency in this allegation. It alleges that a Par Funding brochure "claims to offer insurance . . . that protects Par Funding in case of a default or non-payment." *See* Am. Comp. ¶ 204. Similarly, the SEC alleges that Messrs. LaForte and Abbonizo told investors that Par Funding had insurance to back up investor funds. *Id.,* ¶¶ 205-206. But the SEC does not allege—because it cannot—that Par Funding failed to obtain insurance to cover nonpayment by a small business. Instead, in an odd effort to allege falsity, the SEC alleges that "Par Funding *did not offer small businesses* insurance on the Loans, and thus investor funds were not protected by insurance." Am. Comp. at ¶ 207. But this does not make any of the alleged statements *false*. Having failed to allege that Par Funding did not obtain this

insurance, or that anyone who allegedly made these statements knew when they made them that Par Funding's insurance did not cover investor funds, the SEC's theory fails.

4. Payments to Ms. McElhone and Mr. Cole

Here again, rather than address the insufficiency of this allegation, the SEC hopes the Court will punt this argument to a different procedural stage of the case. But the Defendants' argument—and the SEC's pleading deficiency—is not based on a dispute over facts. The SEC simply did not allege facts to suggest that the statement made in the Form D filings were false or made with scienter. Simply put, the SEC alleges that Mr. Cole and Ms. McElhone would not receive any of the gross proceeds of the securities offering, but fails to allege—because it cannot—that the payments they allegedly received represented funds deposited by investors rather than other funds generated by Par Funding's legitimate merchant cash advance business. At minimum, the SEC's conclusory allegations do not meet the requirements of Rule 9(b).

5. Mr. LaForte's Criminal History

The SEC alleges that Mr. LaForte told investors in November 2019 that he had started Par Funding eight years prior and that he touted both its and his success in the industry. *See* Am. Compl. at ¶¶ 102-103. The Complaint does not allege that any of these statements are false. Instead, the SEC argues that Mr. LaForte's statements were materially misleading because he failed to disclose convictions which the SEC acknowledges were at least 10 years old at the time of the alleged representations to investors. *Id*., ¶ 18. The SEC's own regulations make clear that convictions that are even five years or older need not be disclosed to the investing public. For example, Regulation S–K, which is promulgated by the SEC, requires disclosure of a prior conviction by a control person only when it is within five years and material to an investment decision. 17 C.F.R.§ 229.401(g). *See also Hoffman v. Estabrook & Co., Inc.*, 587 F.2d 509, 517-

518 (1st Cir. 1978) (affirming as "correct" the district's finding that "the omission from a memorandum of [the defendant's] past criminal record was not material" because the investors were attracted to the defendant's idea rather than the defendant's character and integrity).

Moreover, this information was publicly available, and therefore, part of "the 'total mix' of information [already] available" to investors. *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32; *Park Yield LLC v. Brown*, No. 18 Civ. 1947 (GBD) (SN), 2019 WL 6684127, at *8 (S.D.N.Y. December 6, 2019). *Park Yield LLC v. Brown*, No. 18 Civ. 1947 (GBD) (SN), 2019 WL 6684127, at *8 (S.D.N.Y. December 6, 2019).

In *Park Yield*, the court dismissed the plaintiff's claim that the defendant, the controlling shareholder in a limited liability company in which plaintiff invested, materially misled the plaintiff by failing to disclose his prior criminal conviction to the plaintiff. *Id.* The court explained, "[a]s to [the defendant]'s alleged failure to inform plaintiff of his conviction, plaintiff does not demonstrate how any such failure to disclose publicly available information constitutes a material omission." *Id.* Citing *In re Bank of Am. AIG Disclosure Sec. Litig.*, 980 F. Supp. 2d 564, 576 (S.D.N.Y. 2013), aff'd, 566 F. App'x 93 (2d Cir. 2014), the court explained, "[w]here allegedly undisclosed material information is in fact readily accessible in the public domain[,] a defendant may not be held liable for failing to disclose this information." *Id.* Consequently, the court continued, "any alleged failure by [the defendant] to disclose his conviction was immaterial as a matter of law, and Plaintiff's claim under Section 10(b) and Rule 10b-5 must be dismissed."[2] *Id.*

[2] In order to overcome this obvious pleading deficiency, the SEC alleges that Mr. LaForte attempted to conceal his identity from investors and references an email address and business card in support of this claim. However, because there is no allegation that he ever used either in connection with an interaction with an investor, much less in connection with the offer or sale of a security, this theory fails. More important still, the SEC's claim is also internally inconsistent in that the Complaint also alleges that Mr. LaForte posted videos and articles about himself on Par Funding's website bearing his own name and likeness. Reasonable inferences drawn from

As a consequence, the SEC's claim that Mr. LaForte acted with scienter in failing to disclose information readily available to the public is nonsensical. *See Hollinger v. Titan Capital Corp.,* 914 F.2d 1564 (9th Cir. 1990) (Broker dealer's failure to disclose to investors that registered representative had 11–year-old felony forgery conviction was not "reckless conduct" that could have satisfied scienter element in civil action under Securities Exchange Act § 10(b) and Rule 10b–5); *Cohen v. Telsey*, No. CIV 09-2033, 2009 WL 3747059, *13 (D.N.J. Nov. 2, 2009) (defendant, an attorney for the issuer, did not act with the requisite intent in omitting control person's conviction because by 2001 the conviction was more than 15 years old).

6. Par Funding's Regulatory History

Once again, the SEC ignores the deficiencies in its Complaint and simply reiterates allegations that fall well short of the mark to properly allege a materially misleading statement in violation of the antifraud statutes. Here, the SEC's theory is that statements touting Par Funding's success as a profitable cash advance company were materially misleading. *See* Am. Compl. at ¶ 227. Notably, however, *the SEC does not allege that Par Funding's cash advance business operations were not profitable*. Instead, it alleges that the statements are misleading because they omit that Par Funding "ha[d] twice been sanctioned for violating the securities laws." *Id.* In these cases, courts must consider whether the omitted conduct is sufficiently connected to the defendant's existing disclosures to be material. *Fries v. N. Oil & Gas, Inc.*, 285 F. Supp. 3d 706, 719 (S.D.N.Y. 2018).

In *Fries*, the plaintiff alleged that a public company made materially fraudulent representations and omissions in public filings with the SEC about one of its executives. *Id.* at 719.

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the SEC's own version of the events therefore undermine its theory that Mr. LaForte intended to conceal his identity.

As the SEC has alleged here, the public company touted the executive's management expertise, but failed to disclose conduct which led the SEC to issue a cease-and-desist order against the executive concerning violations of the antifraud provisions of the securities laws. *Id.* at 712, 714 - 715. The court dismissed the claim, finding that the plaintiff failed to allege an actionable omission about the executive because: (1) the statements touting the executive's experience were not false; (2) none of the statements made about the executive's experience suggested that he was not engaged in the conduct that gave rise to the cease-and-desist order; and (3) the improper conduct was not a material source of the company's or the executive's success. *Id.* at 719 - 720.

For these same reasons, the court should dismiss the SEC 's claim that statements touting Par Funding's success as a profitable cash advance company were materially misleading by omission. First, the SEC did not allege that these statements were false. Second, the alleged statements did not suggest that Par Funding was no longer engaged in the conduct that gave rise to the prior securities violations. And finally, the SEC did not allege that the conduct that gave rise to the prior securities violations was a material source of the company's success (or that it even continued). Consequently, the alleged statements could not have been materially misleading and cannot form the basis of a violation of the securities laws.

b. Allegations Specific to Defendants

i. Ms. McElhone

The SEC's response regarding Ms. McElhone makes two things perfectly clear. First, it does not attribute a single alleged misrepresentation to her directly; it is now clear that she had no knowledge of the falsity of any such statement, did not disseminate or make any such statement to an investor, and did not act with scienter with respect to any such statement. Second, the SEC is relying exclusively on her title with Par Funding as an improper basis to charge her in Count VIII

with a violation of Section 20(a) of the Exchange Act. It is well established that "a plaintiff may not allege 'controlling person' status merely by reciting a corporate officer's title without alleging actual control and the nature of the controlling person's 'culpable participation' in the fraud." *Ellison v. Am. Image Motor Co., Inc*., 36 F. Supp. 2d 628, 642 (S.D.N.Y. 1999); *see, e.g., Craig v. First Am. Capital Res., Inc*., 740 F. Supp. 530, 533, 537 (N.D. Ill. 1990). In *Craig*, the plaintiff alleged that the defendant was liable as a control person simply because the defendant was the President and director of the corporate defendant. *Id.* The district court rejected the plaintiff's argument. The court explained that to attach control person liability under Section 20(a), the plaintiff was required to allege more than just the fact that he was an officer of the corporate defendant. The plaintiff was required to allege that the defendant had "potential for control over the specific activity upon which the primary violation [of securities laws] is predicated." *Id.* (citations omitted). Accordingly, the court granted the defendant's motion to dismiss the control liability claim against him.

Similarly, in *In re Galena Biopharma, Inc. Sec. Litig*., 117 F. Supp. 3d 1145, 1201 (D. Or. 2015), the Court found that the simple allegation that the defendant was a control person because he was the corporate defendant's Chief Operating Officer and Executive Vice-President was insufficient to attach liability under Section 20(a). The court explained that the plaintiff failed to plead any other allegation that would tend to show that the defendant had the "requisite control over [the corporate defendant's] day-to-day operations." *Id.* Thus, the court dismissed the plaintiff's control liability claim against said defendant. *Id.* For those same reasons, the Court should dismiss Count VIII as to Ms. McElhone.

ii. Mr. Laforte

The SEC's case against Mr. LaForte is largely built on the question of whether disclosure of his decade-old criminal history was necessary. It is worth repeating that the SEC is not alleging that Mr. LaForte told investors that he had no prior criminal history. In fact, the evidence will demonstrate that he did, in fact, tell investors and, as is the case for many other aspects of this matter, that he and Par Funding received advice from legal counsel on this issue.

For purposes of the SEC's Complaint, the issue is whether Mr. LaForte's alleged failure to disclose his criminal history to investors renders other statements he made touting his experience materially misleading by *omission*. As explained, *supra*, the sheer age of the convictions rendered them immaterial:

> "The Federal Rules of Evidence ***and the SEC's own internal policies*** both suggest that the probative value of prior bad acts is diminished after ten years. Under the Federal Rules, evidence that a witness in a civil or criminal trial has been convicted of a felony must be admitted within ten years of the conviction; after ten years, the conviction is admissible only if its probative value, "supported by specific facts and circumstances, substantially outweighs its prejudicial effect." Fed. R. Evid. 609(b)(1). Similarly, the SEC's own regulations on reporting for public companies require that directors and officers disclose legal proceedings "material to an evaluation of ... ability and integrity" only from the last ten years."

See SEC v. Jensen, 835 F.3d 1100, 116-1117 (9th Cir. 2016) (emphasis supplied). Moreover, because the information the SEC alleges was publicly available to investors, its alleged omission could not have rendered statements made regarding Mr. LaForte's background materially misleading. Finally, Mr. LaForte could not have acted with scienter in allegedly omitting disclosure of his criminal history to some investors given that this information was both publicly available and, *by virtue of the SEC's own internal policy*, of "diminished [value] after ten years." *Id.*[3]

[3] This argument applies equally to the allegations made against Messrs. Abbonizio and Cole regarding Mr. Laforte's criminal history.

iii. Mr. Cole

The SEC's internal policies and regulations that render Mr. LaForte's criminal background immaterial for purposes of public company disclosures by LaForte apply equally as to representations by Mr. Cole. Moreover, because Mr. LaForte's history is publicly available information, Mr. Cole could not have acted with scienter even if he knowingly omitted their disclosure to investors as alleged by the SEC. Finally, for the reasons stated in the Defendants' Motion to Dismiss and Section 3(a)(4), *supra*, the SEC has failed to adequately state a claim with respect to the Form D filings allegedly signed by Mr. Cole.

iv. Mr. Abbonizio

The SEC's Response confirms and underscores the complete insufficiency of the allegations that Abbonizio acted with the requisite scienter to sustain claims against him under Rule 10b-5 of the Exchange Act and Section 17(a)(2) of the Securities Act. With regard to Abbonizio's alleged omissions of LaForte's criminal background, the SEC refers to the allegations that Abbonizio was an owner of Par Funding, that Abbonizio claimed to have founded Par Funding with LaForte, and that Abbonizio introduced LaForte to potential investors. And similarly, with regard to Abbonizio's alleged misrepresentations about Par Funding's underwriting process and loan default rate, the SEC again refers to the vanilla allegations that Abbonizio was an owner, adding that Abbonizio claimed these were "critical" parts of the business that were necessary to its success. *See* Response at 29.

