**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.

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**DEFENDANT LISA McELHONE'S NOTICE OF JOINDER IN THE MOTION OF FOX ROTHSCHILD LLP TO STRIKE THE SEC'S MOTION (ECF 757) FOR AN ORDER TO SHOW CAUSE WHY DEFENDANT LISA MCELHONE AND HER FORMER COUNSEL SHOULD NOT BE HELD IN CONTEMPT OF COURT AND INCORPORATED MEMORANDUM OF LAW (ECF 762)**

Defendant Lisa McElhone joins the Motion of Fox Rothschild LLP to Strike SEC's Motion (ECF 757) for Order to Show Cause Why Defendant Lisa McElhone and Her Former Counsel Should Not be Held in Contempt of Court and Incorporated Memorandum of Law (ECF 762).[1]

## INTRODUCTION

On September 14, 2021, the SEC filed a Motion for Order to Show Cause Why Defendant Lisa McElhone and her Former Counsel Should Not be Held in Contempt of Court (ECF 757) (the "OSC Motion"). On September 15, 2021, Fox Rothschild LLP ("Fox"), filed a Motion to Strike the SEC's OSC Motion (ECF 762). Defendant McElhone joins and adopts each and every point

[1] Undersigned counsel is previously engaged to appear before another Court on the date set for argument on the Motion to Strike, Monday September 20, 2021. Accordingly, this Notice also respectfully requests that Alejandro Soto, Esq. or David Ferguson, Esq. be permitted to appear on behalf of Ms. McElhone for the purposes of arguing the Motion to Strike.

and argument in that motion in its entirety, including the SEC's lack of standing to bring the OSC motion. The Receiver was vested by the Court with the exclusive right to seek the recovery of alleged estate assets. The issues raised in the SEC's OSC Motion are thus beyond its purview. Further, the SEC's motion should be stricken for these additional reasons:

1. The SEC's failure to meet and confer under the rules greatly prejudiced the Defendants because it led to false claims made in the public sphere;

2. The claims concerning a tract of land located at 4309 Old Decatur Road, Texas (the "Decatur Property") have been addressed in filings before this Court by the Receiver and the Defendants and are the subject of civil litigation the Receiver has commenced about the matter in the state of Texas;

3. The Receiver - who is collecting money for the noteholders/creditors - was paid $35,000 rent for the use of the Defendants' home pursuant to an agreement between the Defendants and the Receiver; and

4. The claims concerning the allegations that Defendants Joseph Cole Barleta and Lisa McElhone secured documents for a defense on July 24, 2020, were fully litigated by the Receiver and those Defendants months ago and the matter was settled by a payment of $75,000 as per a stipulation between them and the Receiver.

## ADDITIONAL REASONS TO STRIKE THE OSC MOTION

### *A. The SEC's Failure to Meet and Confer Under the Rules Greatly Prejudiced the Defendants Because It Led to False Claims Made in the Public Sphere.*

The SEC filed the OSC Motion without a pre-motion conference of counsel as required by the Local Rules. Local Rule 7.1(a)(3) requires that, with certain exceptions not relevant here, "prior to filing any motion in a civil case . . . counsel for the movant shall confer (orally or in writing), or make reasonable effort to confer (orally or in writing), with all parties or non-parties who may be affected by the relief sought in the motion in a good faith effort to resolve by agreement the issues to be raised in the motion." Local Rule 7.1(a)(3). "Failure to comply with the requirements of this Local Rule may be cause for the Court to grant or deny the motion and impose on counsel

