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.,
_____/

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Securities and Exchange Commission seeks partial summary judgment that (1) the Par Funding promissory notes are securities; (2) the Defendants engaged in an unregistered securities offering under Section 5 of the Securities Act of 1933 ("Securities Act"); and (3) that Defendants Lisa McElhone and Joseph LaForte violated Section 17(a) of the Securities Act and Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ("Exchange Act").

II. LEGAL STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In making this assessment, the court "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party," *Stewart v. Happy Herman's Cheshire Bridge, Inc*., 117 F.3d 1278, 1285 (11th Cir. 1997) (citation omitted), and "must resolve all reasonable doubts about the facts in favor of the non-movant." *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of Am*., 894 F.2d 1555, 1558 (11th Cir. 1990) (citation omitted).

The movant's initial burden on a motion for summary judgment "consists of a responsibility to inform the court of the basis for its motion and to identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (alterations and internal quotation marks omitted) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the

moving party has shouldered its initial burden, the burden shifts to the non-moving party to "demonstrate the existence of evidence that would support a verdict in its favor." *Id*. (citing *Celotex*, 477 U.S. at 322-23).

"To survive a [summary judgment] motion ..., [a nonmovant] need[s] to create more than a 'metaphysical' possibility that his allegations were correct; he need[s] to 'come forward with specific facts showing that there is a genuine issue for trial,' " *Wrobel v. County of Erie*, 692 F.3d 22, 30 (2d Cir. 2012) (emphasis omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986)), and "cannot rely on the mere allegations or denials contained in the pleadings," *Walker v. City of New York*, No. 11-CV-2941, 2014 WL 1244778, at *5 (S.D.N.Y. Mar. 26, 2014) (internal quotation marks omitted) (citing, inter alia, *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009)).

III. THE NOTES ARE SECURITIES

A. The Par Funding and Fidelis Promissory Notes are Securities[1]

1. Test for determining whether promissory notes are securities

As the Court explained in denying the Defendant's Motion to Dismiss:

> To reach the issue of an alleged violation of the Securities Acts, the transaction at hand must involve a "security" as defined in the *Acts. Fin. Sec. Assur., Inc. v. Stephens, Inc*., 500 F.3d 1276, 1285 (11th Cir. 2007) (quoting *Home Guaranty Ins. Corp. v. Third Fin. Servs., Inc*., 667 F. Supp. 577, 579 (M.D. Tenn. 1987)). Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act broadly define a "security" to include "any note." 15 U.S.C. § 77b(a)(1); 15 U.S.C. § 78c(a)(10). However, the Supreme Court has explained that the phrase "any note" as it appears in the Securities Acts "should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts." *Reves v. Ernst & Young*, 494 U.S. 56, 62-63 (1990).
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> Congress's purpose in enacting the federal securities laws was to "regulate investments, in whatever form they are made and by whatever name they are called." *Id*. at 61 (emphasis in original). Accordingly, in *Reves*, the Supreme Court articulated a test—the "family resemblance" test—to enable courts to distinguish between "notes issued in an investment context (which are 'securities') from notes issued in a commercial or consumer context (which are not)." *Id*. at 63. ***The family resemblance test begins with a presumption that any note of more than nine months is a security***. *Id.*

[1] Mr. Vagnozzi is not disputing that the ABFP Funds notes and limited partnership interests are securities and therefore this issue is not in dispute. Therefore, this Motion focuses on the notes that some defendants claim are not securities – namely, Par Funding and Fidelis.

[ECF No. 583].

2. The Notes Are Of More Than Nine Months - Therefore There Is A Presumption That The Notes Are Securities

Here, the Par Funding and Fidelis Notes are of more than 9 months.[2] Accordingly there is a presumption that the notes are securities. *Reves*, 494 U.S. at 63. The Defendants cannot demonstrate to the contrary, as there is a lack of evidence that the notes fall into one of the judicially exempt categories or meet the family resemblance test.