At bottom, the SEC's argument is that, because Abbonizio is an alleged owner of Par Funding and a self-proclaimed co-founder, he therefore must have known or ought to have known the truth about these alleged misstatements and omissions. But even in the light most favorable to

the SEC, this attempt to bootstrap the scienter element onto allegations relating to Abbonizio's alleged role with the company are insufficient; there must be something more that specifically addresses Abbonizio's alleged mental state. *See SEC v. Yorkville Advisors*, LLC, 305 F. Supp. 3d 486, 511–12 (S.D.N.Y. 2018) ("Mere allegations that a defendant knew or should have known of fraudulent conduct based solely on his or her corporate title or position are insufficient. . . . It is also insufficient to allege that a defendant 'ought to have known' of the fraud."). Indeed, the Amended Complaint does not include any allegations that give rise to an inference that Abbonizio possessed *any* information contrary to what he relayed to potential investors. As such, the claims against Abbonizio must be dismissed.

v. Mr. Furman

Not surprisingly, of the SEC's 40-page Response, there are only three short paragraphs devoted to Mr. Furman's alleged misrepresentation about a New Jersey regulatory action against Par Funding. *See* Response at 33; Am. Compl. at ¶233. According to the Response (and the Amended Complaint), on June 16, 2019, Mr. Furman falsely told an undercover individual posing as an investor that the State of New Jersey had "retracted" its action against Par Funding and that New Jersey had said that the company was "good" and did not need to pay a fine or have any penalties.

As a threshold matter, the Response (like the Complaint) fails to square with the SEC's filings with this Court. On July 28, 2020, the SEC filed a transcript of an alleged recording of the conversation between the undercover posing as an investor and Mr. Furman about the State of New Jersey action. [*See* ECF No. 41-30]. While the SEC's Response (and Complaint) allege that the recording occurred on **June 16, 2019**, the declaration filed under penalty of perjury before this Court provides that the conversation at issue occurred on **March 5, 2020**. *Id*. at ¶4. Although

courts must construe and accept as true the factual allegations in a complaint and inferences reasonably deductible therefrom, courts "need not accept . . . **facts which run counter to facts of which the court can take judicial notice** . . . ." *Response Oncology, Inc. v. Metrahealth Insurance Co.*, 978 F.Supp. 1052, 1058 (S.D.Fla. 1997) (emphasis added) (citations omitted); *see also*, *Howard v. Kerzner Int'l Ltd.*, No. 12-22184-CIV-FAM, 2014 WL 714787, at *5 (S.D. Fla. Feb. 24, 2014) (Moreno, J.). Considering that the SEC's alleged facts in the Complaint "run counter to [facts in the SEC's filing] of which the court can take judicial notice" because it is in the record, the Court need not accept the factual claims as true when deciding the Motion to Dismiss. This alone is enough for this Court to dismiss the Complaint as to Mr. Furman.

Contrary to the Response, the Complaint also fails to sufficiently allege scienter as to Mr. Furman. The SEC's Response (like the Amended Complaint) lacks any specific allegations that Mr. Furman had the intent to deceive when he purportedly provided incorrect information to the undercover about the State of New Jersey action against Par Funding. He was neither a Par Funding employee nor trained to understand state regulatory actions. And the SEC does not allege that Mr. Furman had any specific duty to ensure that the information about New Jersey was accurate.

Moreover, the Response fails to answer *an*y of the questions posed in the Defendants' Motion to Dismiss as to how Mr. Furman purportedly knew that *any* of his alleged representations were untrue. [*See* Mo. to Dismiss at pgs. 19 - 24]. The SEC ignores these questions because it cannot allege with any particularity that Mr. Furman acted with the intent to deceive (or that he acted recklessly or negligently). By ignoring Mr. Furman's challenges to the Complaint, the SEC concedes that the Complaint is deficient. *See GolTV, Inc. v. Fox Sports Latin Am. Ltd.*, 277 F. Supp. 3d 1301, 1311 (S.D. Fla. 2017) (Altonaga, J.) (treating argument ignored by plaintiff's brief

in response to motion to dismiss as conceded) (citing *Hartford Steam Boiler Inspection & Ins. Co. v. Brickellhouse Condo. Ass'n, Inc.*, No. 16-CV-22236, 2016 WL 5661636, at *3 (S.D. Fla. Sept. 30, 2016) (Gayles, J.) ("[A] plaintiff who, in [its] responsive brief, fails to address [its] obligation to object to a point raised by the defendant implicitly concedes that point.") (citation omitted)). Because the SEC cannot sufficiently allege Mr. Furman's intent, the Complaint lumps Mr. Furman with other defendants in a textbook example of an impermissible "shotgun pleading." *See* Motion to Dismiss at 20-23. As a result, the Court should dismiss all counts alleged against Mr. Furman.

vi. Mr. Vagnozzi

The SEC's Response is most telling for what it does not say about Mr. Vagnozzi, and therefore concedes that dismissal is required. The SEC ignores Mr. Vagnozzi's arguments in the Motion that the Complaint fails to adequately allege scienter as to his alleged misrepresentations regarding Par Funding's default rate and underwriting practices. Motion at 21 - 22. The SEC also ignores Mr. Vagnozzi's arguments regarding the inadequacy of the Complaint's fraud allegations as to the April 2020 exchange offer. *Id.* at 21 - 23. The SEC ignores the rhetorical questions we raised in the Motion because it has no answer. As to Mr. Vagnozzi's dismissal argument that the Complaint fails to allege fraud with regard to the use of "Agent Funds," Motion at 23, the only thing the SEC can say about that is a boilerplate statement that he "created the new structure" and "train[ed] sales agents." Response at 32.

None of the SEC's concessions is surprising. The Complaint utterly fails to plead any particularity of fraudulent conduct as to Mr. Vagnozzi regarding the Par Funding "business practices" allegations or Mr. Vagnozzi's alleged statements regarding the pros and cons of accepting an exchange offer at the beginning of the pandemic when Par Funding defaulted on its

notes. And there is nothing inherently wrong about creating agent funds or engaging in alleged training, so these allegations also are insufficient to state a claim of fraud.

Instead, the SEC focuses mostly on Mr. Vagnozzi's allegedly not disclosing his own regulatory background. In doing so, the SEC first points, again, to statements about Par's business, track record, and successful investment history, without any showing as to how Mr. Vagnozzi knew any of this was allegedly false. Response at 30 - 31. The SEC makes much of him saying that Par Funding had never missed a payment, which of course was absolutely true. But all of these allegations are irrelevant to a claim of fraud with respect to regulatory proceedings. The two things have nothing to do with each other. The SEC similarly points to a statement by Mr. Vagnozzi that he has no criminal record, which is a true statement. *Id.* The best the SEC can point to is that Mr. Vagnozzi allegedly did not disclose his widely-publicized settlement with the Pennsylvania securities regulators based on an investigation they opened in February 2019 regarding Mr. Vagnozzi's conduct prior to the 2018 switch to Agent Funds. At a minimum, that fact does not support any claim of fraud for conduct before that date. More important, the SEC ignores the fact that its own evidence presented in the preliminary injunction hearing contradicts that allegation because Mr. Vagnozzi was recorded advising a prospective noteholder about that settlement with Pennsylvania. *See* [ECF No. 147 ¶ 30].

Finally, the SEC argues that it has stated a claim due to Mr. Vagnozzi's alleged failure to disclose facts about Par Funding's regulatory history. The Complaint has no particularized allegations showing that Mr. Vagnozzi was aware of Par Funding's state regulatory investigations before they were publicly announced. As to Mr. LaForte's criminal background, as we previously pointed out, that is immaterial as a matter of law. His conviction is not material, and the SEC

baldly stating otherwise – in direct contravention of its own adopted regulations – does not sufficiently state a claim.

vii. The Trust

In keeping with its "sue first and sort out the facts later" strategy, the SEC merely recites the allegations of the Complaint as to the Trust without responding to the arguments raised in the Motion to Dismiss. Because the SEC is alleging that Par Funding funneled commingled funds into the Trust, the SEC must plead sufficient allegations with particularity to satisfy both components of the applicable 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).

First, the SEC has alleged that the Trust owned Par Funding. *See* Am. Compl. at ¶36. The governing jurisprudence requires only an "ownership interest" to preclude an entity from being a proper relief defendant. *Janvey*, 588 F.3d at 834. Par Funding had a legitimate interest in distributions from Par Funding. The SEC did not allege that the transfer to the Trust was a gift. Second, the SEC has not alleged sufficient factual support that investor funds were diverted into the Trust. *Founding Partners Capital Mgmt*., 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 allegations of the Amended Complaint create a reasonable inference that distributions were made from Par Funding revenues, and not gross proceeds of the of the offering. If the SEC has evidence that investor proceeds were transferred to the Trust, Rule 9(b) requires that it say so in the Amended Complaint. Until then, the Trust is not properly named as a Relief Defendant and should not be subject to any future disgorgement order seeking to recover the Trust's assets.

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: December 22, 2020

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN RE: CASE NO.: 18-19121-RAM
CHAPTER 11
1 GLOBAL CAPITAL LLC,
et al., (Jointly Administered)
Debtors.
_____/
SARAH FOSTER, individually and on behalf of all others similarly situated, ADV. NO.: 18-1438-RAM
Plaintiff,
vs.

CARL RUDERMAN,

Defendant.
_____/

ECF# 115, 132, 137
May 26, 2020

The above-entitled cause came on for hearing before the Honorable ROBERT A. MARK, one of the Judges in the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, via Zoom Video Conference, at 301 North Miami Avenue, Miami, Miami-Dade County, Florida on May 26, 2020, commencing at or about 1:30 p.m., and the following proceedings were had:

Transcribed from a Digital Audio Recording by:
Margaret Franzen, Court Reporter

APPEARANCES VIA ZOOM VIDEO CONFERENCE:

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MICHAEL S. BUDWICK, ESQUIRE
and
THE MOSKOWITZ LAW FIRM, by
ADAM M. MOSKOWITZ, ESQUIRE
On behalf of the Plaintiff

JONES LAW OFFICE, P.A. by
JASON Z. JONES, ESQUIRE
and
MARCUS NEIMAN RASHBAUM & PINEIRO, by
MICHAEL A. PINEIRO, ESQUIRE
JASON L. MAYS, ESQUIRE
On behalf of the Defendant

GREENBERG TRAURIG, by
JOHN DODD, ESQUIRE
General Counsel
On behalf of the Liquidating Trustee

GENOVESE JOBLOVE & BATTISTA, by
GLENN D. MOSES, ESQUIRE
On behalf of the Liquidating Trustee

UNITED STATES ATTORNEY'S OFFICE, by
JERROB T. DUFFY, ESQUIRE
RAYCHELLE A. TASHER, ESQUIRE
On behalf of the United States

ALSO PRESENT VIA ZOOM VIDEO CONFERENCE:

JAMES CASSEL, Liquidating Trustee

CORINNE AFTIMOS, Law Clerk

JACKIE ANTILLON, Courtroom Deputy and
ECRO - Electronic Court Reporting Operator
JORDAN ZORNS, Judge Mark's Intern
BRIANNA JOSEPH, Judge Mark's Intern

- - - - - - -

THE COURT: Let's get started on our 1 Global hearing. The -- you may need to unmute your microphones. I'm going to actually go in the order that I have folks listed. The only attorney I don't see is Michael Pineiro.