an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee." *Id.*

The SEC has – yet again – failed to observe this Rule and filed a surprise motion without meeting or conferring with undersigned counsel on these issues. The failure to do so has not only unfairly blindsided both the Defendants and Fox but has also prejudiced Defendants by publicizing false claims about them. Where a failure to meet and confer significantly prejudices an adversary, such failure can give rise to a motion to strike the filing. *Incardone v. Royal Carribean Cruises, Ltd.*, No. 16-20924-CIV, 2019 WL 8989848, at *1 (S.D. Fla. June 5, 2019) (holding that, in light of the Plaintiff's repeated failure to comply with Local Rule 7.1(a)(3) "striking Plaintiffs' motions would be an appropriate sanction."); *Taverna Imports, Inc. v. A&M Wine & Spirits, Inc.*, No. 15-24198-CIV, 2018 WL 11227737, at *2 (S.D. Fla. June 4, 2018) (striking motion for multiple reasons, including that it "did not comply with Local Rule 7.1(a)(3)"); *Jenkins v. Grant Thornton LLP*, No. 13-60957-CIV, 2014 WL 12634797, at *1 (S.D. Fla. July 22, 2014)(denying the motion without prejudice for failure to comply with Local Rule 7.1(a)(3)). For the reasons stated below, the failure to confer was calculated, unfair, and greatly prejudiced Defendant McElhone.

### ***B. The SEC's Unnecessary, Hastily, and Carelessly Filed Motion Fits with the SEC's Pattern of Making Claims Without Proper Meet and Confer and without Performing Due Diligence or Due Investigation.***

As Defendants made clear in their Motion to Dismiss the Amended Complaint Due to Misconduct by The Securities and Exchange Commission and Related Constitutional Violations (ECF 663), the SEC in this case has an established a pattern of failing to conduct reasonable inquiry into the accuracy of its allegations prior to making public allegations. For example, as ECF 663

(and ECF 746) established, the SEC made the following misrepresentations in order to seek the initial TRO in this action:

(i) filing and using multiple declarations by financially motivated individuals (14 or so merchants out of about 7,600) which were replete with demonstrable falsities;

(ii) falsely alleging that Par funded the merchant cash advance to Fleetwood Services *before* conducting the on-site inspection of the business despite the SEC's own exhibits to its TRO Motion establishing this was untrue;

(iii) falsely alleging in its TRO Motion that a transcript of a recorded dinner conversation showed that Joseph Cole referred to Par's MCAs as loans and said that the reason he was about to buy a bank was to avoid usury laws (that do not apply);

(iv) falsely alleging Joseph LaForte's identity was concealed from investors at a large event put on by Defendant Vagnozzi when his name was announced at the onset of the occasion;

(v) falsely representing the default rate made to investors by using an obviously flawed calculation method; and, last but hardly least; and

(vi) falsely suggesting to the Court that the Defendants stole investor money by cleaning out Par's bank account and sending the money to another company in Georgia when, in fact, the Georgia bank account was a CBSG-owned ACH account used regularly for merchant transfers and corporate business.

(ECF 746 at 3). Further misrepresentations or false allegations made by the SEC include, in its Complaint and Amended Complaint:

(vii) that Par failed to conduct underwriting (*see* Amended Complaint at para. 154-184), despite overwhelming evidence to the contrary in Par's enormous 750 GB custom-built underwriting database called ConvergeHub which the SEC was wholly unaware of or otherwise failed to address because it failed to conduct any due diligence on Par prior to filing this action;

(viii) that Par's MCA funding deals were "loans" (*see* Amended Complaint at para. 44-46) when, in fact, state and federal courts around the country have determined that MCA funding deals are not "loans" and are perfectly lawful – well-known and obvious facts the SEC should have known prior to filing its action;

(ix) that Par's MCA funding deals paid exorbitant "interest" (*see* Amended Complaint at para. 44-46) when, in fact, state and federal courts around the country have determined that MCA funding deals are not "loans" and the fees charged are

perfectly lawful – well-known and obvious facts the SEC should have known prior to filing its action; and

(x) that Par misrepresented its "default rate" (*see* Amended Complaint at para. 185-203) when, in fact, the SEC never understood what the default rate was or what it represented, and the default rate was corroborated by defense expert Joel Glick in his report dated July 13, 2021 (*see* ECF 649 at Exhibit H).