IV. SECTION 5 OF THE SECURITIES ACT

"Sections 5(a) and 5(c) of the Securities Act of 1933 require the offer or sale of certain securities to be registered."[3] "Registering securities ensures that companies file essential facts with the SEC, which then makes these facts public."[4] "It's unlawful, without an exemption from the Securities Act's registration requirements, for any person to use an instrumentality of interstate commerce to buy or sell, offer to buy or sell, or transport or deliver after sale, an unregistered security."[5]

There are three elements for a Section 5 claim:

(1) The Defendant directly or indirectly sold, or offered to sell, securities;

(2) The Defendant used an instrument of transportation or communication in interstate commerce in connection with the offer to sell or sale of securities.

(3) A registration statement for the securities was not in effect.[6]

"A person who sells unregistered securities violates Securities Act §5 regardless of whether the violation was committed knowingly, intentionally, recklessly, or negligently."[7] "Scienter is not a consideration." *SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004). A Defendant's "good-faith belief that the sale or offer to sell was legal, and [his/her/its] reliance on the advice of counsel,

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[2] Statement of Undisputed Facts, Facts 28, 31, 61, 73.
[3] Eleventh Circuit Pattern Jury Instruction 6.7.
[4] *Id.*
[5] *Id.*
[6] *Id.; SEC v. Spence & Green Chem. Co.*, 612 F.2d 896, 901-02 (5th Cir. 1980).
[7] Eleventh Circuit Pattern Jury Instruction 6.7.

aren't defenses to a violation of Securities Act § 5."[8] The terms "sale" or "sell" mean the transfer of a security for value. This includes contracts for the sale for value or any other disposition for value of a security or interest in a security.[9] An "offer," "offer to sell," or "offer for sale" means attempting to dispose of a security or an interest in a security for value by inviting buyers.[10]

A. The Offerings

Par Funding offered and sold promissory notes from 2012 until February 2020.[11] Par Funding contracted with individuals to serve as so-called "Finders" to locate and solicit investors in 2016 and 2017, and Cole signed the Finders Agreements on behalf of Par Funding.[12] The Finder's Agreements provide that once Par Funding receives investor funds, it will pay the finder a one-time distribution.[13] Beginning no later than Fall 2016 until December 2017, Defendant Dean Vagnozzi was one such agent for Par Funding.[14] Vagnozzi and his company A Better Financial Plan raised about $20 million for Par Funding in exchange for a commission equal to 6 or 7 percent of each investment he solicited.[15] Defendant Michael Furman also solicited investors to purchase Par Funding Notes.[16] For example, he distributed marketing materials, solicited investors, and in November 2017 Furman met with potential investors at his firm, United Fidelis Group, in West Palm Beach, Florida, and recommended the Par Funding investment.[17] By December 2017, Par Funding had raised at least $482 million from investors.[18] The investors purchased the Par Funding notes by sending funds directly to Par Funding or through self-directed IRA accounts.[19]

In early 2018, Par Funding converted the Finders to Agent Fund managers who raised money from investors for the purchase of Par Funding notes.[20] The roughly 40 Agent Funds[21] and the Agent Fund managers, including Defendants Dean Vagnozzi and Michael Furman, issued

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Fact 27
[12] Facts 34-35
[13] Facts 35
[14] **Fact 36**
[15] **Fact 37**
[16] Facts 38-40
[17] **Facts 38-40**.
[18] **Fact 41**
[19] Fact 42
[20] Fact 43
[21] Fact 54

promissory notes and offered and sold them to investors.[22] The Agent Funds then funneled this investor money to Par Funding in exchange for Par Funding promissory notes issued to the Agent Funds.[23] While the Agent Funds offer investors promissory notes in the Agent Funds, investors are told that profits will be generated by Par Funding's Loan business in which the Agent Funds invest.[24] Par Funding and ABFP coordinated the issuance of the notes.[25] The Agent Fund Managers were compensated by keeping the difference between what the Par Funding notes paid the Agent Funds in interest and what the Agent Funds paid investors in interest (the "Spread").[26] Vagnozzi also received 25% of the Spread for all Agent Funds he managed through his company ABFP Management.[27]