Mr. Jones -- let me ask Jason Jones, is he the one that's going to be presenting the argument or do you know what's going on?

MR. JONES: Yes, Your Honor. Mr. Mays is going to be presenting the argument on the motion to dismiss, and Mr. Pineiro will be handling the renewed motion to stay proceedings.

THE COURT: Okay. Do you want to text him and find out why he's not on?

MR. JONES: Sure, Your Honor. I'll do that right now.

THE COURT: Okay. So let me call roll really in the order that it came -- came to me in the list from my calendar clerk. So when I call your name, if you could just announce your -- your full appearance.

Mr. Duffy.

MR. DUFFY: Your Honor, Jerrob Duffy for the United States, intervenor.

THE COURT: Well, Mister -- Mister -- Mr. Jones is on mute for the time being.

Mr. Mays.

MR. MAYS: Present, Your Honor, of Marcus Neiman Rashbaum & Pineiro, on behalf of Mr. Ruderman.

THE COURT: Mr. Moses.

MR. MOSES: Good afternoon, Your Honor. Glenn Moses, M-o-s-e-s, for the liquidating trustee.

THE COURT: Mr. Dodd.

MR. DODD: Good afternoon, Your Honor. John Dodd, D-o-d-d, general counsel to the liquidating trustee.

THE COURT: Mr. Moskowitz.

MR. MOSKOWITZ: Here, Your Honor. Thank you.

THE COURT: Go ahead and announce your appearance.

MR. MOSKOWITZ: Appearance on behalf of the plaintiffs, class action plaintiffs in this matter, Your Honor.

THE COURT: And Mr. Budwick.

MR. BUDWICK: I had to unmute myself, I apologize. Michael Budwick of Meland Russin & Budwick, along with co-counsel, Adam Moskowitz, on behalf of Ms. Foster.

THE COURT: Okay, and Mr. Cassel.
MR. CASSEL: I'm the liquidating trustee.
THE COURT: Okay. So two -- two of the names -- some of the names you may see on your screen, Jackie Antillon is my courtroom deputy; Corinne Aftimos, my law clerk; Jordan Zorns and Brianna Josephs, summer interns.
We have Jeffrey Neiman, and I'm not sure who that is. Mr. Neiman, do you want to announce who you are?
MR. PINEIRO: Your Honor, this is Michael Pineiro. It's possible that initially I popped in on the Zoom meeting under my partner's account, but I changed the name.
So it's Michael Pineiro and Jason Mays of Marcus Neiman Rashbaum & Pineiro, who are here on behalf of Mr. Ruderman, I apologize for that.
THE COURT: Okay, and I didn't mean to scare or was -- we had a Mr. Neiman, but I don't see that name any longer.
All right.
MS. TASHER: And -- and Your Honor --
THE COURT: Yes.
MS. TASHER: -- this is -- this is -- this is Raychelle Tasher, Assistant United States Attorney, on behalf of the United States in this matter, intervenor.

THE COURT: Okay, and that's R-a-y ---
MS. TASHER: I'll be (inaudible).
THE COURT: R-a-y-c-h-e-l-l, we have that listed in. I also believe we had a last minute, so to speak, request from Elizabeth Young.
Are you on the line, as well? Okay, maybe not.
So there's three matters on for today, a motion to intervene and for a 180 day stay by the United States; a motion to dismiss by the defendant, Mr. Ruderman; and a renewed motion to stay filed by Mr. Rudeman -- Ruderman.
It would be my intention to take up the renewed motion to stay, which certainly in part is based on the Government's motion, but if the renewed motion to stay the entire proceeding is granted, then I believe that would resolve the Government's motion, as well.
Just -- just some ground rules so we don't have too many attorneys, but let me -- let me understand who's going to argue what. So who -- who's going to argue the motion for stay, is that Mr. Pineiro or Mr. Mays?
MR. PINEIRO: I will be arguing that, Your Honor.
THE COURT: Okay, and who's going to argue on behalf of the plaintiffs?

MR. BUDWICK: Your Honor, I will, and Mr. Moskowitz will then present the motion to dismiss, the response.
THE COURT: Okay, and then Mr. Mays, I think it was said earlier, you're going to do the motion to dismiss?
MR. MAYS: That's correct, Your Honor.
THE COURT: Okay. All right. So I've read the papers on the -- on the renewed motion to stay.
Let me -- let me -- let me start with Mr. Pineiro as to a couple of things. One was the argument in the response that if you need discovery, it should be asserted in your response to the summary judgment under Rule 56(d), and then the other point I'd like you to respond to would -- would be the request, the connection isn't directly clear, but the request that Mr. Ruderman turn over control of the artwork as a condition to the stay.
So, Mr. Pineiro.
MR. PINEIRO: Yes. Thank you, Your Honor. Michael Pineiro, again, for the record, on behalf of defendant, Carl Ruderman.
Your Honor, our -- our motion -- our renewed motion to stay is essentially premised on the fact that the Government is seeking to stay just discovery. We were

content to obtain the discovery that we were seeking in defending the case in summary judgment.
When the Government intervened, at that point we were faced with a dilemma, which is basically accept their position, whereby discovery is stayed, we're not afforded any access to the discovery, and the plaintiff would maintain their action and try to prosecute and obtain a judgment.
Now, as we've said in our papers, that's unprecedented. There's not one case that they've submitted or that we found that would support that type of procedure.
Addressing more specifically the issues that you've raised, the plaintiffs simply misstate the law regarding Rule 56(d). As a -- as an initial matter, Judge, we're not in the middle of Rule 56(d) briefing. You -- you've abated that.
So right now what we're weighing is, frankly, within your discretion the appropriate scope and tenor of a stay of this case, and whether it's appropriate to stay it sort of half baked, just discovery, or a full stay, which is consistent with what all other courts typically do in these scenarios, and frankly, it's consistent with what the Government typically requests in these scenarios where it seeks to intervene.

So as an initial matter, I disagree with the plaintiff's position that somehow we needed to have submitted an affidavit. We would do that if there was Rule 56 briefing, but you specifically abated that.

More importantly, they're actually completely incorrect under the law. They've submitted, in my view, incorrect law to you on that point. Under 11th Circuit law it's well established that you don't need to submit an affidavit when you're seeking a continuance under Rule 56(d).

The 11th Circuit is very clear on this. We cite a case in our -- in our papers, Your Honor, it's the Snook case, and it's an 11th Circuit case, and it says, and I'm quoting, "In this Circuit, a party opposing a motion for summary judgment need not file an affidavit pursuant to Rule 56 of the Federal Rules of Procedure in order to invoke the protection of that rule.

This Court has concluded that the written representation by plaintiff's lawyer, an officer of this Court, is in the spirit of Rule 56 under the circumstances. Form is not to be exalted over fair procedures."

There are dozens of cases on Westlaw where a Federal District -- where the Southern District of Florida District Court has applied that ruling. One example is

the Saporo vs. Cajova case (phonetic), that's 2013 Westlaw 12106190, where Judge Williams, District Court Judge Williams, says the Courts of this circuit do not require an affidavit from a non-moving party opposing a summary judgment motion under Rule 56(d). A court may deny or defer a motion for summary judgment under Rule 56(d) so long as the non-moving party meets its burden of calling to the District Court's attention any outstanding discovery.

Now, we weren't required to do that here, Judge, because again we're not in Rule 56 briefing, but to be very clear, our motion -- our response to the motion to stay discovery and our renewed motion, it's the same paper, points out the very -- it meets that burden.

We very specifically point out the four depositions that we want to take. Two of those are of Mr. Heide -- all of those four individuals, Your Honor, indisputably have highly pertinent evidence regarding the motion for summary judgment filed by the plaintiffs. No one here disputes that. There was no dispute about that in the plaintiff's papers, and the Government doesn't dispute it.

What's been ---

THE COURT: You said -- hold on. You said -- you said four. I had -- I had written down in my

notes three in terms of the parties that pled and what they said in their -- in their statements. Heidi, Atlas and Schwartz. Is the -- is the fourth also somebody who's pled guilty and I didn't see it --

MR. PINEIRO: No.

THE COURT: -- or it's a different person?

MR. PINEIRO: No, Your Honor. The fourth person is Eric Alexander. We do reference him in our papers. He is the former CFO of 1 Global. To my knowledge, he has not pled guilty, but he was -- there's no substantive testimony from him in the SEC case.

I thought we were reasonable here. We're not seeking to re-depose people who have testified, given depositions in the SEC case. The four individuals here, three of them have pled, and the fourth invoked the Fifth Amendment in the SEC case. So those are the four people we seek to depose, two of which, Your Honor, the plaintiffs exclusively rely on the -- on the factual proffer in their plea agreements in support of summary judgment.

So if you look at Pages 3 and 4 of the plaintiff's motion for summary judgment, that's Docket Entry 127, one of the central issues in this case -- actually, the central issue is was Mr. Ruderman involved, actually involved, or was he -- did he know of the sale of

the 1 Global notes without a registration? That's the key factual issue, setting aside some of the legal circumstances here.

On that issue on which they seek summary judgment, a 200 plus million dollar summary judgment, the only evidence cited by the plaintiff is the plea agreement of Mr. Atlas and Mr. Heide, and what they're suggesting to you is you take that as true, and that Mr. Ruderman not be able to depose those individuals.

Again, there's -- there's simply no case law that permits that. I have not found one case where a defendant is not provided access to discovery, and that a court can move forward with summary judgment, and they haven't found a case either.

Their papers, they filed a response to the Government's motion, and then a response to our renewed motion, and they haven't provided you with one case supporting what they're asking for.

Conversely, I've cited to you a litany of cases where -- where the 11th Circuit is very clear, if a District Court proceeds to summary judgment and enters a summary judgment order, it's reversible in this very circumstance where you're -- where you're trying to deny discovery to the non-movant.

I'm not going to belabor the point on that,

our brief extensively addresses the issue and the only real rebuttal by the plaintiffs was this Rule 56(d) procedural rebuttal, which is invalid. Under the law it's completely incorrect.

On the issue of -- and I'm -- I'm willing, Your Honor, to address any other ---

THE COURT: That's fine. If you want to briefly comment on the artwork.

I was, in part, just curious as to what the status was of the trustee's efforts to get the artwork and what Mr. Ruderman's current degree of control is, if it -- if that's known or acknowledged, but go ahead.

MR. PINEIRO: So, Your Honor, what I can tell you is the -- all of Ruderman's assets were frozen in the SEC case, and so my understanding of the art trust, and again, Mr. Ruderman is not the trustee or a beneficiary, so I am not an expert on the art trust.

My understanding is that the art trust encompasses certain artwork and other personal property. My understanding is that when 1 Global was put into receivership or not 1 Global, I'm sorry, when it was -- when it was -- when it was taken over by the -- by the debtor-in-possession, Greenberg Traurig, they basically, I think at that point, relocated a lot of the artwork that's subject to that trust. I believe it's in a storage

facility now.

Now, there may be other pieces of artwork encompassed by that trust in Mr. Ruderman's personal residence, which is for sale right now -- the residence is for sale, not the art, I don't know. I don't know about that.

What I can tell you is the request here made by the plaintiff is confounding to me. I have never seen this done. Again, they are requesting that you enter a stay -- that -- that if you enter a stay, that you enter essentially a motion without any proper briefing -- you enter an order without any proper briefing requiring Mr. Ruderman to account for certain property and to turn it over.

