UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.
_____/

NOTICE OF CORRECTION TO CASE CITATION WITHIN DEFENDANTS' REPLY IN SUPPORT OF (DE 663) DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT DUE TO MISCONDUCT BY THE SECURITIES AND EXCHANGE COMMISSION AND RELATED CONSTITUTIONAL VIOLATIONS

The Defendant, Joseph LaForte, hereby submits his Notice of Correction to the Reply filed on August 23, 2021 [D.E. 727]. The corrected reply is attached hereto as an exhibit, and its purpose is solely to clarify a citation made to the case *SEC v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011), on page 11 of the Reply.

Dated: August 27, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 27, 2021, I electronically filed the forgoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmissions of Notices of Electronic Filing generated by CM/ECF.

By: */s/ David L. Ferguson*
DAVID L. FERGUSON

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

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CORRECTED REPLY IN SUPPORT OF (DE 663) DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT DUE TO MISCONDUCT BY THE SECURITIES AND EXCHANGE COMMISSION AND RELATED CONSTITUTIONAL VIOLATIONS

EXHIBIT A

> "[I]n June 2020, Par Funding transferred millions from the Par Funding, leaving only thousands in its bank account."
>
> -SEC Counsel Amie Riggle Berlin
> to this Court, regarding the need for an *ex parte* asset freeze.
> July 27, 2020 (DE 14 at 77)

This statement, and others similar statements by the SEC, had real and immediate consequences on this litigation. Conversely, the out of context quote about winning from Mr. LaForte to his lawyer in the context of litigating nonpaying merchants to recover money owed to Par, which is only seeing the light of day because the SEC was able to induce this Court to appoint a Receiver and shut down Par, does not show that Mr. Laforte or any of the Defendants have done anything wrong, but rather, that Mr. LaForte, like many others, has a will to win. This is not controversial. We do not demonize the late, great Vince Lombardi for his famous quote: "Winning isn't everything, it's the only thing," which Laforte was obviously paraphrasing. The SEC's Response opens with a continuation of the exact type of conduct that forms the basis for the Rule 41 Motion, demonizing the Defendants with ad hominem attacks, and even falsely accusing the Defense of presenting manufactured evidence. However, the SEC's conduct about which the Defense complains, was unfair, prejudicial, and has created a significantly unfair advantage in favor of the government that cannot be remedied by anything short of dismissal.

The SEC's Response fundamentally misunderstands the purpose of Defendants' Motion, which is not to prove that there is no genuine issue of material fact on any of the allegations of the Complaint, but that the SEC brought this case on an incomplete investigation full of undeveloped theories, many of which later proved false, but were not corrected by the SEC, and facts that were false when they were alleged. Unlike a statement in a complaint or preliminary motion that later is proven unfounded in ordinary litigation, these false statements had real, immediate, and devastating consequences due to the drastic *ex parte*, emergency, preliminary relief sought by the SEC. These false allegations fundamentally changed the character of this litigation by inducing the Court to order an asset freeze and install a Receiver and caused the Defendants to have to fight with one hand tied behind their backs, having to litigate for months just to get access to their own documents to defend themselves. It also caused devastating injury to Par because the Receiver ceased Par's daily business of making merchant cash advances and collecting money owed by merchants. This is not how an alleged securities registration and misrepresentation cases should be litigated but was done in this way by the SEC in an endeavor to prompt this Court to enter emergency *ex parte* relief so the SEC could

railroad the Defendants. Obviously, it is the SEC that is seeking to win at all costs regardless of the truth and the law. This type of government overreach and misbehavior should not be tolerated, and the case should be dismissed.

I. The SEC Has No Response for the Most Significant Frauds on This Court That Caused the TRO and Receivership

In its Response, the SEC attempts to divert attention away from the real issues by offering a series of strawman arguments, which it of course knocks down. But the facts are indisputable that the SEC's haphazard investigation resulted in false facts and faulty legal contentions being presented to this Court in support of the Motion for Temporary Injunction and Appointment of the Receiver. The SEC goes to great lengths in its Response to take responsibility for the investigation, but that is not the winning argument the SEC thinks it is because if true, it only shows that the SEC, more than the merchant declarants, is responsible for the misrepresentations to the Court.

In the Response, the SEC does not even acknowledge some of the arguments raised by Defendants regarding the false claims it presented to this Court and deflects as to others without providing a substantive response. The SEC completely ignores Defendants' arguments that the SEC misled the Court by falsely alleging that: (1) Joseph LaForte hid his identity from noteholders, which the SEC's own evidence proves is false; (2) Mr. Cole discussed purchasing a bank to avoid usury laws, which the SEC's own evidence proves is false; and (3) the Defendants stole millions of dollars of noteholders' money by cleaning out Par's bank account and sending the money to another company in Georgia leaving behind only $83,000.00, which did not happen. In fact, the SEC does everything it can to shift focus away from the fact that it told this Court that Par executives raided the company coffers right before this action was filed and implied they were about to abscond.