The ABFP Income Funds were created by Dean Vagnozzi.[28] ABFP Income Fund offered and sold promissory notes to investors and then funneled this investor money to Par Funding in exchange for Par Funding promissory notes.[29] ABFP Income Fund II offered and sold securities in the form of limited partnership agreements to investors, and then funneled this investor money to Par Funding in exchange for Par Funding promissory notes.[30] Vagnozzi raised more than $28 million through the offer and sale of the securities to investors.[31]

Fidelis Financial Planning was created by Michael Furman for purposes of raising money for the purchase of Par Funding promissory notes.[32]

B. <u>The Undisputed Facts Show The First Element Is Met</u>

As to the first element, the issue is whether each Defendant directly or indirectly sold, or offered to sell, a security. As to the offering or selling a security indirectly, "[t]o satisfy this [first] element, the SEC isn't required to show that [the defendant] had direct contact with any of the investors who were offered or purchased the securities at issue."[33] A Defendant "has indirectly offered or sold that security to the public if he or it has employed or directed others to sell or offer

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[22] Facts 17-23, 24-26, 44, 60-63, 72-76
[23] Fact 44
[24] Fact 45
[25] Fact 55
[26] Facts 58-59
[27] Fact 59
[28] Facts 60-71
[29] Id.
[30] Id.
[31] Fact 71
[32] Facts 24-26
[33] *Id.*

them, or has conceived of and planned the scheme by which the unregistered securities were offered or sold."[34] Further, a Defendant can be liable under Section 5 if he or she was a "necessary participant' or 'substantial factor' in the sale of securities "if, for example, [he/she/it] employs or directs others to sell or offer to sell securities, or plans the process by which unregistered securities are offered or sold."[35] He raised more $11 million through the offer and sale of Fidelis notes to investors.[36]

1. Lisa McElhone

McElhone participated in the offer or sale of Par Funding promissory notes by:

- Signing the Par Funding promissory notes[37]
- Hiring Defendant Perry Abbonizio to locate investors[38]
- Authorizing Par Funding to offer and sell promissory notes[39]
- As the sole officer and President of Par Funding, and as the sole signatory on the Par Funding bank accounts, paying so-called "Finders" to locate and solicit investors[40]
- As the sole officer, President, and sole employee of Par Funding, controlling the company with Defendant Joseph LaForte and thus controlling the offering.[41]
- Approving Par Funding marketing materials for distribution to potential investors in the offering.[42]

This conduct is sufficient to meet the first element of a Section 5 claim. *Papadopoulos v. Sidi,* 547 F. Supp. 2d 1262 (S.D. Fla. 2008) (holding that there were "sufficient undisputed facts" establishing a Section 5 claim where: (1) defendant, the CEO/Director,[43] had a "key role" on the issuer's management team; (2) the defendant co-signed the stock certificates; and (3) the defendant received some of the funds from the sale of those certificates). Further, McElhone's consent to and eventual delivery of commission payments to Finders serves as a fourth way to find her a "necessary and critical step" in the offering because the Finders located and solicited investors

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[34] *SEC v. Friendly Power Co., LLC*, 49 F. Supp. 2d 1363, 1371-72 (S.D. Fla. 1999).

[35] *Id.*

[36] Fact 79

[37] Fact 30

[38] Fact 15

[39] Facts 9-10

[40] Facts 4, 9-10, 30

[41] Facts 9-10

[42] Fact 10

[43] Meaning the defendant was both CEO and Director of the relevant entity.

pursuant to the Finders' Agreement based on the promise of commissions if they successfully solicited investors to buy Par Funding notes, and McElhone was the sole signatory on the Par Funding accounts that made those payments. *See Zacharais v. S.E.C.* 569 F.3d 458 (D.C. Cir. 2009) (finding defendant liable as a participant under Section 5 based on apparent consent to and eventual delivery of the commission payments to sales agents); *Friendly Power Co., LLC*, 49 F. Supp. 2d at 1371-72 (liability based on employing or directing others to sell securities).