Now, I'm not a bankruptcy lawyer, Your Honor, but I do litigate in these courts, in the federal courts a lot, and what they're essentially asking for is a positive injunction without the benefit of actually filing a motion under the federal rules for that. I'm not sure the plaintiffs have standing to make that kind of an argument.

I understand the trustee in the bankruptcy matter may have some standing on that, and I'm not sure who they would direct that to, whether it's to Mr. Ruderman or to Mr. Steven Schwartz, who at one point

was the trustee of that trust, but that is a meritless request. It's procedurally improper in various ways and again, I don't believe that they have standing.

I think if the Court were to even contemplate a ruling on that sort of ad hoc request, that it be done with appropriate briefing under the federal rules based on what they're seeking, which is an extraordinary remedy. They're asking for a positive injunction requiring Mr. Ruderman to take affirmative steps where he gathers property and turns it over.

Again, I -- that didn't -- that didn't even happen in the SEC case, Your Honor, and again in the ---

THE COURT: Well, we can -- we can leave it at that for now.

Mr. Budwick.

MR. BUDWICK: Thank you, Your Honor.

Let -- let me address the points that Mr. Pineiro raised, and let me also maybe talk about what the stay would mean.

It's difficult to understand what is exactly the length of the ultimate stay Mr. Ruderman would be seeking. He's seeking a stay temporarily of the adversary proceeding, but that's presumably until he's indicted.

If he's indicted, he would then seek another stay. He would then seek a stay through trial, through

sentencing, through the exhaustion of appeals. So the stay is not for a few months, the stay that's being requested likely is a multi-year stay, which he would retain control of this artwork.

And just quickly in terms of the artwork, the statement just made was it was uncertain as to who owns the artwork in the house. I know who owns the furniture and the artwork in my house, and I believe Mr. Ruderman likely knows who owns the artwork in his house.

And if it's his artwork, and he has the ability to dispose of it, then that's an issue of great concern, especially if he's going to be going to prison at some point in the near future, and artwork is one of the more easily laundered assets, and I'll come back to the artwork.

Our view is Rule 56(d) provides exactly for this situation, and -- and to be very clear, we do not rely exclusively on Mr. Ruderman's invocation of the Fifth or the pleas that are stipulations with the U.S.A. under oath that were filed with -- publicly.

If you look at the motion for summary judgment, which is ECF 128, at Page 5, we also cite to the declaration of Lyn Sohun, the Global chief compliance officer, and head of financial planning. She talks about

how Ruderman gave all the directives at 1 Global and totally ran the company with an autocratic style of leadership.

You also have an excerpt of Michael Latson, who is the 1 Global financial analyst who explained that while Ruderman was the chairman of 1 Global, he effectively acted also as the CEO.

So there's a -- there's a mountain of evidence that Mr. Ruderman was the control person for this entity, and there's no evidence to the contrary, and under Rule 56(d), I think the approach Mr. Pineiro is taking is one that a criminal defendant would take. In -- in criminal court, a defendant can sort of just sit there and let the Government put on its case, and watch the case and proceed to trial, and that's fine in a criminal context.

In the civil context it's different. Once the plaintiff comes forward with the burden of proving the evidence to prove his or her case, then it's up to the defendant to do something to avoid entry of summary judgment to show that there is a material issue of disputed fact.

You have to cite to a witness, an affidavit, a transcript, a document, an e-mail, something. There has been nothing, and we have asked for the proffer that Mr. Pineiro indicated an attorney can provide.

And let's assume that an attorney can provide the requisite proffer, I personally have asked Mr. Pineiro by e-mail multiple times, give me your proffer. Tell me if you could take a deposition, who is it that you would depose, and what you reasonably believe in good faith this person would say that would support the notion that summary judgment should not be entered? And instead the response is, we're entitled to test the evidence.

That's not how Rule 56 works. They have to identify what is it that they would actually uncover during the course of discovery. So there can be a document, an e-mail, a contract, a letter, something, but they have yet to identify any of those things.

So effectively what they're seeking is a multi-year stay where they have no defendants, have proffered no defendants -- proffered no defenses, have no affidavits, have not complied with Rule 56(d), and then are going to retain this artwork, which they claim they don't even know who owns, very vague statements, respectfully, from Mr. Pineiro as to what artwork is in the house, is it held by the trust, is it held by Mr. Ruderman, personally, what's the value of the artwork?

We've been asking those questions actively, and we can't take a 2004 Exam, and neither can the

trustee, because Mr. Ruderman claims that he can't sit for an exam because of Coronavirus and -- and other health issues, even though today examinations are taking place remotely through Zoom all the time.

So we're being left in the dark while there's an indefinite stay, and that's simply not fair to the -- to the victims in this case.

We think the appropriate measure is for Mr. Ruderman to file a response to the summary judgment motion, to set forth his basis under Rule 56(d), whether it's an affidavit of anyone on the planet who has personal knowledge that can show that there's a fact that shows that summary judgment should not be entered, or Mr. Pineiro can file under Rule 11 a written proffer that suggests that there is a fact that he seeks to uncover.

And I'm not suggesting that Mr. Pineiro would violate Rule 11, it's the opposite, I know he would comply with it, and therefore, it would not be possible for him to provide that written proffer.

And so we're entitled to summary judgment, the notion of this discovery is really just a side show, and we would ask the Court to reinstate the summary judgment briefing.

If for any reason there is a stay, and we're concerned about how many years that stay would last, then

certainly we believe that this Court has the jurisdiction and the discretion to impose reasonable conditions.

And to say that there's artwork which he doesn't own in a house that he's selling or an apartment that he's selling, and that that can't be turned over to a trustee to put in a storage location, we think is -- is frivolous.

There's no basis for him to retain that sort of asset, which can be easily laundered, when there is a stipulation with the Government that has been filed under penalty of perjury that states, from the former trustee, that this was a sham trust that was set up to deceive and defraud Mr. Ruderman's creditors.

Thank you, Your Honor.

THE COURT: So just some clarification factually on what you know about the artwork.

Is there some artwork that the trustee has possession of, and Mr. Dodd or Mr. Moses I guess could jump in, and other artwork that would not be an asset of the estate, and you could only get if you get a judgment against Mr. Ruderman?

MR. BUDWICK: I would like to defer to Mr. Dodd if I could, but this is my understanding from having spoken -- and I'm not sure if it was Mr. Dodd or one of his colleagues, is that there was some artwork that

was in the physical premises of the corporation, and that's being held and maintained by the liquidating trustee, and that separate and apart from that, there is artwork in the residence of Mr. Ruderman, and that is either held by himself individually in his own name or it's held by the art trust, for which the former trustee has stated it was a sham.

THE COURT: Mr. Dodd, anything to add on that point?

MR. DODD: No, Mister -- Mr. Budwick's description is correct, other than to add that the trustee is maintaining the art that was at the 1 Global premises pursuant to both approval from the Bankruptcy Court and the District Court, but I think subject to further -- further orders from both courts as to actually how to dispose of it.

So it's more like just a custody arrangement right now, than any determination as to ownership.

THE COURT: Okay. We're skipping around a little bit, but since we're talking about the artwork, and I know there was some discussion at the last hearing or the hearing in March on the discovery in the main case, the -- the order entered in the main case said it's without prejudice to the trustee seeking to depose Mr. Ruderman in a lawsuit or adversary proceeding he may

initiate in the future.

Remind me, Mr. Moses, I think it was you that -- was there some discussion of an adversary proceeding involving the artwork, is that one of the proceedings that we may have been referring to in that order?

MR. MOSES: Thank you, Your Honor. I think that was Mr. Battista who was there, and I -- and I don't recall if there was a discussion particularly with respect to commencing an adversary vis-a-vis the artwork.

Clearly we have a statute of limitations coming up on estate causes of actions, and that's in about 60 days, and so we'll be doing what we need to do with respect to that, including with respect to Mr. Ruderman.

THE COURT: Okay. Who was -- I wanted to ask the -- the -- the Government a question or two. Who -- who should I be directed to, would that be Mr. Duffy or ---

MR. DUFFY: Your Honor, Jerrob Duffy for the United States.

THE COURT: Okay. So as -- before I go back to Mr. Pineiro, as to the length of a stay, at least as it relates to the discovery that the Government was concerned about, walk me through what the sequence would be.

Mr. Budwick is concerned that until there's

a trial, if there's a trial and all appeals have been exhausted, the stay might be in place, but at what point in the proceedings, if there is a sooner point, would the Government no longer have objections to the depositions of some of your witnesses?

MR. DUFFY: Your Honor, we -- we are mindful of the interests of the parties to this litigation. We asked for six months because we wanted to ask for what we thought was the least amount of time, at least initially, that we would, if you will, need to preserve our interests.

But we would -- we would -- we would probably be looking to ask the Court to continue a stay perhaps up until the time of -- of a trial, if there were one. I don't want to, you know, say in this proceeding or otherwise, that we know precisely what's going to happen with respect to our criminal investigation. It's active, it's ongoing, it pertains to one or more individuals.

As the Court has already heard, and as the filings show, there have been several individuals who have been charged publicly, and I can just reference -- I can just represent to the Court that it is active and ongoing.

If the Court were concerned at some point that our process was not sufficiently expeditious to balance the interests, we could provide an ex parte report

to the Court if requested, to provide the Court with specific information about the status of our investigation, but we -- we are prohibited from doing that publicly.

So the answer to your question directly is perhaps up until the time of a trial, if there were one, but the awkward component of that question, Your Honor, is I can't say at this point exactly what the next steps will be in the criminal investigation.

THE COURT: Okay, and I -- well, I assume the Government's concerns about deposing these witnesses would end if there was an indictment or information and plea; right?

MR. DUFFY: All three of those things, if there were an indictment, information and plea with respect to Mr. Ruderman, Your Honor --

THE COURT: Yes.

MR. DUFFY: -- is that what you're referring to? If Mr. Ruder ---

THE COURT: Or if it includes (inaudible.)

MR. DUFFY: If Mr. Ruderman were to be charged in a criminal case, and if he were to accept responsibility in connection with that, and/or be adjudicated guilty, I do not see -- I don't see the interests that we have represented in our motion for stay

as being the same.
So it's a little bit hard for me to say exactly, but -- but so reading the tea leaves, Your Honor, if that were to take place, then I -- I would expect that our interests would -- we would no longer be asking for the type of stay we have asked.
And I will say, just to address a related point that was raised, we asked for a stay of discovery in part because we are mindful that there are a variety of claims that this Court is attempting to adjudicate, and interests it is attempting to balance, and we were asking for the, if you will, most limited, the most limited intervention that we -- that we could.
I -- I have in other matters asked for a stay of the entire proceedings. I have in other matters, civil and administrative, asked for only a stay of -- of certain specific discovery that was ongoing.
So there are, from time to time, depending on the facts and circumstances, we, on behalf of the United States, in a situation like this where there might be a parallel criminal or administrative process at the same time, we might, you know, not always take the same, you know, course of action.
But -- but here, Your Honor, we would be -- if -- if -- if for some reason Mr. Ruderman were charged

criminally and he were to accept responsibility, then that would -- that would probably change the interests that we've -- that we've advanced.
THE COURT: And once it went to trial, presumably, the -- the prospect of an appeal wouldn't -- wouldn't affect your concerns, I wouldn't -- I wouldn't suspect. If -- if you've already gotten the testimony, your concerns about inappropriate pretrial or pre-indictment discovery would be -- be over at that point.
MR. DUFFY: That's right, Your Honor, or just depending on the circumstances. I mean, I would -- I would say, Your Honor, that during a criminal -- if there were a criminal charge -- a criminal case, any defendant, whether it be Mr. Ruderman or anybody else that was charged, would have certain discovery rights, criminal discovery rights. There are the ability to call witnesses, to obtain documents from third parties and so forth.
It's just not as broad as in the civil or the bankruptcy process, and it's -- it's not typically -- and the standard is different. It's essentially for trial, I mean, as opposed to reasonably calculated to lead to the discovery of admissible evidence, it was just the more broad civil standard.