The significance of the theft of the Company's money misrepresentation cannot be stressed enough as the Defense submits that it had to have been a material inducement to this Court granting the extraordinary and devastating preliminary relief sought by the SEC. Case law is clear that even when there is sufficient prima facie evidence of securities laws violation such that a TRO can be entered, the appointment of a receiver is a different animal only appropriate in extraordinary circumstances. *SEC v. Brigadoon Scotch Distribs.*, 388 F. Supp. 1288, 1293 (S.D.N.Y. 1975) ("The application for the appointment of a Receiver is denied. No showing has been made that such a drastic remedy is necessary for the protection of the public. Indeed, it appears that the expense which a receivership would involve would not only impose an undue burden on the defendants but could jeopardize the interests of the public as well."); *SEC v. Bennett & Co.*, 207 F. Supp. 919, 924 (D.N.J. 1962) (granting preliminary injunction, but denying motion for appointment of receiver because

"[t]here is no evidence that any of the defendants have in the past diverted any funds belonging to others to their own use."); *see also SEC v. Hollnagel*, 503 F. Supp. 2d 1054, 1058 (N.D. Ill. 2007) (court denied motion for receiver because even though noteholders were owed $48 million, the defendant would be able to maintain the corporation and obtain the funds to pay the notes better than a receiver). Thus, the SEC needed to convince the Court that Par was in danger of dissipating its assets or that the Receiver could protect the noteholders better than Par. The SEC's allegations were false when made and the Defendants have now shown this to the Court.

The SEC does not even attempt to deny or justify this false allegation, because it cannot be justified. This case is a house of cards that started with the SEC's Big Lie that Par was diverting noteholder money out of its accounts resulting in the extraordinary relief from the Court which caused, among other things, the waiver by the Receiver standing in the shoes of Par of the attorney client privilege. Rather than even acknowledging this misrepresentation in its Response, the SEC uses an out of context quote from an email it would not even have had but for its misrepresentation to the Court to demonize the Defendants. The SEC's smug and callous indifference to what it did here is shameful.

It is now clear that the SEC's expert, Melissa Davis, whose inaccurate Declaration the SEC cited in its TRO Motion as verifying the theft of Par's money that never occurred, did not even bother to review all of the relevant accounts. As explained by the Defendants' expert:

> To date, Melissa Davis ("Davis"), the forensic accountant retained by the Securities and Exchange Commission (the "SEC"), has submitted three declarations. The first two, dated July 23, 2020, and August 4, 2020, address bank accounts for which the SEC asked her to analyze. The list of accounts she was provided to analyze as reflected in her July declaration did not include all bank accounts and did not include any ACH accounts. None of the nine automated clearing house (ACH) payment processors used by CBSG was included in this list. Additionally, five bank accounts used by CBSG were not included in the list she was asked to analyze.

Expert Report of Joel Glick, attached as Exhibit B at 5. Thus, the entire basis of Ms. Davis's theory that Par was moving money out of its bank accounts seems to be the fact that she did not consider that the ACH accounts belong to Par. As further explained by Mr. Glick, Par used these accounts primarily to make interest and principal payments to noteholders and make advances to merchants because the fees Priority charged were significantly less expensive than the cost of wiring the funds through a bank account. *Id.* at 6. This blunder should cause the Court great concern when considering Ms. Davis's expert opinions in this case. Whether the SEC withheld information regarding Par's ACH accounts from Ms. Davis, or she simply ignored them, the misrepresentation that Par was transferring

millions of dollars out of its accounts caused immediate and irreparable harm to the defense. The harm done by this false contention and other misrepresentations by the SEC cannot be remedied on post-judgment appeal or by anything short of dismissal.

The SEC likewise ignores the fact that in the Motion the Defendants dismantle the SEC's false allegation that Mr. LaForte hid his identity from noteholders. Mr. LaForte does not dispute that he did not always use his last name when dealing with merchants seeking cash advances, which is a common practice in the industry for safety and security reasons. The SEC twisted that practice into the false allegation Laforte concealed his last name from noteholders obviously to induce the Court to act. Again, however, the damage has been done. Mr. LaForte's past criminal conviction is littered throughout the SEC's case, despite the fact that there is no evidence that he has engaged in any criminal conduct related to Par. The SEC goes further and attempts to deflect attention away from its own bad behavior set forth in the Motion by saying in the Reply that there are ongoing investigations by other agencies. Response at 2 n. 2. Whether that is true or not is wholly irrelevant to the SEC's misconduct and the Motion at hand. Apparently, the SEC's defense to its misconduct is that if other agencies are or may be investigating defendants, then the Court should allow the SEC to lie about them. Moreover, the evidence that Mr. LaForte did not hide his identity from ***noteholders*** was in the possession of the SEC when it filed this case and made the allegation. The SEC describes in detail a 2019 noteholder dinner put on by Dean Vagnozzi, mentioning it 14 times in its TRO Motion. The SEC alleges that Mr. Laforte's name was concealed from noteholders at the dinner and attached a transcript of that dinner to its TRO Motion. However, the transcript of the dinner filed by the SEC as an exhibit to its TRO Motion shows that Mr. Vagnozzi introduced LaForte by name to the entire crowd over the PA system, stating: "I want to introduce ***Joe LaForte***. Come on up, Joe." (DE 41-7 at 57, lines 17-18) (emphasis added). Notably, this evidence was obtained though an undercover private investigator retained by Heskin. The SEC's response when called out for this falsity, again crickets. There is no excuse for such conduct, particularly by a federal agency.