2. Joseph LaForte

LaForte participated in the offer or sale of Par Funding and Agent Fund promissory notes by:

- Having authority over Par Funding, which issued the notes[44]
- Soliciting investors through in-person meetings and discussions, including at one sales event for 300 potential investors and investors[45]
- Reviewing for edits and approval the Par Funding brochures and the "funding analysis" distributed to potential investors as the marketing materials for the offering.[46]
- Creating with defendant Dean Vagnozzi the structure through which Par Funding sold its notes to so-called Agent Funds, which then raised money from investors for the purchase of Par Funding notes by selling Agent Fund notes and then funning investor money to Par Funding in exchange for Par Funding promissory notes[47]
- Meeting with Agent Fund Managers to provide them with information about Par Funding, to tout the investment and success of Par Funding, and to tell Agent Fund managers what they should tell potential investors[48]

This conduct is sufficient to meet the first element of a Section 5 claim. LaForte directly offered the securities by personally soliciting investors in meetings and at the November 2019 sales event. He provided information to the Agent Fund managers about Par Funding for their use in touting Par Funding to solicit investors. His work in planning the process by which the notes were offered or sold serves as a separate basis pursuant to which the Court can find that LaForte

[44] Fact 11
[45] Facts 33, 56, 57, 65-68, 76, 83
[46] Fact 11
[47] Facts 65-68
[48] Facts 80-82

was a necessary participating in the offerings. *Friendly Power Co., LLC*, 49 F. Supp. 2d at 1371-72 (planning the process by which unregistered securities are offered or sold).

3. Joseph Cole Barleta

Defendant Joseph Cole Barleta participated in the offer or sale of Par Funding and Agent Fund promissory notes by:

- Signing the Par Funding promissory notes on behalf of Par Funding[49]
- Soliciting investors for Par Funding and agent note offerings through in-person meetings and discussions and a sales event[50]
- Executing so-called "Finders Agreements" pursuant to which Finders would locate and solicit investors in exchange for commissions[51]

This conduct is sufficient to meet the first element of a Section 5 claim. Barleta directly participated in the offering by signing the notes and directly soliciting investors. He also participated in the offering by executing the Finders Agreements pursuant to which individuals were paid to locate and solicit investors in the Par Funding offering. *Friendly Power Co., LLC*, 49 F. Supp. 2d at 1371-72 (employing or directing others to sell securities).

4. Perry Abbonizio

Defendant Perry Abbonizio participated in the offer or sale of Par Funding, ABFP, Fidelis, and Agent Fund promissory notes by:

- Locating and soliciting hundreds of investors directly, which was his job for Par Funding[52]
- Training the Agent Fund managers to raise investor money for the purchase of Par Funding notes.[53]
- Distributing the Par Funding marketing materials and information agents used to solicit investors.[54]
- Meeting with potential agent fund investors and soliciting them to invest in the agent fund notes[55]

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[49] Facts 13, 29-30
[50] Facts 33, 56, 57, 65-68, 76, 83
[51] Facts 34-35
[52] Facts 15, 16, 33, 56, 57, 65-68, 76, 78
[53] Fact 15, 16, 52, 53,
[54] Fact 15, 16, 80
[55] Facts 65-68, 80, Exhibit I

Thus, Abbonizio participated directly in the offerings by directly soliciting investors. In fact, that was his job at Par Funding. On top of that, he was a necessary participant in all three offerings because he distributed offering materials and information to the agent fund managers so they could solicit investors and participated in the agent funds' sales events.

5. Dean Vagnozzi

Defendant Dean Vagnozzi participated in the offer or sale of Par Funding, ABFP Income Fund, and Agent Fund promissory notes by:

- Locating and soliciting investors directly for Par Fundig as a "Finder" and then as an agent fund manager, creating the agent fund model Par Funding used to raise investor money through the agent funds' offerings, and creating his own agent funds through which he solicited investors[56]
- Raising investor funds for the purchase of Par Funding promissory notes by issuing, offering, and selling securities in funds he created specifically for the purpose of funneling that investor money to Par Funding in exchange for Par Funding promissory notes[57]
- Recruiting individuals to create Agent Funds for the purpose of raising investor money to purchase Par Funding securities, providing the funds with information and encouraging them to solicit investors, and managing agent funds[58]
- Training the Agent Fund Managers on how to solicit investors and how to create turnkey agent funds so they could have their own securities offerings to raise money for the purchase of Par Funding notes using investor funds[59]