THE COURT: All right. I want to come back to Mr. Pineiro.
The -- I -- I agree with you on the artwork. I don't find that to be an appropriate condition of -- of a stay, and -- and I agree with you as a matter of law that an affidavit isn't required under Rule 56 to present argument that you need more time for discovery, but why shouldn't I require at least some proffer that doesn't violate Mr. Ruderman's Fifth Amendment privilege as to what facts you believe would be uncovered through additional discovery that would create a genuine issue of fact as to whether he was a control person or if I'm not using the precise legal term, I think you know what I'm -- I'm requesting.
MR. PINEIRO: Your -- Your Honor, yeah, thank you.
The -- the first thing that I would say is the first reason why that's not a proper burden being placed on Mr. Ruderman here is because of the circumstances here. We haven't been engaging in year-long discovery, we haven't taken 12 depositions, and I'm asking you to continue summary judgment because I need to take two more, it's the opposite.
We haven't taken any depositions. The first moment that I attempted to set four -- four indisputably

highly relevant witnesses for deposition, the Government intervened, and has sought to stay that. And so all of the case law says that when you don't afford adequate time for any discovery, any summary judgment order that you enter that's adverse to Mr. Ruderman is reversible.
And, again, I mean, you can find a dozen cases on this point, Your Honor. In our brief, let me just turn to the page, at Page 11 and 12, we cite to multiple 11th Circuit decisions that would apply here, where summary judgment was entered before any access to discovery was taken -- was provided to the non-movant, and where there was pending discovery requests.
So this isn't -- this isn't the typical circumstance where parties have been engaging in discovery for several months and somebody is asking for more time. I'm asking for Mr. Ruderman to be afforded his most basic due process right in a civil case, that's Rule 26 discovery.
Okay. Mister -- Mr. Budwick points out that this isn't a criminal case. I know that. I'm a civil litigator, that's generally all that I do, and I'm very well aware of the burdens of summary judgment, and what I say to that is, the 11th Circuit has made very clear multiple times, multiple cases, you cannot proceed to summary judgment.

Moreover, Your Honor, the 11th Circuit has also said that where a movant, someone asking for summary judgment, attaches affidavits to the motion for summary judgment, the non-movant has to have the opportunity to depose those people if they seek to, and that's what we're doing here.

In the Jones case, that's Jones vs. City of Columbus, that's a 1997 11th Circuit case, 120 F -- F.3d 248, at Page 254, the 11th Circuit reversed a summary judgment where the plaintiff never had the opportunity to depose the individuals whose affidavits were offered in support of a motion for summary judgment.

So what Mr. Budwick is attempting to do here, is essentially completely invert the Rule 56 standard. He is seeking to -- he moved for summary judgment before I get any access to any discovery. He wants to prevent me from deposing people on whose factual proffers he's relying on, and then he's telling me, well, explain -- he's telling the Court, well, they have to explain to you what -- what these depositions might show.

What I can tell you is I don't have to rely on a plea agreement. A plea agreement is a document drafted by a lawyer from the Department of Justice based on a factual proffer made by a defendant. That is not all of the relevant testimony, and there can certainly be

conflicting testimony from those very witnesses, and what Mr. Budwick wants to do is in contravention of 11th Circuit law, deny me the ability to take those depositions because he wants to move quickly to a judgment.

I understand, Your Honor, I'm a plaintiff's lawyer in some cases, but expediency doesn't trump due process, the 11th Circuit has made that clear, and for that reason, while he argued, Mr. Budwick didn't cite to you one case supporting the order he's asking you to enter. Meanwhile, there's a -- there's a trove of cases supporting what it is that we're asking here.

So -- so, Your Honor, with that, I think what they're asking you to do is -- is -- is contravene 11th Circuit law. What they're asking for you -- asking you to do is not consistent with what District Courts do in this circumstance.

We want to take these depositions and we have -- we have to have the ability to take these depositions, Your Honor, if we're being asked to defend a summary judgment motion or go to trial in a case where they're seeking rescissionary damages of over $200 million.

I have not in my 13 years as a -- as a lawyer, including the year when I clerked on the

District Court, seen a case where the Court proceeded to summary judgment before the defendant had access to any discovery. It's unprecedented.

THE COURT: Let's -- let's put it into context, though. This is not a defendant in a summary judgment motion that is unaware without discovery of facts that may -- or of testimony that may create genuine -- genuine issues of fact.

This is the -- the individual who, by many accounts, ran the company, who is disputing at this point that he was a culpable control person. He knows what role he played. If he thinks that somebody is going to testify, to provide information that showed him playing a lesser role, a legally insufficient role for culpability under the -- under the claims, why can't he proffer that without violating the Fifth Amendment?

Why shouldn't he proffer that there is some plausible defense here factually, not just, well, the plaintiff needs to prove this. They're relying in part on guilty pleas where the -- to make some sort of analogy here, where, you know, Heide and -- and Atlas and Schwartz have said, yeah, Mr. Ruderman was driving the car that ran over all these investors. Well, Ruderman knows whether he was driving the car or not. I mean, why can't he proffer, no, I wasn't driving?

Now, it's not -- under the securities law it's not quite that black and white, but -- but putting again more -- more on point, why can't, and why shouldn't I require some proffer that he believes through discovery he will show that there is a genuine issue of fact?

Why does he need -- in other words, and then I'll -- I'll let you respond. Why does he need the testimony of these people to be able to assert at least by proffer that his role was insufficient to have him legally culpable as a control person?

MR. PINEIRO: Your Honor, thank you for your questions.

I -- I think your question is sort of harking back to the reason why we initially moved for a stay. Mr. Ruderman is severely prejudiced here because as confirmed by the Government, this case has -- is virtually identical or very similar, has extreme overlap with a criminal investigation into Mr. Ruderman.

So I would be very hesitant to make any potential factual proffer that could be viewed as -- as coming from my client, given that he has a Fifth Amendment right, and given the circumstances that he's -- that he's faced with here, and that's why we filed the motion to stay in the first circumstance.

We expressed to the Court the impossibility

of Mr. Ruderman's situation. He cannot properly defend himself against these claims because he cannot testify on his behalf given the criminal investigation.

Now, it's even worse. Now we're actually trying to get deposition testimony from the two individuals whose testimony pertain to whether he was a control person regarding these -- the offering of the notes, and we can't -- and it's being suggested that we shouldn't be able to take those either.

And so on the issue of a factual proffer by Mr. Ruderman, we're in a very sensitive circumstance, and all the case law says is that the criminal proceedings and those interests sort of trump whatever is happening in a -- in a civil proceeding, no matter what Mr. Budwick might say.

That's why, for example, in the In Re: Ahead case, I think that was a 1987 bankruptcy case, the Court -- you know, the Court basically in this very circumstance said the defendants seeking a stay will not be burdened for we are staying the civil proceeding, as well, and they will be afforded complete discovery at the time they must defend this proceeding.

So, you know, in that case, the New York court said it would be a more efficient use of judicial time and resources to have the criminal case proceed

first, for many of the issues here will be disposed of in that proceeding. Whereas, if we proceeded first here, much permanent information would probably be withheld, and that's the very problem I have here, Your Honor. That's -- that's -- that's the first point that I would raise.

The second one that I would raise, Your Honor, is -- so the issue here is not just whether Mr. Ruderman is the control person. Nobody here disputes the standard.

So under Section 15 of the Securities Act, Mr. Ruderman can be held liable as a control person for the sale or offering of securities without a registration statement unless he had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the control person is alleged to exist.

That's Section -- that's 15 USC 77o, and the way that courts have interpreted that provision, Your Honor, is requiring proof that he was a culpable -- culpable participant in the actual violations.

So the -- the facts here -- the summary judgment really comes down to was Mr. Ruderman aware, was he involved in the actual decision making regarding the issuance of or the sale of the notes without a

registration statement, and so what that -- what that really relates to then is these opinion letters.

There were certain opinion letters that were provided by Mr. Atlas' law firm. Those opinion letters provided that the notes that were issued by 1 Global were not securities because they were short-term, nine-month notes, and basically what Mr. Heide and Mr. Atlas say in their factual proffers as cited by the plaintiffs is, those opinion letters were false. They were fraudulent. Mr. Ruderman knew that.

Now, those opinion letters speak for themselves. They're certainly evidence that I could submit to the Court, and -- and our position is we're entitled to depose those two individuals to -- to understand the basis of why they're saying that. That's really what this comes down to, I -- I believe.

And -- and let's be very clear, again, if you just reviewed Document 127, the motion for summary judgment, the only evidence that they submit on this point are those factual proffers, that's it, Mr. Heide's and Mr. Atlas' factual proffers.

And so to answer your question about why I shouldn't have to make a proffer under Rule 56(f), again, the 11th Circuit says if there's affidavits or -- if there's affidavits, which basically these factual proffers

are, they're one sided, lawyer-prepared documents that were sworn to by certain individuals, what the 11th Circuit says is that in the -- when somebody submits those in support of summary judgment, you're entitled to depose those persons. You can't cut off and prevent discovery and enter a summary order.

Again, Your Honor, there's a lot of litigation in this district. There's a lot of scenarios where you have parallel criminal and civil litigation. There's not one order that does what Mr. Budwick is suggesting that you do. There's not one, and that -- that's because what they're seeking is extreme.

And while if may be frustrating to Mr. Budwick, and others, it's the law. It's the law that a non-movant is entitled to properly defend summary judgment by deposing affiants.

A contrary rule would make summary judgment -- it would -- it would basically destroy the summary judgment process for non-movants. You'd -- you'd be able to -- to basically attack people without affording them due process.

And so I -- I think require -- requiring Mr. Ruderman to proffer what that discovery might show, it's not consistent with the law and it imposes a burden on a non-movant that doesn't exist, and there's no case

law suggesting that that's -- that that's what's appropriate here.

THE COURT: It's not a proffer of what he thinks the discovery might show. I mean, in theory he's thinking if -- if pressed, these witnesses would not -- not make the same statements they made in their pleas, I don't know exactly, or that they would provide some supplemental information that may take him out of the control person.

It is a little troublesome that you -- you haven't been able to even proffer that -- or I guess it would be in an answer if you file an answer, but it comes back to Mr. Ruderman knows, and you're -- I guess you're saying he can't provide even exculpatory, an exculpatory proffer because of the criminal investigation?

How -- how would a proffer that he was not a control person jeopardize him in the criminal proceeding, unless his concern would be they would layer on perjury charges?

MR. PINEIRO: That's not -- I don't know that's a concern, Your Honor. Frankly, I haven't closely evaluated whether there would be some type of waiver there on the Fifth Amendment issue, but I think it's the same concerns that are being raised by Mr. Duffy.

So I'm being asked to proffer certain

defenses to -- to what appear to be immanent criminal charges. Meanwhile, Mr. Duffy is suggesting that I shouldn't be able to depose any individuals who have information relevant to this case because somehow that might circumvent the criminal discovery rules.

Okay. He hasn't identified any actual -- he hasn't identified any concrete reasons why this shouldn't move forward, other than hypotheticals, where if you read the motion -- if you read the motion, it's all speculation. The possibility of, you know, of obstruction, things like that.

These motions are intended to preserve the Government -- the Government's somewhat tactical advantage in these criminal cases. I mean, there's no -- no real doubt about that, and we agree, though, we agree that the interest of -- we agree with the Government. The interests of justice command this stay, but it has to be a full stay and courts -- courts faced with these kind of motions almost always stay the entire case.

You know, Mr. Budwick hasn't cited to any cases where -- in these parallel circumstances, Your Honor, where -- where courts entered orders consistent with what he's asking. It just -- it just doesn't happen.

THE COURT: Mr. Budwick, I'll give you a few

more minutes.

MR. BUDWICK: I'd appreciate it.