The SEC produced multiple declarations from Heskin's merchant clients stating that Mr. LaForte concealed his identity from them. However, in light of the fact that the SEC was in possession of a recorded presentation where Mr. LaForte was introduced to approximately 300 noteholders by his real name, it is clear that these declarations were submitted for the improper purpose of baiting the Court into believing that Mr. LaForte always hid his identity from everyone, specifically noteholders. This was not the case.

II. Heskin Was a Significant Portion of the Complaint and TRO Motion and a Large Document Dump Does Not Change That

The SEC argues that it conducted its own investigation and points to the percentage of documents it produced from Heskin in relation to the number of documents it produced, as a whole as evidence of this. However, the SEC's argument fails because it ignores that it relied extensively on information and legal theories provided by Heskin in its Amended Complaint and the TRO Motion. Heskin procured the merchants and information in the merchant declarations for the SEC, much of which have been proven false. Heskin is the source of the allegations that Par's MCA's were "loans" and usurious, which the SEC argued to this Court, but now disavows knowing they are false and claiming they are "irrelevant" after the damage has been done. The SEC certainly thought those allegations were relevant when it littered them thought the Complaint, Amended Complaint, and TRO Motion. Heskin commissioned and paid for the Reehl investigations taping of a dinner on November 21, 2019, which the SEC used as evidence in support of the Complaint and TRO Motion, while conveniently ignoring the fact that Mr. LaForte was introduced to a room of approximately 300 noteholders by his real name. Heskin also invented the specious default rate analysis adopted by the SEC, that was the basis for the Andjich Declaration, whereby the number of confessions of judgment filed in courts equals the percentage of defaulted advances for noteholder purposes.

Additionally, the SEC's attempt to argue Heskin's investor and securities related deposition questions, which read like a blueprint of the Complaint later filed by the SEC, were relevant in his merchant lawsuits fails. Heskin deposed Mr. Cole a mere 24 days before the SEC filed its Complaint and TRO Motion. The SEC argues the investor and securities related questions were somehow not out of line because Defendants knew to expect them and for support points to email correspondence between Mr. Cole and Par's counsel, which the SEC should never have had and only now has because its false allegations induced the Court to appoint a Receiver who thereafter waived Par's attorney client privilege) However, these investor and securities related topics are *not* discussed in the correspondence (yet another example of the SEC making false allegations about conversations, similar to the false allegations about the transcript of the Cole dinner conversation about the bank and the Vagnozzi introduction of Joe Laforte at the noteholder dinner), nor are they on the area of inquiry set forth in the 30(b)(6) Corporate Representative deposition notice prepared by Heskin. Therefore, no matter what was litigated, those questions were outside the scope and wholly irrelevant to Heskin's merchant actions. However, most tellingly, the questions Heskin asked at that deposition read like a word for word rendition of the pleading and motion filed by the SEC just three weeks later. This cannot be a

mere coincidence. Notably, the documents produced by the SEC show that Heskin ordered Cole's deposition transcript on a *rush* basis and immediately forwarded it to the SEC. Furthermore, at the deposition, Heskin told Par's counsel "the time will come," foreshadowing the SEC's complaint that he was obviously gathering evidence for.[1] (DE#20-2). To believe the SEC's explanation it was Heskin with a crystal ball not the Defendants, as the SEC facetiously suggested in Exhibit 12 to its Response (DE #700-1 p. 18).

Finally, Heskin provided a report from his expert in a merchant action, the Lunden Report, and the SEC ran with it. Notably, Mr. Lunden in his report made it clear it was not his expert opinion that Par's MCA's were loans and usurious and he got that theory from Heskin, but the SEC misled the Court by not pointing out that caveat and thereby making it appear it was Mr. Lunden's opinion. Additionally, the Lunden Report makes it clear the Fleetwood advance was funded after the onsite inspection, but the SEC did not care and argued to the contrary when it filed its TRO Motion and still argues falsely that it was funded beforehand. Irrespective of the amount of documents and information the SEC collected from any other sources, it obviously considered what it got from Heskin to be highly relevant and relied heavily upon documents and evidence from Heskin to induce this Court to enter the most drastic pretrial relief there is. The SEC's Amended Complaint and TRO Motion make it clear Heskin was leading the investigation, not the SEC.

III. Response to SEC's Chart About Noteholder Misrepresentations

The SEC continues to attack Par's underwriting through its own chart of "truths." However, the SEC's chart is flawed because it attacks underwriting guidelines made up by the SEC that Par has never promised noteholders. First, the SEC claims that Par regularly approved funding before a site inspection. However, the way the SEC uses "approved" in its filings and merchant declarations is a made-up point in the funding process that does not exist. While merchants are preliminarily qualified based on their document submissions, Par has no obligation to actually fund until the money is actually sent. Par's documents are clear that if it learns anything new about the financial condition of the merchant after preliminary qualification, which would include a failed site inspection, troubling bank statements, or issues with a background check, it is not obligated to fund. Nevertheless, over a year into this case, the SEC continues to harp on the "approval" date, which is a concept manufactured by

[1] In the Response, the SEC claims that Heskin found out about the Complaint filed by the SEC after it was filed from the Philadelphia Inquirer. (DE# 691 at 6). However, the Heskin declaration the SEC points to as evidence of this says no such thing. (DE# 691-5). Yet another example of a made-up allegation by the SEC, not unlike the "approved" before the onsite turned into "funded" switcheroo the SEC pulled with the Fleetwood Declarations, discussed in the Motion and herein.

the SEC. The SEC is aware that the time period it refers to as "approval" was really a pre-qualification, but Par was not obligated to make the advance until funding.