6. Michael Furman

Defendant Michael Furman participated in the offer or sale of securities by:

- Creating Fidelis and managing it through his company United Fidelis, for the purpose of soliciting numerous investors to invest in Fidelis' securities for the ultimate purpose of funneling that investor money to Par Funding in exchange for Par Funding promissory notes, and then doing just that[60]

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[56] Facts 17-23, 33, 36-37, 46, 58, 60-71
[57] *Id.*
[58] Fact 47, 52, 53, 58-59, 80-83
[59] Facts 48-51
[60] Facts 24-26, 38-40, 72-79, 83

C. The Undisputed Facts Show The Second Element Is Met

The Defendants used interstate commerce or the mails in the offerings. As set forth in the Facts supporting the first element that are cited above, **McElhone and LaForte** controlled Par Funding, which emailed distributed marketing materials and offering documents via email[61] Par Funding, controlled by **McElhone** and LaForte paid Agent Fund managers and Finders. LaForte emailed investors and spoke with Agent Fund Managers on the phone to encourage them to raise investor money for Par Funding. Barleta also used the phone and email to solicit investors. Abbonizio spoke with investors on the phone, and emailed and mailed Agent Fund managers Par Funding marketing materials. Vagnozzi used the phone and email to solicit investors. And Furman used the phone and email to solicit investors.

D. The Undisputed Facts Show The Third Element Is Met

No registration statement for the Par Funding and ABFP Income Fund securities was in effect.[62]

Having met its burden, the burden shifts to the Defendants to prove the securities qualified for a registration exemption. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); *Doran v. Petroleum Management Co.*, 545 F.2d 893, 899 (5th Cir. 1977). There is no evidence in the record to demonstrate that any exemption applies, and therefore the Defendants cannot meet their burden.

IV. SECTION 10(b) and RULE 10b-5 OF THE EXCHANGE ACT AND SECTION 17(A) OF THE SECURITIES ACT

Section 10(b) and Rule 10b-5 of the Exchange Act and Section 17(a) of the Securities Act are similar. The main difference is "that § 10(b) and Rule 10b-5 apply to acts committed in connection with a purchase or sale of securities while § 17(a) applies to acts committed in connection with an offer or sale of securities." *S.E.C. v. Maio*, 51 F.3d 623, 631 (7th Cir. 1995) (emphasis in original); *see also S.E.C. v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 795 (11th Cir. 2015) ("Though Rule 10b-5 regulates a different activity, i.e., the "purchase or sale" of securities rather than their "offer or sale," it borrows much, though not all, of its language from § 17(a)."). Rule 10b-5 and Section 17(a) both include three subsections.

Rule 10b-5(a) makes it unlawful to "employ any device, scheme, or artifice to defraud"; subsection (b) makes it unlawful to "make any untrue statement of a material fact or to omit to

[61] Intentionally omitted.
[62] Facts 21-22, 25-26,

state a material fact necessary in order to make the statements made . . . not misleading"; and subsection (c) makes it unlawful to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5(a)-(c).

Similarly, Section 17(a)(1) makes it unlawful "to employ any device, scheme, or artifice to defraud"; § 17(a)(2) makes it unlawful "to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made . . . not misleading"; and § 17(a)(3) makes it unlawful "to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a).

In some cases, the Eleventh Circuit has indicated that violations of Section 10(b), Rule 10b-5, and Section 17(a) require a showing of "material misrepresentations or materially misleading omissions." *See S.E.C. v. Merch. Cap., LLC*, 483 F.3d 747, 766 (11th Cir. 2007); *S.E.C. v. Radius Cap. Corp.*, 653 F. App'x 744, 749 (11th Cir. 2016). However, the Eleventh Circuit has also clarified that a defendant may be liable under both Section 17(a)(1) and (3) and Rule 10b-5(a) and (c) without making a material misrepresentation.[63] Accordingly, for claims under Section 17(a)(1)-(3), Section 10(b), and Rule 10b-5(a)-(c), the SEC must show: (1) a device, scheme, artifice to defraud; a material misrepresentation or omission; or an act, practice, or course of business which would operate as a fraud or deceit; (2) in the offer of or in connection with the purchase or sale of a security; and (3) in interstate commerce. *See S.E.C. v. Quiros*, No. 16-21301, 2016 WL 11578637, at *12 (S.D. Fla. Nov. 21, 2016).