To -- to mirror the comment, I specialize in financial fraud, and I've served as special counsel in some of the largest Ponzi schemes in the country. I have never seen someone who has been accused of running a fraud in which he's defrauded thousands of people out of hundreds of millions of dollars keep artwork, keep his property, keep the civil litigation at bay, hold all his creditors at bay for years until he goes through trial. It didn't happen with Mr. Madoff, Mr. Petters, Mr. Standford, Mister -- Mr. Rothstein, anybody.

The relief that's being requested, the whole notion of he gets to sell his apartment, which is going to involve now moving all of that artwork, which Mr. Pineiro can't even represent today who owns, and whether it's insured.

Based on the affidavit of Mister -- not the affidavit, but the plea of Mr. Schwartz, we have every reason to believe that this is art that belongs to the art trust nominally, but is truly owned and held in a sham trust and should be turned over eventually to the creditors.

And so he's holding us at bay for an indefinite period of time, and in the meantime, assuming

that a proffer would be adequate in lieu of an affidavit, there is still no proffer.

The simple fact is, Mr. Pineiro's firm has been engaged for well over a year. There's an insurance policy for which they're paying -- getting paid their fees. There are public applications as to how much they're seeking. They've been paid well into the healthy six figures so far, and presumably the reason for this is to investigate and prepare for an eventual indictment.

And so as they're going through their investigation, and as they're preparing for an eventual indictment, which they clearly expect, they must be in a position to identify one witness, one fact, something which they think will create a material issue of disputed fact in this case, and he simply isn't.

Even when pressed by -- by Your Honor, he has not identified any particular proffer and that's why we want it in writing. Under Rule 56(d), the proffer would have to be in writing subject to Rule 11, and they failed to do that, then summary judgment would be granted.

Mr. Ruderman can identify any information he wants or counsel has any information at his disposal based on his investigation over the last year and a half, and can capably file a proffer. There is nothing to proffer. There is no material disputed fact as to what

Mr. Ruderman's role was at the company. He was the leader of the company. It's his subordinates who have pled guilty and who are pointing to him as being the leader, and he doesn't even need to be the leader. He just needs to at least be on equal par as his subordinates, but there is no issue of fact that that's the case, and there is no proffer, and there is no affidavit, and so essentially what they're getting is a free stay.

They're getting a stay until at least trial, which would be at least a year away from today at the fastest, if not 18 months, if he's not indicted for a number of months, and in the meantime, he's selling his apartment, he's moving his assets. We know that he's got a sham trust that he's held assets in under the plea agreement, and he's likely going to be taking more steps to defraud his creditors.

He's, I believe, about 80 years of age. If he gets any sort of criminal sentence or sentence, it's likely to be a life sentence. He has every incentive to dispose of his assets and secrete his assets, and we are being irreparably harmed, because when the day comes when we finally get our judgment, if we're in fact stayed, there will be nothing left for us to collect upon.

And this art trust is likely -- putting aside the receivables in this case, in terms of litigation

recoveries, I think it is clear, the largest litigation recovery that the victims will get in this case.

THE COURT: What -- what -- this is -- this comes from the side, but it was a question I meant to ask I think at one of the prior hearings, it came -- came back to mind reading Judge Bloom's decision.

The SEC wound up or looking at the docket, the SEC wound up with a consent judgment against Mr. Ruderman; correct?

MR. BUDWICK: Yes, Your Honor, I believe $49 million.

THE COURT: So why -- why doesn't that judgment provide an ability to freeze or attach or execute on his assets?

MR. BUDWICK: I don't know the details of that. I don't know if there was -- part of that was an agreement not to execute upon the additional artwork. I don't know what the details of that are, but there certainly is a $49 million judgment.

Unless he has more than $49 million in assets, he shouldn't really be terribly concerned about the plaintiff getting a judgment.

THE COURT: Does anybody ---

MR. PINEIRO: I can answer that.

THE COURT: Go ahead, Mr. Pineiro.

MR. PINEIRO: Your Honor, we represented Mr. Ruderman in the SEC proceeding. So there is a $49 million judgment. It's a no admit/no deny judgment.

We have, as part of the resolution of that matter, the art trust was carved out in terms of collections. So there was an agreement with the SEC whereby the judge -- they could not seek to collect -- they could not seek to execute the judgment against the art trust because it raised all types of issues, and to be clear, that -- those would be -- those are post-judgment proceedings.

I mean, this -- this -- we're putting the cart, way, way before the horse. We're talking about collection on a judgment that Mr. Budwick doesn't have, against a trust for which Mr. Ruderman is not the trustee or a beneficiary.

So he'd have to bring proceedings supplementary if he ever wanted to take his potential judgment and executed on that. He'd have to bring in -- he'd have to implead Mr. Schwartz, or beneficiaries, et cetera. So I'm very confused about all this discussion when liability hasn't been determined in this case.

The other thing that I would point out, Your Honor, is if the Court is not inclined to grant the full stay, then Mr. Ruderman's position is you should

decline the stay, any stay whatsoever, and we've argued that.

We've said if you don't want to stay the full case, then deny the Government's motion. Then allow us to take these depositions, we can brief summary judgment once we've taken the depositions, and we'll gladly then have a hearing on the summary judgment motion.

THE COURT: Are you -- if the motion to dismiss is denied, and I agree to enter a stay or continue the abatement of summary judgment, are you arguing for a stay that would protect you from filing an answer, as well?

MR. PINEIRO: No, Your Honor. I think that we can -- we can file an answer. Our primary concern is being required to defend an action at the -- at the Rule 56 stage or at trial without having had any discovery, but we can file an answer.

And -- and -- and one other point I can make, Your Honor, is this is all within your discretion. So you can -- you can stay discovery, just toll, for example, or defer the dispositive -- the dispositive motion deadlines, and that's what courts have done where they don't enter full stays.

What the District Courts have done is they said, well, I'm not going to prejudice either side where

there's no discovery by requiring them to respond to dispositive motions or to file, so I'll just defer any adjudication on those motions until we have some type of -- until the case -- until the stay on discovery is lifted.

So we would file a -- what we would suggest then is we would file our answer, and the Court can defer the motion for summary judgment and any other dispositive motion deadlines until we have further clarity from the Government.

THE COURT: Okay, and discovery -- well, plaintiff doesn't believe they need more discovery, they filed a motion for summary judgment.

Was somebody about to speak?

MR. BUDWICK: Yes, Your Honor, if I may? I was simply going to highlight that if there was a negotiated carveout of the art trust as part of the consent $49 million judgment, I think that highlights the need for us to move forward in our litigation.

That means that the SEC's judgment will not be used to execute on the art trust, and we're happy to bring in any beneficiaries or alleged trustees of the sham trust, we just need Mr. Pineiro, we'd like if he could tell us who they are since we can't take 2004 discovery of Mr. Ruderman or depose him. But we're happy to -- to

bring in those parties, but the fact that the SEC cannot proceed against that asset highlights the need for us to move forward with our litigation.

And, again, there -- there needs to be respectfully some sort of proffer. Mister -- Mr. Ruderman knows, he knows what he can possibly proffer and Mr. Pineiro knows through his year and a half investigation, which has been well funded, what he can possibly proffer. There is no proffer and -- and there's resistance to a written proffer. We think that's telling.

If it -- if Mr. Pineiro had a written proffer to offer, if his argument is under 11th Circuit law I can simply do an attorney proffer, our response is, fine, then do it, but he's not providing a written attorney proffer. He's providing no proffer whatsoever.

And then Mr. Ruderman retains the artwork, and moves out of his apartment, and who knows what happens to the art, and the SEC is not going to proceed against the artwork. We are put in a -- on an -- untenable -- untenable position based on this.

We would ask that Mr. Ruderman comply with Rule 56(d), and I think Your Honor does have broad discretion to enter -- in connection with the stay to impose reasonable conditions, and there's been no argument that there's any prejudice whatsoever in turning over the

artwork.

We don't even know what apartment he's going to move to or where he's going to live, or if there's space for the artwork. So there's no prejudice to simply turning over the artwork and having it sit with the other art that was held at the corporation that the trustee is holding.

THE COURT: Okay. At this point I'm going to grant the renewed motion to stay, Docket Entry 137. I was going to consider granting it until there was no longer an objection to Mr. Ruderman's right to depose Heide, Atlas and Schwartz, and I guess maybe Mr. Alexander, but I think at this point I want -- I'm going to go back and just abate the summary judgment and -- and grant the stay for a hundred eighty days, and let's -- let's see what the status is.

In part I want to see what may play out in the main case in connection with the artwork. I think there was a decent argue -- a good argument for a proffer, but I'm also convinced by Mr. Pineiro that, number one, the -- under the general premise of defending a summary judgment, that a party has a right to depose witnesses whose affidavits or in this case, plea statements, were relied on, at least in significant part, in the summary judgment before granting summary judgment based in large

part on that testimony.

And as to the proffer, I was giving that more thought, and perhaps Mr. Budwick on rehearing, if you seek rehearing, I might consider, reconsider whether a proffer should be required, but for now I'm persuaded that any proffer of a defense in the context of this civil case may be problematic while the criminal investigation is going forward, and I'm accepting or adopting Mr. Pineiro's argument on the problem -- Fifth Amendment problem with providing a proffer.

We'll do a short order on this, and again, Mr. Budwick, if you think there's -- if you can frame the issue of a -- of a proffer addressing both the general requirements under Rule 56 and the Fifth Amendment issues that are at play here, I may consider a motion for reconsideration.

So let's turn to the -- well, and let me just confirm with the Government that that order renders it unnecessary at this point for you to intervene, other than without prejudice to seeking limited intervention to continue the stay if -- if -- if it's --

MR. DUFFY: Correct, Your Honor.

THE COURT: -- not otherwise extended?

MR. DUFFY: That's correct, Your Honor. Yes, Your Honor. Thank you, Your Honor.

THE COURT: Okay. All right. So that -- that ---
MR. BUDWICK: Your Honor -- Your Honor, if I may? I'm sorry to interrupt.
THE COURT: Go ahead.
MR. BUDWICK: Thank you for the ruling.
I -- I just want to alert the Court that Mr. Moskowitz is going to handle the response on the motion to dismiss. I have another matter at three o'clock, if I can just ask the Court's indulgence that I may leave the Zoom call before three o'clock?
THE COURT: I did have an attorney once that -- I know this will surprise all of you, who are very professional, walked out in the middle of a Bench ruling once I had announced I was ruling against her, so I won't consider that you're walking out because I ruled against you and --
MR. BUDWICK: Never.
THE COURT: -- we'll leave it to Mr. Moskowitz, who looks serious and ready to roll.
Well, let's turn to the -- to the motion to dismiss. I've read a lot in connection with the motion to dismiss. Let -- let's take it in two pieces. The offensive collateral estoppel issue is interesting, and at first blush it seems that this may be a perfect case to

apply it since it really is the -- essentially the identical argument on these MOIs, as they've been referred to, memoranda -- memoranda of indebtedness, are they securities?
But then I was troubled, Mr. Moskowitz, by the fact that Judge Bloom did not strike an affirmative defense that raised the statutory exception for whether this is a security, and also the fact that the consent judgment itself did not admit liability.
So under these circumstances, take a few minutes, maybe you can turn me around on -- on the collateral estoppel, but let's start there.
MR. MOSKOWITZ: I'll -- I'll just take one minute, Your Honor. Thank you very much.
The Christo decision in the 11th Circuit says that you're to -- to view whether it has a preclusive effect, whether it contains sufficient indicia of finality, and that's sort of the context that you use. So you're not just looking at the motion to dismiss order itself.
In the context of what happened sooner, you have the order on the motion to dismiss, and then as Mr. Budwick said, immediately following that you have a $49 million judgment that permanently enjoined Mr. Ruderman from ever selling unregistered securities