The merchants, and by extension the SEC, were clearly aware that a deal is not finally approved until it is funded because the contracts say exactly that. Par's contracts state:

> You have been pre-qualified based on our preliminary review of the information you have provided. Your pre-qualification is not a guaranty of funding nor a commitment to fund. You must provide the requested additional information, sign and return the Agreement and related documents sent to you, and our underwriting department will make a final determination regarding the terms of your Agreement. Any misrepresentation relating to any information you have provided to us or may provide to us in the future or any adverse change in your financial condition or status may void this pre-qualification offer. Pre-qualification is subject to withdraw, change, and/or cancellation at any time if you no longer meet the requirements for the requested funding.

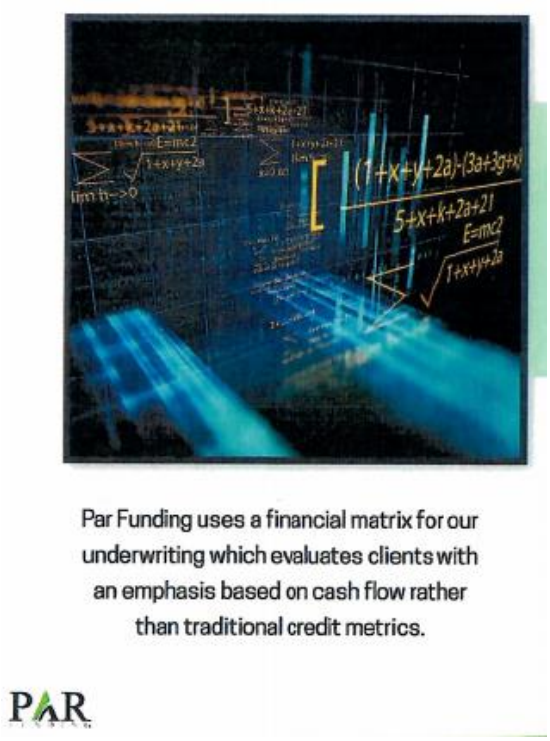
Again, all deals are pre-qualified before Par received the requested documentation needed to fulfill the underwriting guidelines and conducted the site inspection. Par would not waste the money or time to do an onsite if that were not the case. However, the merchants were not funded until the underwriting process was complete, which included all documents requested to complete underwriting and the onsite inspection where appropriate.[2] *See* Noteholder Brochure, attached as exhibits 1 and 2 to Exhibit A.

Additionally, the SEC is apparently making the nonsensical argument that Par must get a new application from a merchant and order new site inspections when it funded merchants who are existing clients that already provided an initial application and had an onsite inspection. While the federal government may revel in inefficiency and red tape, profitable businesses do not. The purpose of an onsite inspection is essentially to make sure the business exists. All documents gathered in the underwriting process were subsequently uploaded to and stored and maintained in ConvergeHub, Par's CRM. The purpose of a CRM is to store all the information that a company collects about its customers. Thereafter, employees have a centralized platform to allow them to access, analyze, and use previously obtained customer data on a continuing basis, rather than repeatedly requesting the same documents and information over and over. The purpose of a CRM is to allow businesses to store and use pre-existing data. Obviously, if a merchant requested a second round of funding after a first application, updated bank statements would be required to show current cash flow, but other

[2] Contrary to the SEC's assertion, Defendants did not forge or doctor documents or evidence. Documents were formatted or highlighted to show the Court information from QuickBooks and the application in the most streamlined way possible without needlessly overburdening the Court and filing all the bank statements. In light of the SEC's false allegations, a complete set of documents are being filed under seal. *See* Rebuttal Chart attached as Exhibit A 1-99.

documents do not need to be re-requested. Par's third-party vendor systems are capable of verifying preexisting information and any changes that may have resulted from prior data obtained in the original application process. By logging into Experian Business Background, Clear by Thompson Reuters, Data Tree, Data Merchant, and looking at social media and Google products, Par underwriters can ascertain the data that is needed for renewals.

The SEC also argues that Par does not collect debt schedules, profits and loss statements, and other underwriting documents, but fails to point to a single document that Par promised noteholders it would obtain and did not do so. Further, the SEC's discussion about profit and loss statements and debt schedules demonstrates a total lack of understanding of the MCA business, which is most concerned with cash flow and the merchants;' apparent ability to repay advances over a short period of time, usually 100 days. In fact, one of Par's brochures for noteholders explains that: "Par Funding uses a financial matrix for our underwriting which evaluates clients with an ***emphasis based on cash flow rather than traditional credit metrics.***" *See* Exhibits 1 and 2 to Exhibit A (emphasis added). Again, the SEC has manufactured underwriting guidelines that Par never promised its noteholders.