For claims under Section 17(a)(1) and Rule 10b-5, the SEC must also show facts supporting scienter. *Merch. Cap.*, 483 F.3d at 766. The SEC need only demonstrate negligence for claims under Sections 17(a)(2) and (3). *Id.* There is "considerable overlap among the subsections of the Rule and related provisions of the securities laws" as they prohibit some of the same conduct. *Lorenzo v. S.E.C.*, 139 S. Ct. 1094, 1102 (2019). However, Rule 10b-5(b) and § 17(a)(2)

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[63] See *Big Apple Consulting*, 783 F.3d at 796 (indicating that subsections (1) and (3) in § 17(a) and subsections (a) and (c) in Rule 10b–5 "prohibit schemes to defraud and fraudulent courses of business" and "do not use the word 'make' or even address misstatements"); *S.E.C. v. Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014) ("The operative language of section 17(a) does not require a defendant to "make" a statement in order to be liable . . . Likewise, subsections (a) and (c) of Rule 10b–5 'are not so restricted' as subsection (b), because they are not limited to 'the making of an untrue statement of a material fact.'").

specifically require misrepresentation. Whereas Rule 10b-5(b) requires that the defendant be the "maker" of the misrepresentation or omission, meaning the defendant has "ultimate authority over the statement, including its content and whether and how to communicate it," § 17(a)(2) does not. *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011); *Big Apple Consulting*, 783 F.3d at 797 (holding that Section 17(a)(2) cannot be read to include the "maker" restriction present in Rule 10b–5(b)).

a. The Undisputed Facts Demonstrate That McElhone and LaForte Violated Rule 10b-5(b) and Section 17(a)(2)

As noted above, to establish a violation of Rule 10b-5(b), the SEC must prove that the defendant made a material misrepresentation or materially misleading omission in connection with the sale or purchase of securities with scienter. Section 17(a)(2) requires a showing of a material misrepresentation or materially misleading omission in connection with an offer or sale of securities made with negligence. As set forth above, the undisputed facts demonstrate the notes are securities.

Thus, the remaining issues are: (i) whether the LaForte and McElhone made material misrepresentations or omissions (ii) in connection with the purchase or sale, or offer and sale of securities, (iii) with scienter or negligence.

In the securities fraud context, the test for materiality is "whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action." *Merch. Cap.*, 483 F.3d at 766 (quoting *S.E.C. v. Carriba Air*, 681 F.2d 1318, 1323 (11th Cir. 1982)). In other words, a statement or omission is material where "there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable shareholder as having significantly altered the 'total mix of information available.'" *S.E.C.* v. *Monterosso*, 768 F. Supp. 2d 1244, 1263 (S.D. Fla. 2011), *aff'd*, 756 F.3d 1326 (11th Cir. 2014) (quoting *S.E.C. v. DCI Telecommunications, Inc.*, 122 F. Supp. 2d 495, 498 (S.D.N.Y. 2000)).

Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *S.E.C. v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004) (internal quotations and citation omitted). Scienter can be established by a showing of knowing misconduct or severe recklessness. *Monterosso*, 756 F.3d at 1335. To show severe recklessness, the SEC must demonstrate "that the defendant's conduct was an extreme departure of the standards of ordinary care, which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor

must have been aware of it." *Id*. (quoting *Carriba Air*, 681 F.2d at 1324). Circumstantial evidence may be used to support a strong inference of scienter. *City of Miami*, 988 F. Supp. 2d at 1360