Finally, multiple witnesses have testified, and the SEC has effectively conceded, that it failed to contact Par or its counsel in any manner to verify any of the information it received from Shane Heskin and others, including merchants with a financial motive, prior to commencing this action and seeking a Receivership and TRO. Now, here again, the SEC has made false and inflammatory public allegations without a meet and confer in violation of Local Rule 7.1(a)(3), and without due diligence into its allegations.

### *C. The Decatur Property Claims Were Already Addressed by the Defense and the Receiver Long Ago and the Receiver Has Commenced Civil Litigation in Texas About the Matter.*

The SEC is attempting to relitigate issues previously briefed and is misstating the facts. (*See* ECF 557, Receiver's Motion to Lift the Litigation Injunction to Allow Commencement of Proceedings Involving Liberty Eighth Avenue, LLC, Kingdom Logistics, LLC, DEF Capital LLC, and Lisa McElhone; *see* ECF 493 dated February 22, 2021, Defendants' Joint Response to the Receiver's Interim Status Report dated February 1, 2021 at POINT II, and *see* ECF 582, Defendant Lisa McElhone's Opposition to the Receiver's Motion to Lift the Litigation Stay). As stated in POINT II of the Defense Response of February 22, 2021 and the exhibits attached thereto, to the Interim Status Report dated February 1, 2021, "[t]he Old Decatur Road Property had not been a Trust asset since November 2019, several months before the instant SEC suit even was filed, and Lisa McElhone does not now, and never has, owned any percentage of Kingdom Legacy, the Par Funding merchant who purchased the Old Decatur Road Property

several months before this suit was initiated. Finally, neither the sale of the Old Decatur Road Property (months before the suit), nor the transfer of the deed, diminished Par Funding's assets. In fact, the sale and transfer increased and preserved Par Funding's assets and value." (ECF 493 at p. 4) The Defense further addressed these issues on May 11, 2021 in ECF 582. In any event, as the SEC recognizes, the Receiver has already commenced litigation about these issues in Texas concerning the Decatur Property, which shows that any disputed issues of fact must be resolved in litigation brought by the Receiver and not in a contempt motion by the SEC, which lacks standing to sue to recover Receivership assets. ECF 754 at 9.

D. ***The Receiver - Who Is Collecting Money for the Noteholders/Creditors - Was Paid $35,000 Rent for the Defendants' Use of Their Own Home.***

Again, the SEC's faulty allegation concerning this issue could have been readily addressed had the SEC simply made a phone call to undersigned counsel, instead of filing a baseless and inflammatory motion. This Court may recall that the Receiver has required Mr. LaForte and Ms. McElhone to pay rent to the Receiver for the use of the home in which they live. The Receiver was paid $35,000 for that rent through a check issued by Lacquer Lounge. The Receiver knew where those monies came from and accepted the check. In addition, it is self-evident that the monies were paid to the Receiver, who is charged with collecting funds for the Receivership estate.

The SEC has caused substantial damage by its failure to meet and confer and its rush to file a surprise motion with no merit. Lacquer Lounge was established in 2011 and is a nail salon. Lacquer Lounge is not a Receivership Entity. It was established before Par was created and generates very modest revenue. Lacquer Lounge employs about 20 people who are paid by splitting the revenues for the services they perform with Lacquer Lounge, as is standard in the

industry. The employees have families and support them on this very modest income, which they lost when the SEC proceeded down this unnecessary path.