Given that Par funded deals that usually had 100-day terms or shorter, cash flow information was what it needed to determine a merchant's qualification for funding. There is no dispute that Par Funding obtained three-months of bank statements along with an application, a voided check, and a copy of the merchant's driver's license. Industry standard is a voided check, a driver's license, three-

months of bank statements, application, and proof of ownership. *See* competitors underwriting standards attached as exhibits 28-1 and 28-2 to Exhibit A. Par went above and beyond that and performed significantly more underwriting than many in the industry including site inspections, although it did accept pictures from the owner when the business was of a sensitive nature such as a law firm, children's playground, or a facility that stores hazardous materials. Par also took other information, when necessary, on a case-by-case basis when it deemed appropriate. Even though this was not a promise made to note holders.

Additionally, the SEC claims Par did not do background checks, but it did. This argument evidences complete ignorance of the fact that Experian has numerous products, not just personal credit report offerings, including individual and business background checks which are two platforms separate and apart through Experian: Experian Business Background for background checks and Experian for personal credit. Par conducted both on every merchant it ever funded, as disclosed to note holders. *See* Exhibit A-14, A-18 A-32, A-46, A-79-82, A-99.

The SEC in its chart continues to double down on many of the false assertions called out in Defendants' Motion despite overwhelming evidence to the contrary. The Defendants have attached a rebuttal chart dispensing with the contentions raised by the SEC it is chart, *See* Exhibit A, hereto, and its supporting exhibits, 1 through 99.

One of the most egregious misrepresentations made by the SEC in its TRO Motion involves the Fleetwood Declarations and the timing of the Fleetwood Services advance. Remarkably, when confronted with irrefutable evidence proving false its allegation that the Fleetwood Services advance was funded the day before the January 5, 2017, onsite inspection, the SEC belligerently doubles down. Defendants provided Par's Bank Statement that shows Fleetwood Services was funded on January 9, 2017, *not* January 4th. *See* Motion Exhibit 29. The SEC's own exhibits filed in support of its TRO Motion confirm that the merchant was funded on January 9, 2017. *See* TRO Motion Exhibit 76, the Lunden Report (provided to the SEC by Heskin), Exhibit "A," at pp. 1 and 13 (confirming Par made the first advance in the amount of $133,335.00 on January 9, 2017). In fact, the Fleetwoods say nothing about when the advance was first funded and instead allege the advance was "approved" before the site inspection. This approval concept is a false, irrelevant, and misleading concept explained in this Reply, but for the purposes of this argument, even the Fleetwoods knew better than to make the false claim that funding occurred before the onsite inspection. The SEC made the funded allegation up along with other false allegations discuss in the Motion to bait the Court into the most drastic pretrial relief possible. In its Reply, the SEC ignores Par's Bank Statement, its own TRO Motion Exhibit, the

Lunden Report, and does not address the discrepancy between the Fleetwoods' Declarations ("approved") and the SEC's allegation ("funded") in the TRO Motion. Instead, the SEC cites in its chart a "Fleetwood ConvergeHub record" that the SEC has to know is inaccurate and not reliable. *See* (DE 692) SEC Reply Chart at p. 15, footnote 32. Specifically, the "Fleetwood ConvergeHub record" cited by the SEC lists the date of funding as 01/04/2017; the date of Agreement is blank, the Deal Value is USD 0.00; and the Expected Close date is **08/17/2021**. This document is obviously inaccurate and not dispositive. The SEC may not understand or may but does not want to acknowledge that ConvergeHub is an internal database at Par that can be accessed and modified by employees/staff as documents and information are subsequently added to the file. Data entered into the CRM by Par staff does not trump original documents, like contracts, inspection reports, background checks from Experian, or bank statements, and is not intended to. If it read that document the SEC must know it is completely inaccurate. Notably SEC cut off information regarding the bottom of the application and used an application that was not Par's application. Ultimately, the Fast Advance Funding application dated December 29, 2016, was the one that this deal was based on. Ex. A-55.

The SEC does not even attempt to explain the discrepancy between this ConvergeHub record and Par's Bank Statement and the SEC's own (borrowed) Lunden Report because it cannot possibly do so in good faith. Notably, this Fleetwood ConvergeHub record is not something the SEC would have had access to prior to filing its TRO Motion since the TRO Motion was filed on July 27, 2020 (DE# 14) and the Receiver took over Par's operations on July 28, 2020.Therefore, the SEC cannot claim this erroneous internal record caused the SEC to mistakenly make a false allegation to this Court about Par's underwriting. Instead, the SEC uses this record that it obtained after the fact to cloud and confuse the issue and continue the harm caused by the false allegation. The SEC should admit the allegation is false but will not. The SEC's conduct should not be condoned. Without ramifications for this and the other false allegations raised in the Motion, like all the money was stolen from Par's bank account just before suit was filed, the SEC will be emboldened to engage in similar conduct in the future.