i. LaForte

Material Misrepresentations About Investing His Own Money

LaForte made material misrepresentations to potential investors that he had invested his own money during a sales presentation where he was identified as the President of Par Funding.[64] In truth, LaForte never invested his own money in Par Funding.[65] He made this misrepresentation in connection with the offer and sale of securities.[66] LaForte made the misrepresentations with knowledge or at a minimum, severe reckless.[67] Whether the President of Par Funding would be willing to invest his own money in Par Funding is information a reasonable investor would want to know. Similarly, whether the President of Par Funding lied publicly about investing his own money is information a reasonable investor would want to know. LaForte made these representations during an event hosted by Dean Vagnozzi and attended by about 300 people to during which they were offered the opportunity to invest in Vagnozzi's investment fund that raises investor money for Par Funding through the offer and sale of promissory notes.[68] He made this same misrepresentation in an email to an investor. [69]LaForte's misrepresentation that he personally invested his own money in Par Funding is knowingly false.

Material Omission About His Criminal Record

LaForte touted his business success, financial expertise, and leadership without disclosing that he was previously convicted and served time in prison for grand larceny and money laundering. The Par Funding website included numerous articles featuring LaForte and his claimed business success, and directed readers to LaForte's 'Forbes Council' profile, in which he describes himself as '…one of the small business industry's most distinguished and accomplished leaders.'" LaForte held himself out in videos he posts online as a 'financial expert' for Par Funding." To conceal his criminal history, LaForte used aliases Joe Mack and Joe Macki. LaForte admitted to at least one individual that if people googled his real name they would see his negative history. LaForte also used the alias with Agent Fund Managers. For example, in 2019, individual

[64] Facts 65-68
[65] Fact 98
[66] Facts 65-68
[67] Fact 66
[68] Fact 65-68
[69] Facts 97-98

recruited to be an Agent Fund Manager toured Par Funding's offices before deciding whether or not to create an Agent Fund. During the tour, he met LaForte, who introduced himself as Joe Mack, and was told by Abbonizio that Mack was in charge of Par Funding's operations. The individual searched online to learn about Joe Mack's background but found nothing and subsequently created an Agent Fund to raise money from investors for the purchase and sale of Par Funding promissory notes, and did raise money from investors and use that money to purchase Par Funding notes. This Agent Fund manager would not have created an Agent Fund or offered and sold the securities had he known that the person he met and who ran the operations for Par Funding used a fake name with him and was actually a convicted felon.[70]

The omission about his criminal background is material because a reasonable investor would want to know that the individual running the day-to-day operations of the entity whose success was required to generate investment returns (and whose failure, losses) had two felony convictions for financial crimes. *See, e.g., S.E.C. v. Prater*, 289 F. Supp. 2d 39, 52-53 (D. Conn. 2003) ("The failure to disclose anywhere on the websites or in other materials any information about [Defendant's] extensive criminal history, including convictions for fraud, would certainly constitute a material omission which a reasonable investor might view as important in deciding whether to trust their money with [Defendant] or his company."); *S.E.C. v. Cap. Cove Bancorp LLC*, No. 15-00980, 2015 WL 9704076, at *6 (C.D. Cal. Sept. 1, 2015) (finding that in using an alias, defendant "omitted and never disclosed [his] criminal history when soliciting investments" and that this omission was material); *United States v. Hatfield*, 724 F. Supp. 2d 321, 328 (E.D.N.Y. 2010) ("It is well-settled that information impugning management's integrity is material to shareholders."). Mr. LaForte's admission that he used aliases with investors so they would not Google him and learn about his criminal record demonstrates scienter.

Misrepresentations and Omissions About Related Persons In Par Funding Form D Filings

In its 2019 and 2020 Form D Filings with the Commission, Par Funding failed to identify LaForte in the Item 3 of the form requiring the disclosure of "Related Persons." The instructions accompanying Form D direct filers to provide the full name and identify of "Related Persons" and defines "Related Persons" as "Each executive officer and director of the issuer and person performing similar functions (title alone is not determinative) for the issuer, such as the general and managing partners of partnerships and managing members of limited liability companies" and

[70] Facts 11-12, 84-89

"Each person who has functioned directly or indirectly as a promoter of the issuer within the past five years of the later of the first sale of securities or the date upon which the Form D filing was required to be made." These instructions go on to direct the securities issuer (i.e., Par Funding) that, with respect to the disclosure of "Related Persons": "to prevent the information supplied from being misleading, also provide a clarification in the space provided." Par Funding fails to disclose LaForte's involvement in its filings with the Commission and also during its solicitation of investors.[71] Materiality and scienter are demonstrated for the same reason set forth above concerning the omissions about LaForte's identify and involvement in the company as a convicted felon.