again.
So you put that in the context, you have the MOI ruling that the security -- that these are securities, and then you have Mr. Ruderman consenting to a $49 million judgment and agreeing to permanently be enjoined from ever selling unregistered securities, in that context we believe that there is finality that the Christo decision would say is what you need to have this type of preclusive effect.
THE COURT: Okay, and I believe it was going to be Mr. Mays.
MR. MAYS: Your Honor, yes.
For the record, Jason Mays from Marcus Neiman Rashbaum & Pineiro on behalf of Mr. Ruderman.
Collateral estoppel applies when an issue is actually litigated and when the ruling on that issue was a necessary and critical part of the judgment. The issue of whether MOIs constitute securities was -- was not actually litigated within the meaning in the SEC proceeding.
So to be actually litigated, the resolution of the issue, as Mr. Moskowitz pointed out, must have had sufficient indicia of finality.
Motion to dismiss denials almost never carry that indicia of finality for the very reason that Your Honor pointed out, that the case proceeds after the

denial, and as Judge Bloom declined to strike the affirmative defenses, it was in recognition of the fact that the issue had not yet been resolved.
Mr. Ruderman and the SEC entered into the consent judgment in August 2019. The consent judgment by its very terms did not include findings of fact or conclusions of law, and Mr. Ruderman did not admit or deny the SEC's allegations.
In the 11th Circuit, whether a consent judgment has collateral estoppel effect depends on the intent of the parties. Under these circumstances, it's clear that the parties did not intend for it to have collateral estoppel effect, and that Your Honor should consider the motion to dismiss independently.
THE COURT: Are there any cases, Mr. Moskowitz, where ruling on a motion to dismiss was deemed sufficient for collateral estoppel or offensive collateral estoppel, in any event?
MR. MOSKOWITZ: I don't cite to them, Your Honor, no.
THE COURT: All right. Well, let's -- let's get onto the substance of it, and I think really where the Ruderman side has -- has come down, is looking more at the, I guess, short-term note exception, to the extent the notes are secured by business assets or accounts

receivable.
Is that a fair statement, Mr. Mays, that that's ---
MR. MAYS: Your Honor, there -- there is two components to it, and -- and the first is that the MOIs fall under the judicial exemption to securities, those articulated by the Supreme Court in Reves vs. Ernst & Young, and then also they fall under the statutory carveout of the definition of securities under the Securities Act for short-term notes of nine months or less.
In Reves, the Supreme Court specifically exempted one, short-term notes that were secured by the assets of a small business, and short-term notes secured by the assignment of accounts receivable, and the MOIs in this case, Your Honor, we submit fall squarely within both of those exemptions.
They were secured by a lien on small business assets, and by the assignment of small business accounts receivable of 1 Global.
THE COURT: But -- but there's -- but there's no cases that -- that -- that I saw, and I looked at, I think, the three or four cases that are on Page 12 of the motion to dismiss, cases involving money being basically turned over with total control of the

borrower/seller of the -- of the notes and -- and kind of unspecified fractional interests in unspecified loans that were going to be given in the form of these merchant credit agreements.
It -- it -- and I'll -- I'll let you answer in a moment. It just seemed to me that even if that exception isn't limited to actual assets of the borrower being pledged, that it would require at least that there be some very specific collateral being -- being offered to the lender, the -- the noteholder, in connection with the loan to make it really a -- a commercial transaction rather than an investment.
So are there any -- are there any cases like that? I mean, besides Judge Bloom's opinion itself, we -- we also have Judge Middlebrooks' decision in the Woodbridge Ponzi scheme, Honig vs. Kornfeld, which had somewhat similar facts, so ---
MR. MAYS: Your Honor, the MOIs in this case were unique instruments. They -- prior to the District Court's ruling, we could -- did not find any cases that sort of were sufficiently analogous.
But 1 Global's merchant cash advances were loans to small businesses, in which those businesses pledged its assets, including its accounts receivable and its business to 1 Global as security for the loan.

And then even though it's done in -- in two different transactions, 1 Global through the MOIs, then pledged those same -- security in those same assets and accounts receivable to the MOI noteholders in exchange for -- for -- those loans.
So -- so under those circumstances, you know, we submit, Your Honor, that this -- this falls squarely within the exemptions that Reves contemplated because what was -- what was contemplated by the Supreme Court was the security aspect of it, and that's why we believe, Your Honor, that the District Court by emphasizing that it wasn't one specific business' assets or one specific accounts receivable, that was not what the -- what the Supreme Court required under Reves.
THE COURT: Well, Judge Bloom went through the Reves factors, as did Judge Middlebrooks in -- in Honig. Where -- where did she go wrong? Where did the two of them go wrong?
MR. MAYS: Well, Your Honor ---
THE COURT: Well, I guess -- I guess Honig was -- was longer term, so some lawyer believed that they could create nine-month notes, and they wouldn't have the same problems, perhaps, as the Wood -- Woodbridge notes, but in any event, where did Judge Bloom go wrong?
If I'm going to deny collateral estoppel and

evaluate the merits of her decision, she goes through the four-factor test.
MR. MAYS: Well, Your Honor, the four-factor test is a test that is the family resemblance test, and the family resemblance test under Reves seeks whether or not an instrument is -- actually resembles one of the exempt categories.
And Judge Bloom actually acknowledged in her order, that if an instrument falls within one of these specifically enumerated categories, which are one, whether it's a short-term note that's secured by the assets of a small business; or two, whether it's a short-term note that's secured by the assignment of accounts receivable, you only get to the four factors for the family resemblance test if it does not fall squarely within one of those exemptions.
And so what we submit to you, Your Honor, is that we don't -- there's no need to even turn to the -- to the family resemblance test and those four factors, because these MOIs fall squarely within.
So where did the -- where did Judge Bloom go wrong in terms of the analysis? We submit, Your Honor, in -- in two ways, three if we get to the statutory carveout for -- for short-term notes.
But with regard to the Reves exemptions

there's two ways, and the first is, as I mentioned a moment ago, the Court emphasized that what's at issue here is MOIs that were not secured by any lien on a small business or some of its assets or by an assignment of accounts receivable, but instead were secured by many liens and multiple assignments of accounts receivable.

But the District Court did not rely on any authority that that's a meaningful distinction, and we submit, Your Honor, that the number of businesses that secure a note is a distinction without a difference. It -- it doesn't really -- it doesn't bear itself on the extent of the note security.

THE COURT: But you do -- but you -- but you acknowledge that there's no cases with these kinds of multiple assignments totally at the discretion of the, we'll call -- we'll call 1 Global -- let's just say -- we'll just say 1 Global instead of trying to call them seller or borrower?

MR. MAYS: Yes, Your Honor, instruments that are quite on all fours with the MOIs here, we did not find cases that -- that deal directly with this.

But the second -- the second way that the District Court reasons that these instruments did not fall under the Reves exemptions, is as you alluded to just now, the fact that 1 Global had discretion to expand its

business activities under the MOIs and were not required to use the MOI noteholder funds to fund the MCAs.

And, you know, we submit, Your Honor, that's -- that's also another distinction that is not meaningful for purposes of determining whether the instruments fall under the Reves exemptions, and additionally, there are no allegations currently in the plaintiff's complaint that the MOI -- well, the basis -- let me back up for just a moment.

The basis for the Court articulating that was that -- was the assumption that because 1 Global had discretion under the MOIs, a portion of the funds that were -- were tendered by the noteholders were not necessarily secured.

But, one, that's not necessarily the case and that's not a meaningful distinction, and in any event, the plaintiff's complaint does not allege that a portion of the noteholder funds under the MOIs were not secured. So -- so those were the two distinctions that the Court in our view erroneously relied upon.

THE COURT: All right. Let me turn back to Mr. Moskowitz.

MR. MOSKOWITZ: Your Honor, there's no contrary law that -- that the defendants can cite clearly because there is none.

Judge Bloom hit it straight on all fours. It's an identical factual premise. We made -- they made the same argument, exactly the same, that they're not under the Reves test. Judge Bloom denied it and -- and found that the MOIs are not exempt from the registration as nine-month notes, and she went on that they are commercial in nature because they are really investments, and she went through the factual findings here, as Judge Middlebrooks did in the Woodbridge case.

There's no distinction here between those two. The only difference between our case and Judge Bloom's case, is we actually cite to two sworn statements that they didn't cite to in the Judge Bloom case, the affidavit of Jan Atlas -- I mean, the proffer under oath of Jan Atlas and the proffer of Alan Heide. That was not done in Judge Bloom's case.

So we had everything that was argued in Judge Bloom, where she goes very methodically through the Reves four-part test. There's no difference here, the findings are the same.

What we have, which they didn't have, is we have the sworn statements Jan Atlas and Alan Heide, where he says not only did Mr. Ruderman know that these were securities, but he actually took aggressive measures to trick investors into thinking that they were not. That's

a proffer that we have made.

And again, this is the motion to dismiss stage, so these are allegations that we make, that he not only knew that they were securities, but he tricked the investors, who now we have a certified class of hundreds of thousands of investors that are all defending this motion, and that's why we filed the motion for summary judgment.

We say, not only do we state that these are securities, but if you consider all the evidence, there's no genuine issue of material facts that they're securities, and we would respectfully ask that the motion, therefore, be denied.

THE COURT: Is -- is there an issue just on the limited nine month or short-term distinction? Were some of the notes longer than nine months --

MR. MOSKOWITZ: Your Honor ---

THE COURT: -- is that relevant, or you're fine with saying, let's just -- let's just assume they're nine-month notes, that they're still not within the exception?

MR. MOSKOWITZ: Right, and that's what Judge Bloom actually did. She said that these are not, quote, "commercial in nature, these are investments," and that's exactly what they were meant to be, and she did not

find any clear cut issue on this point.
She found here, the exemption for, quote, "any note which has a maturity at the time of issuance not exceeding nine months, excluding days of grace or any renewal therefore, only applies to notes that can be characterized as commercial in nature, but not to investments, and the MOIs were an investment because 1 Global sought to profit from the success of the debtor apart from obtaining repayment of the note."
There's no dispute about that. That's our allegations, so they're taken as true at this stage, but the evidence will show there's certainly no evidence or proffer or anything to the contrary, and that's why summary judgment will be proper on this point.
But just for purposes of the motion to dismiss, if you take the allegations as true, clearly as Judge Bloom found, and as Judge Middlebrooks found in the Woodbridge case, there are no exceptions here for the nine-month notes under the Reves test.
THE COURT: Where -- where -- what part of the opinion were you reading from about the commercial versus investment?
MR. MOSKOWITZ: I was reading from my notes on her last part, but I don't have the citation exactly to where that was stated.