IV. The Investigation and Claims to the Court About the Investigation Were Constitutionally Insufficient and the SEC's Statements Regarding Its Sufficiency and the Defendants' Ability to Adequately Defend Themselves at the Prior Hearing Are Disingenuous

The SEC makes a number of statements regarding the sufficiency of its investigation as well as the Defendants' opportunity to defend themselves that are disingenuous and should be ignored by this Court. Contrary to the SEC's argument Defendants do not argue that the SEC has an improper

financial purpose (DE 691 at 10), but rather that given the financial motivation of the private attorney and his clients—to wit—getting paid legal fees and potentially avoiding repaying millions of dollars to Par, that a proper and diligent investigation would have consisted of obtaining declarations from multiple sources. Out of 7,600 Par merchant clients, the SEC starts this case with 14 merchants who were all represented by the same lawyer. While the SEC claims that it drafted all of the declarations, there is no dispute that the SEC used this single private attorney's clients rather than other sources, and that the contents of the declarations were procured by the private lawyer in a blast email and were not sufficiently vetted such that they were filed with material items left blank on a form declaration that does not vary much between declarants, if at all.[3]

The SEC (while represented by the same lead-counsel) has previously attempted to rely on a single source with questionable motives in an attempt to establish its allegations while failing to procure evidence with more probative value despite being obtainable through reasonable efforts. *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1326 (M.D. Fla. 2011) (noting that Baker's statements were "wholly uncorroborated and unreliable" and that "[e]ven if susceptible to admission under a hearsay exception, Baker's statements [alleging conduct by Kramer] unquestionably lack reliability. Thus, even if admitted into evidence, the statements would merit neither consideration nor credit.") The *Kramer* court also called out SEC for relying on this witness's own statement of location to attempt to establish unavailability of the witness to overcome a hearsay objection. *Id.* at 1324. ("Nonetheless, the Commission relied substantially on Baker's statement of his purported location and neither confirmed Baker's departure from the United States nor confirmed Baker's arrival in China…. The Commission appears not to have diligently attempted to locate Baker but rather to have attempted to ostentatiously fail to locate Baker.")

Furthermore, the SEC attempts to argue that the Defendants' position is that the SEC has an improper financial arrangement with the merchant declarants. Defendants said no such thing in their motion. Rather, the Defendants stated that the merchants have a financial motivation in helping the SEC take down Par and possibly make their debt go away or reducing it. This is indisputable.[4] Furthermore, while Heskin states in the declaration he filed in support of the Response that his cases are stayed, that is not dispositive of anything. Heskin obviously will seek to get paid for his legal work,

[3] During a meet and confer telephone call on a discovery issue, Ms. Berlin stated to Laforte's counsel, Joshua Levine, that she did not seek declarations from any other source because when she has one attorney cooperating, she does not need to seek out other sources.

[4] Defendants did say that merchants may have sought a whistleblower award as well but did not state that the SEC brought this case for the purpose of handing out a whistleblower award.

whether now or in the future. He could have a contingency agreement with his clients whereby he gets a percentage of any debt that is discharged whether in a private case or this case, or he could simply realize that his private litigation was going nowhere and that this action is the best route for his clients to avoid their debt. Furthermore, the stay of litigation helped stop the bleeding from the losses in federal court. (Sunrooms) which helped Heskin's clients by taking Par down. The publicity from this case may have resulted in Heskin getting additional Par merchant clients. For example, BT Supply, Par's largest merchant client that owed Par in excess of ***$91 million*** has now shown up in Receiver billing as a Heskin client.

Alternatively, through this action, Heskin can obtain discovery he could not otherwise have obtained in his private litigation to build his class action and RICO cases after the stay is lifted by virtue of the Receiver waiving the attorney-client privilege as well as obtaining other evidence that would not have been discoverable in the private litigation he had filed. While the SEC disputes that Heskin led the investigation of this case, it does not dispute that he willfully cooperated with the investigation. If this case truly hurt Heskin and his clients, he would not have so willingly assisted the SEC. This cannot be legitimately in dispute.

Furthermore, there is no dispute that the SEC presented declarations to this Court with inaccuracies, with blanks as to material relevant portions and containing sworn averments as to information that the merchants could not possibly have known, such as whether or not Par conducted a background check on them, even though they all signed documents consenting to background checks. The purpose of the hasty declarations is clear, to bias the Court against Defendants before they would even have a chance to present evidence in their favor. While SEC claims that the merchant correspondence was only a fraction of the production when it did its initial document dump, this statement is misleading because evidence provided by Heskin and his merchants was a significant portion of the "evidence" filed with the Complaint and in support of TRO and appointment of the Receiver. This evidence included merchant declarations, an expert report prepared for Heskin in his private litigation, and an undercover recording by a private investigator bought and paid for by Heskin, and a list of the confessions of judgement filed by New York Unity. The fact that this information does not represent a significant portion of the document dump the SEC made on the defense is irrelevant.

Furthermore, the SEC's so-called "corroborating" evidence either consists of statements taken out of context or is from further biased sources. As already explained above and in the Motion, the SEC presented a statement from the recorded 2019 noteholder dinner about Mr. LaForte being the

president of Par but ignored the fact that he was introduced by his real name to these noteholders. The SEC's "corroboration" for Par's allegedly shoddy underwriting included a declaration of Lionese Jones. However, Ms. Jones is a disgruntled former employee who filed a wrongful termination complaint with the NLRB after she quit her job but could not qualify for unemployment due to voluntary resignation. Again, this case is a house of cards built on biased witnesses and outright misrepresentations to the Court.

The SEC also argues that it supported its assertions with declarations of its auditor that reviewed thousands of pages of documents and therefore, the Defendants are misrepresenting the evidence presented to this Court. Again, the SEC misconstrues Defendants' argument, and avoids responding to the true argument. The Defendants acknowledge that Mr. Andjich claimed to have reviewed thousands of documents consisting of court dockets. The argument in the motion to dismiss is that the SEC did not understand the relevance of the New York Unity dockets at the time the declaration was executed and had to obtain this information from Mr. Heskin, which it did after the declaration was executed. Whether he reviewed one document or thousands, not understanding their significance is the hallmark of an insufficient investigation.