Misrepresentations and Omissions about Par Funding's Regulatory History

LaForte touts to prospective investors Par Funding's success. For example, in November 2019, LaForte told about 300 potential investors that Par Funding is "probably the most profitable cash advance company in the United States - - or maybe the world for that matter, pound for pound." Similarly the marketing brochure for Par Funding was distributed by Par Funding to Agent Funds, authorized by McElhone, and for the purpose of distribution to potential investors was emailed by Par Funding to agent fund managers for use in soliciting investors. The brochure touts Par Funding's success but does not disclose the regulatory history of Par Funding.[72] These omissions are material as any reasonable investor would want to know that the company it was investing in was the subject of numerous regulatory actions for violating the securities laws.

ii. McElhone

The undisputed facts demonstrate McElhone is primarily liable under Rule 10b-5(b) for Par Funding's misrepresentations because she was the "maker." In *Janus*, the Supreme Court held that a mutual fund investment adviser could not be held liable in a private action under Rule 10b-5 for false statements included in its client mutual funds' prospectuses. 564 U.S. at 131. The Supreme Court explained that:

> For purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. One who prepares or publishes a statement on behalf of another is not its maker. And in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a

[71] Facts 90-93
[72] Facts at 94-95

> statement was made by— and only by—the party to whom it is attributed. This rule might best be exemplified by the relationship between a speechwriter and a speaker. Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said.

Id. at 142-43. Courts applying *Janus* have emphasized that "*Janus* did not alter the well-established rule that a corporation can act only through its employees and agents." *S.E.C. v. Brown*, 878 F. Supp. 2d 109, 116 (D.D.C. 2012); *see also S.E.C. v. Pocklington*, No. 18-00701, 2018 WL 6843663, at *14 (C.D. Cal. Sept. 10, 2018) ("Importantly, *Janus* does not stand for the proposition that officers cannot be liable for false and misleading statements in their own company's financial statements."). A corporate officer's position alone is insufficient to render the officer a "maker" of the statement. *Mandalevy v. Bofi Holding, Inc.*, No. 17-00667, 2021 WL 794275, at *6 (S.D. Cal. Mar. 2, 2021). It is enough that a defendant had the power and authority to control the content and issuance of the statement. *Id.*

As set forth above, McElhone is Par Funding's President, CEO, and sole employee, and she has ultimate decision-making authority for Par Funding. McElhone and LaForte control Par Funding together.

The undisputed facts also establish that McElhone is liable as a "controlling person" under Section 20(a) of the Exchange Act. Section 20(a) "imposes joint and several liability on '[e]very person who, directly or indirectly, controls any person liable' for violation of the securities laws." *In re Galectin Therapeutics, Inc*. Sec. *Litig*., 843 F.3d 1257, 1276 (11th Cir. 2016) (quoting 15 U.S.C. § 78t(a)). It is a type of secondary liability and "cannot exist in the absence of a primary violation." *Id*. (quoting *Southland Sec. Corp. v. Inspire Ins. Sols., Inc.*, 365 F.3d 353, 383 (5th Cir. 2004)). A defendant is liable as a controlling person under Section 20(a) if he or she "had the power to control the general affairs of the entity primarily liable at the time the entity violated the securities laws . . . and had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in the primary liability." *Brown v. Enstar Grp., Inc.*, 84 F.3d 393, 396 (11th Cir. 1996) (quotation and alteration omitted). A controlling person is derivatively liable under Section 20(a) if the controlling person "acted recklessly in failing to do what he could have done to prevent the violation." *Laperriere v. Vesta Ins. Grp., Inc.*, 526 F.3d 715, 722 (11th Cir. 2008) (quotation omitted).

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