When the SEC filed its false claim about Lacquer Lounge, we are advised that it also sent the Court's original order from July 2020 to its bank, which then froze the accounts, and 20 Lacquer Lounge employees, who have nothing to do with this case, could not get paid. We have previously asserted that the SEC's false claims in the TRO Motion led to the dismissal of 70 or more hardworking Par employees back in July 2020 and, to date, the destruction of about $187 million in Par assets and value. Now, the SEC's deliberate failure to meet and confer about the Lacquer Lounge payment before filing a false allegation about a single $35,000 payment – made to the Receiver pursuant to an agreement for rent for the defendants' own home- has caused about 20 innocent, hardworking people to lose their paychecks. This is inexcusable and, quite frankly, vexatious and outrageous. The SEC is supposed to be about helping people, not destroying jobs and businesses. The SEC's improper conduct needs to be addressed. The SEC's OSC should be stricken.

***E. The Claims Concerning the Allegations That Defendants Joseph Cole Barleta and Lisa McElhone Secured Documents for a Defense on July 24, 2020, Were Fully Litigated by the Receiver and Those Defendants and the Matter Was Settled by a Payment of $75,000.***

The SEC's attempt to relitigate allegations that Defendants Joseph Cole Barleta and Lisa McElhone secured documents for their defense on July 24, 2020, wholly ignores the fact that this matter was fully litigated – and settled – many months ago by those Defendants and the Receiver. On December 11, 2020, the Receiver filed a Motion for Order to Show Cause Why Defendants Lisa McElhone and Joseph Cole Barleta Should Not Be Held in Contempt alleging the Defendants improperly downloaded certain files on or around the inception of this case. (ECF 423) The Court

granted the requested Order to Show Cause seeking contempt on December 12, 2020. (ECF 425). Thereafter, on January 13, 2021 the Defense filed a substantial rebuttal to the allegations, annexing expert reports and numerous exhibits. (*See* ECF 467). On February 26, 2021, the Court set an evidentiary hearing on the OSC for March 11, 2021. (ECF 496). On March 8, 2021, the Receiver filed on behalf of itself and the Defendants a Joint Motion Regarding Show Cause Hearing Scheduled for March 11, 2021 (ECF 506). Therein, the Receiver and the Defendants advised the Court that:

> McElhone and Cole—without admitting and specifically denying any liability for the Alleged Conduct— have agreed to pay the Receiver $75,000.00, on or before June 7, 2021, as reimbursement for the attorneys' fees and investigative costs the Receiver is seeking through the Show Cause Motion (the "Agreed-Upon Payment"). McElhone and Cole agree that they are jointly and severally responsible for making this Agreed-Upon Payment to the Receiver.
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> . . . .
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> In light of this agreement regarding the Payment, the Receiver, McElhone, and Cole respectfully request the Court to enter an Order denying the Show Cause Motion as moot and canceling the Show Cause Hearing scheduled for March 11, 2021.

ECF 506 at 2-3. A Stipulation between the Receiver and Defendants Barleta and McElhone was executed and on March 8, 2021, the Court granted the motion. (*See* ECF 507). The payments agreed to under the Stipulation have been paid in full.

It is difficult to imagine the SEC was unaware of this litigation with the Receiver before it filed the instant motion, but any such lack of knowledge would have been remedied by a call or email to defense counsel. Now the SEC, without standing to do so, has filed the exact same motion the Receiver did – nine months ago – which was resolved by an agreed-upon Stipulation, thereby multiplying the litigation. Either way, the SEC's failure to meet and confer about this claim before filing it was wrong and has significantly prejudiced Defendants.

Furthermore, even if the SEC had standing to bring this motion—which it does not—the exhibits to the motion facially negate any argument for contempt against Ms. McElhone. The emails from Fox Rothchild show that it gave its clients advice to save these documents to use in their defense. Thus, Ms. McElhone was acting under advice of counsel and should not be held in contempt for doing so, even if the SEC had standing to bring this motion.

**CONCLUSION**

For these reasons, as well as those articulated by Fox, the OSC Motion should be stricken. If the matter is not stricken, counsel request 21 days from the date of such denial to file a Response to the SEC's Motion given the simultaneous preparation of Summary Judgment motions.

Dated: September 19, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on September 19, 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

*s/Joel Hirschhorn*
JOEL HIRSCHHORN