Furthermore, the SEC argues that the Defendants should have raised all of these points in the initial response to the Motion for Temporary Injunction, arguing that it provided a document dump on Defendants, that Defendants had the opportunity to take discovery, and that the Defendants were able to pull some documents from their own system because the case was not properly sealed at the outset. While Defendants were able to get some documents, they did not have full access to ConvergeHub. There is no dispute as to that. In fact, there was protracted litigation and negotiation between Defendants' and the Receiver on access to ConvergeHub, which resulted in a stipulation to grant Defendants' access to a static copy of ConvergeHub on April 16, 2021. The SEC's documents were not what Defendants needed to defend themselves at the early hearings; their own documents were. Documents that were only in the possession of the Receiver because of the SEC's misrepresentations and omissions to this Court. Now the SEC disingenuously argues that the Defendants should have put on evidence that it deprived them of before the hearings and that they did not have until mid-2021.

Furthermore, the SEC's reliance on the volume of documents produced, shows why the Defendants were unfairly disadvantaged at the hearings. While the SEC produced a significant amount of documents during the expedited discovery period, the volume of documents made it like looking for a needle in a haystack and the documents relevant to this motion, were either buried in the SEC's

production or not yet produced. The Defense has still been receiving production form the SEC through early July, including 1,051,389 documents from the SEC in the last 100 days, that is documents not pages.

Production Summary

Production Name	Folder	Date Received	Doc Count	Contents	Production
SEC-KAP_20210126	Par Funding	02/02/21	1,937	Melissa Davis documents - bank statements, wire confirmations, investor agreements	EPROD-SEC-DEF_2021
2021-01-11 - Production	Par Funding	02/08/21	29,379	Receiver initial production documents - statements, btransaction confirmations, accounting worksheets - already hosted on Dropbox	EPROD-SEC-DEF_2021
2021-01-13 - Supplemental	Par Funding	02/06/21	3,521	Receiver provided investor documents - already hosted on Dropbox	EPROD-SEC-DEF_2021
NVMS	Par Funding	02/23/21	255	NVMS merchant site inspections from 2015	EPROD-SEC-DEF_2021
EPROD-SEC-DEF_20200811	Par Funding	02/24/21	97,906	PPM solicitation materials, ABFP emails, Alexis emails, investor agreements, voice mail messages, actum emails, deposit slips, Camaplan documents, investor questionnaires and agreements, Dean financials and videos	EPROD-SEC-DEF_2021
SEC-EMAILS-E_20210223	Par Funding	02/24/21	163	Emails between Kara Dipietro and SEC	EPROD-SEC-DEF_2021
EPROD-SEC-DEF_20210211	Par Funding	02/24/21	67,678	ABFP Documents, CBSG Client Agreements, COJs, underwriting files, CBSG investor documents, FSP / VS HR documents, FAF agreements, Retirement Evolution PPM docs	CLA Production P1254
Premier Trust 2021-02-25	Par Funding	02/26/21	73	Premier Trust entity operating agreements, email correspondence with Lisa	EPROD-SEC-DEF_2021
EPROD-SEC-DEF_20210219	Par Funding	02/26/21	43,770	Fidelis PPM investor documents, Furman emails (a lot of spam), text messages	EPROD-SEC-DEF_2021
2021-02-25 - CBSG Receiver	Par Funding	03/05/21	67,680	Fidelis documents, CBSG accounting, investor, underwriting & ISO files, MPMG files, 1st Global underwriting files, ABFP emails, Camaplan documents.	EPROD-SEC-DEF_2021
EPROD-SEC-DEF_20210301	Par Funding	03/07/21	771	REA tax returns, financials and emails / Additional Kara Dipietro messages	
2021-03-04 - CBSG Receiver Production	Par Funding	03/08/21	244	Convergehub emails and client csv data, missing underwriting pdfs	
EPROD-SEC-DEF_20210225	Par Funding	03/10/21	41,139	Furman documents - text message logs, emails, phone photos,	
Truepic 2021-03-01	Par Funding	03/17/21	3,006	Amended 03/01 production, Truepic invoices, site inspection photos and emails	
EPROD-SEC-DEF_20210308	Par Funding	03/18/21	9,047	Additional Furman PPM documents, investor solicitation and communications.	
2021-03-22 Bybel Ruthledge	Par Funding	03/22/21	22	documents	
2021-03-22 DLA Piper	Par Funding	03/22/21	291	emails and documents from Lisa Jacobs pertaining to consulting agreement and updated notes	
2021-03-22 Fox Rothschild	Par Funding	03/22/21	915	email correspondence pertaining to securities and investor guidance with cbsg	
2021-03-23 Haynes and Boone	Par Funding	03/23/21	28	email correspondence with counsel pertaining to TSSB matter from early 2020	
2021-03-23 Offit Kurman	Par Funding	03/23/21	150	legal filings and documents related to cbsg and affiliate businesses near foudnation of company	
EPROD-SEC-DEF_20210319	Par Funding	03/25/21	6,228	additional Furman PPM documents, investor statements and account materials	
CBSG Database: 5 Custodians	CBSG	03/26/21	1,171,021	Email for parfunding for Joe, Jimmy, Joe Cole, Jamie and Lisa	
CBSG Database: 2 Custodians	CBSG	03/26/21	2,468,902	Email for parfunding for Wendy and Tori	
EPROD-SEC-DEF_20210325	Par Funding	04/02/21	40,713	Additional Furman PPM emails and documents, low value	
EPROD-SEC-DEF_20210402	Par Funding	04/12/21	8,304	About 4,500 merchant underwriting files, John Gissas and Retirement Evolution communications	
EPROD-SEC-DEF_20210408	Par Funding	04/17/21	241,482	FAF sales files, applications, merchant statements, leads, sales rep spreadsheets, collections, sales and accounting employee emails, CFS / FAF emails	
EPROD-SEC-DEF_20210416	Par Funding	04/23/21	122,725	Philadelphia computer files including underwriting, accounting, sales documents, employee emails with attachments, Tori's computer	
EPROD-SEC-DEF_20210427	Par Funding	04/30/21	48,391	Employee communications from the Philadelphia computers, these include attachments for collections, merchant contracts, ACH authorization and funding details. There were also payroll related emails for FSP and Vision Solar.	
Ali Media videos	Par Funding	05/04/21	44	ABFP marketing videos	