THE COURT: No, I think that same premise comes out of comments in other cases, maybe even Reves.
All right. Brief rebuttal.
MR. MAYS: Your Honor, Mr. Moskowitz is addressing the standard under the statutory carveout of the Securities Act for the requirement for whether or not securities have to be registered, in which the Securities Act said that notes of a duration of nine months or less you do not have to -- do not meet the definition of security.
He did not address the Reves factors, so -- so his analysis was focusing on the portion of Judge Bloom's decision that addressed whether or not the MOIs fall under the statutory exemption.
The Reves factors are -- are different, but additionally, plaintiff's complaint does not actually allege that the MOIs, noteholders, received funds from any other source other than the MCAs.
At Paragraphs 20 and 21 of the complaint, it actually says quite the opposite. It alleges that the MOI noteholders' funds that they received in return, were based entirely on the success of the MCA portfolio that 1 Global had assembled.
So, Your Honor, I guess I'll leave it at that, but -- but, you know, we believe that collateral

estoppel does not apply, and because the MOIs were not securities within the meaning of the Act, both because they fall under the Reves judicial exemptions and because they fall under the carveout under the Securities Act, we believe that the complaint against Mr. Ruderman should be dismissed.
THE COURT: All right. I'm ready to proceed on this. I -- I've done a fair amount of reading, perhaps motivated partially by the rainy weekend, but in any event, I've reviewed the motion to dismiss, Docket Entry 115; plaintiff's response, Number 128; defendant's reply, Number 136.
I've read several cases, including Judge Bloom's decision, SEC vs. 1 Global and Ruderman, I don't know if ultimately there was an F.Supp cite, but I have the 2019 Westlaw 1670799, Southern District of Florida, February 7, 2019; the Judge Middlebrooks decision that we've been referring to, Honig, H-o-n-i-g, vs. Kornfeld, K-o-r-n-f-e-l-d, 339 F.Supp 1323, Southern District of Florida, 2018; the Reves decision that we've been talking about, the Supreme Court's decision, Reves, R-e-v-e-s, vs. Ernst & Young, 494 US 56, 110 Supreme Court 945, 1990 decision; and several additional cases cited on the collateral estoppel issue and the securities issue.
As I said, the offensive collateral estoppel

issue had some appeal, but ultimately I conclude that it's not appropriate to apply here. The identical issue was fully briefed, argued and the subject of Judge Bloom's comprehensive opinion, but as I noted, Judge Bloom did not strike a remaining affirmative defense that the notes at issue here, these MOIs, memorandum -- memoranda of indebtedness, were statutorily exempt under 15 USC Section 78c(a)(10), and moreover, the consent judgment admitted no liability.
Now, of course we're not bound by a District Court decision in a court, District Court, where there's multiple judges. However, certainly a decision that's on the same facts and the same issues is -- is one that I'm -- I'm going to take a close look at, and in this -- in this case, after taking -- undertaking an independent review, I agree with Judge Bloom's conclusions that the MOIs are securities.
In the papers and in the cases, although not the focus of the argument today, we start with the presumption, because it's in the definition of securities, that every note is a security. Of course the cases say that presumption may be overcome if a defendant can show that the note falls within recognized exceptions, including some that are discussed, I think it was a prior 2nd Circuit case that was, in large part, the reasoning

was adopted by Justice Marshall in Reves, including notes for consumer financing, home mortgages, and short-term notes secured by a lien on a small business for its assets or short-term notes secured by accounts receivable.

The Supreme Court's decision, as we've already discussed, also adopted a, quote, "family resemblance," closed quote, test for analyzing notes that may not fall squarely within any of the exceptions, but have similar qualities, and to apply this test, the Court in Reves listed four factors. Judge Bloom went through those in her opinion, Judge Middlebrooks did the same in Honig.

And Honig arose, although the notes weren't of the same limited duration, arose from the Woodbridge Ponzi scheme, and had -- did have notes, that like the MOIs here, were marketed as low risk, high yield investments, were purportedly backed by loans to commercial borrowers, and were sold to a large number of investors around the country.

So going through the analysis of the issues, as presented here and as presented to Judge Bloom, we do have to look first is this within the exception for short-term notes that are secured by the assets of a business, and the one area where I think I would depart or not rely in full, at least, on Judge Bloom's analysis, is

that early on -- I'm trying to pinpoint the page from the copy I have. I believe it's at star 5 of the Westlaw opinion.

She said, even if the MOIs 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 were used to fund numerous MCAs so that each noteholder obtained a small fractionalized interest in up to hundreds of MCAs. So she found that distinction to be meaningful.

I would agree with Mr. Mays, there's no case law specifically to that effect and -- and I would -- I would -- I -- I can see that you could have a commercial transaction where a business that's loaning money needs a source of funding, and in exchange for the funding, offers specific security interests in -- in the loans that that particular business is making.

But where this really falls short of fitting within the exception is that they -- this is not of a commercial nature, and we can -- we'll come back to that when we go through the Reves test.

These -- these were investors that were lured by promises of high low risk returns, returns that were going to fluctuate, at least as alleged in the

complaint, based on the success of 1 Global's operations. Money that was given to 1 Global to use at its total discretion. The fact that the only money that may have come back was -- was -- came back from the payments on the MCAs, does not mean that these were notes issued to people lending money in a commercial context based upon their receiving a security interest in a business or a small group of businesses' assets to fall within the exception.

I'll come back to this a little bit more when we go through the factors. So while I don't fully agree that the exception may be limited to notes that are secured by the assets of only a single business, I do fully agree with Judge Bloom's conclusion that these notes, these MOIs, don't fall within the statutory exception.

And when we turn to the -- to the four factors, and I didn't get much argument there from Mr. Mays, and I think the reason is that it would be hard to -- to make a strong argument that applying the four factors would lead to the conclusion that these notes bore a family resemblance to the -- to the kinds of commercial loans or consumer loans that had been deemed to be exceptions to the notes being securities.

The first factor is the buyer's primary motivation, and here it was, again, the high single digit

or low double digit rate of return that 1 Global offered, and as -- as Judge Bloom noted, and has already commented on, and I think it's a strong factor, the MOI stated that 1 Global had sole discretion over how to conduct its business activities.

And that really gets into some of the issues later, too, because these -- these things are all interrelated in some ways, and that is that people were lending money in the hopes that 1 Global's business would be successful and they would get a good rate of return, not lending money with the express expectation that particular assets of particular businesses were going to be -- provide adequate security, and that these were really just a commercial investment in a particular transaction by the issuer, in this case, 1 Global.

The second factor requires that the Court determine whether there was common trading for speculation or investment. Like the notes in -- in the Woodbridge case, in -- in Honig, the -- the notes here were sold to more than 3400 investors in at least 25 states. I'm reading from Judge Bloom's opinion. Whether that specific fact is alleged, you certainly have allegations in the complaint about the over 200 and some odd million dollars worth of notes that were sold and the widespread investor class spread around the country.

And it's important to note that in -- in this factor, the Supreme Court wasn't saying, when it said they were widely traded, they weren't -- they weren't saying that they had to be traded on an exchange, and I don't have the pin cite in Reves, but I did take note when I reread Reves this morning that trading on a public exchange is not a requirement to looking at that exception.

The third factor is the expectations of the investing public, whether these are looked at as securities on the basis of the investments or whether part of a commercial transaction, and that's why I said I think these are related, and this goes back to how these were marketed. They were marketed as high return investments, not as loans as part of commercial transactions.

And Judge -- Judge Bloom, in discussing the third factor, also cited to the Honig case at Page -- 339 F.Supp at Page 1336, talking about the representations and the expectations of the investors in that case.

And the final factor is that the Court consider whether, if these are not regulated by the securities laws, that there's some other regulatory mechanism in place. And, in fact, I think when I looked at the cases, Mr. Mays, that -- that you cited in your motion to dismiss, one of them was a 9th Circuit case, the

First Citizens Federal Savings & Loan Association vs. -- I can't read my own writing, I think it's Worthen -- Worthen Bank & Trust, 919 F.2d 510, 9th Circuit, 1990.

There -- there were a couple of issues there. Those were -- that was a loan participation agreement among sophisticated lending institutions, and the loan that was securing was by a commercial bank to a developer, and I think they -- they did in connection with this fourth factor also look at the fact that there's other regulations in place when you're dealing with lending institutions, and clearly that -- that's not the case here.

And I guess as long as I'm going through it, at least in that page of the notes I took, the -- the Pro -- Prochaska vs. Merrill Lynch case, P-r-o-c-h-a-s-k-a, vs. Merrill Lynch, 798 F.Supp 1427, District of Nebraska, 1992, found that the individual notes secured by assets of the borrowers were not securities.

There was, and this goes back to my distinction in the statutory exemption, there were specific -- there was specific security pledged. These were not, in that case, notes widely distributed and there was no deference in that case to -- as to how the borrower or issuer of the notes was using the money.

The other case I looked at was Singer vs. Livoti, L-i-v-o-t-i, 741 F.Supp 1040, Southern District of New York, 1990, and those were notes secured by a mortgage. There was some discussion there because it was secured by a commercial mortgage, so it wasn't specifically within the exception, but in going through the Reves factor, the Court found that that was commercial in nature.

So, you know, going through the -- the decision as I just have, and both the -- whether they fit within the exception or they fit within resemblance under the Reves test, it's -- it's -- it's fine to go through the factors, it's fine to parse the cases, but I want to add some big picture comments here, and these come out of the cases. They weren't necessarily the focus of the arguments, but as the Supreme Court reaffirmed in -- in Reves, and I'm quoting now, "The fundamental purpose underlying the Securities Act -- Securities Act is to eliminate serious abuses in the largely unregulated securities market," and that's at 110 Supreme Court at 949. I don't have pin cites for a couple other quotes, but it says to fulfill this purpose, quote, "Congress painted with a broad brush," closed quote, to, quote, "take account of the transaction under investigation."

When you look at the big picture of the

securities laws, you look at the nature of this transaction, the MOIs here are not short-term notes for commercial purposes.

These were aggressively widely marketed instruments -- investments, rather, of money to an enterprise with full control of the proceeds, investments where the return was going to fluctuate, not based on the specific -- a specific commercial transaction with one or a distinct group of borrowers, 1 Global, rather it was going to fluctuate with the results of 1 Global's success in its overall operations.

So at the end of the day, we go through all this analysis, there's cases arguably on both sides, but really at the end -- by the -- by the time I went through all this and read these cases, this one just isn't close. The notes here, the MOIs are securities under federal and Florida law, of course Florida law, it's been held the definition under federal law applies, so the motion to dismiss is -- is denied.

So, Mr. Moskowitz, either you or Mr. Budwick can submit an order just -- I'm not going to publish on this. Just incorporate the Court's findings and conclusions by -- by reference, deny the motion to dismiss.

How much time do you need to answer? I

think the rules would normally give you just 14 days. I guess, Mr. Pineiro, I don't know if this is your question or Mr. Mays.

MR. PINEIRO: Your Honor, I can answer that. If you don't mind giving us 21 days, that's fine.

THE COURT: All right. So 21 days then to answer, and then we'll have the answer in place and the case will otherwise remain stayed. We'll see what develops in the -- in the main case, we'll see what develops in the criminal investigation.

I suspect there -- there won't be any secrets once -- I suspect all parties will know if and when there's an indictment, and if an indictment, if there's a plea and so forth.

But with the exception of the answer, and perhaps any motion for rehearing that Mr. Budwick may seek on obtaining a proffer, I don't think there's anything else really to address or anticipate, is there, in the case, in the adversary at this point, Mr. Budwick or Mr. Moskowitz?

MR. BUDWICK: I -- I don't think so, Your Honor.

MR. MOSKOWITZ: No, Your Honor.

THE COURT: Okay. All right. So I'm going to do the order on the -- the stay, Mr. Moskowitz or

Mr. Budwick will submit the order on the motion to dismiss.

The order on the stay will -- will provide the protections that I talked about with respect to the Government. If for some reason the Government needs to seek an extension of the stay, they can intervene again for -- for that purpose, but otherwise, there won't -- you know, there won't be any order at this point granting intervention or specifically ruling on the -- on the Government's request.

Okay. All right. Well, thank you all. I think the Zoom hearing was useful. My -- my summer interns, who we've been having participate or at least observe the Zoom hearings, listen to the telephone hearings, have had quite a range of complex issues in the last week since they started, I hope their heads are not exploding, but it's always good to have good cases with good lawyers to help expose our -- our interns to -- to the law, and this had a lot of law to it.

So thank you all, and I'll recess the hearing. Thank you.

MR. BUDWICK: Thank you, Your Honor.

MR. PINEIRO: Thank you, Your Honor.

MR. MOSKOWITZ: Thank you, Your Honor.

(Thereupon, the hearing was concluded.)

CERTIFICATION

STATE OF FLORIDA :
COUNTY OF MIAMI-DADE :

I, Margaret Franzen, Court Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that the foregoing proceedings were transcribed by me from a digital recording held on the date and from the place as stated in the caption hereto on Page 1 to the best of my ability.

WITNESS my hand this 15th day of December 2020.

_____

MARGARET FRANZEN
Court Reporter and Notary Public
in and for the State of Florida at Large
Commission #GG187411
April 14, 2022