The SEC's argument that the Defense had a fair shake at the hearings and should have raised these issues sooner because it dumped documents on them should be rejected.

V. The SEC's Rebuttals to the Motion Is Replete with Strawman Attacks on Points the Defendants Did Not Make Combined with Personal Attacks

The SEC claims that the Defendants' theories about the investigation of this case are unfounded and then, without a hint of irony, accuses the Defense of attempting to intimidate witnesses.[5] As a preliminary matter, Ms. Berlin had a conversation with counsel for Lisa McElhone, Mr. Futerfas, in which she stated she did not intend to call Kara DiPietro and probably would not call any of the other Heskin merchants to testify at trial, thus, this alleged witness intimidation is illogical. To the extent the SEC changes its mind and desires to call these witnesses at trial, their bias, motives, and credibility will certainly be fair game. But there is absolutely no evidence that there has been any attempt by counsel to intimidate witnesses other than rank speculation by the SEC. This is a scandalous allegation that has no place in a federal court filing, especially in the context it is brought here. Furthermore, the concept that the Defendants are harassing or scaring witness by challenging the veracity, bias, and motives of its accusers is repugnant to due process and absurd.

[5] Defendants concede that a few documents were filed that should have been redacted, without proper redactions. However, these exhibits were immediately sealed. Defense counsel submits that this was an oversight, not intentional as evidenced by the fact that other information was redacted.

Additionally, the SEC's arguments dismissing its other misrepresentations as irrelevant are not legitimate. For example, the SEC's argument about how this Court stated that it would not decide the issue of whether Par's transactions were loans or not or whether they were usurious at the Preliminary Injunction phase entirely misses the point. Falsities were used by the SEC to get the TRO, Asset Freeze, and Receiver appointed, and once obtained the SEC says the falsities are now irrelevant. Every misrepresentation made to the Court at the early stages of this case compounded to influence the Court's decision to enter the TRO, asset freeze, and appoint the Receiver. Combined with the SEC's uncorrected misrepresentation that Par executives were raiding the company coffers, the Court could not have reasonably reached any other conclusion than that the appointment of a Receiver was necessary, even though we know that this representation is and always has been false. The Defense has had to litigating against the Receiver extensively. This is not because the Defense wanted to but because it has been forced to. Most notably the nearly nine-month battle to obtain access to its own documents that needed to defend against the Receiver's and SEC allegations of wrongdoing. But for some of the material misrepresentations made to this Court at the outset, this case would have been litigated a completely different way and a profitable company would not have been destroyed by government overreach.

Conclusion

The SEC states: "This is a case about whether the securities offerings were registered and whether the Defendants made false representations to investors." (DE#691 at 26 n. 34). The Defense agrees, and again, this is not the prevailing argument the SEC thinks it is. Rather, it shows that the SEC had an improper motive in littering the record with scandalous, impertinent, and false allegations that induced the Court to enter a TRO, Asset Freeze, and appoint the Receiver. This has resulted in catastrophic injury to Par as well as extraordinary litigation disadvantages including the confiscation of Par's own documents, necessary for its defense, and the wavier of Par's attorney-client privilege and privileged documents being used against them. The primary issue the Court needs to resolve when considering this Motion is if the SEC did not make the false allegations at the inception and brought the case as it now casts it, about "whether the securities offerings were registered and whether the Defendants made false representations to investors," the Court would have ordered a Receivership and allowed Par to be shut down. Imagine if Par had been able to continue to operate and collect while this case was litigated how much different things would be now, how much better off the noteholders would be, how much more fair and just this litigation would be. There is simply no remedy for this conduct in this Court or on appeal, and the only adequate remedy is Dismissal.

Dated: August 27, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 27, 2021, I electronically filed the forgoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmissions of Notices of Electronic Filing generated by CM/ECF.

By: */s/ David L. Ferguson*
DAVID L. FERGUSON