

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.

_____ /

**DEFENDANTS JOSEPH W. LAFORTE, LISA MCELHONE, AND JOSEPH COLE
BARLETA'S AMENDED JOINT STATEMENT OF UNDISPUTED FACTS IN SUPPORT
OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT**

A. Relevant Background

1. Complete Business Solutions Group Inc., d/b/a Par Funding (hereinafter “Par Funding” or “CBSG”) is a merchant cash advance business founded in Philadelphia, PA. Par Funding provided funding to small businesses throughout the country. The company employed about 70 employees, including highly skilled accountants, bookkeepers, underwriters, and ACH account processors.

2. Pursuant to tax advice given, Par Funding restructured its business operations in 2017, and thereafter an entity referred to as Full Spectrum Processing (“FSP”) began to handle the day-to-day operations of Par Funding. *See* Exhibit 4, Cole Deposition Tr. at 8, 19:16-20. Defendant Lisa McElhone is the sole owner of FSP. (DE 119) (Am. Compl. at 6.)

3. Par Funding initially employed Defendant Joseph Cole Barleta as its Chief Financial Officer until 2017 when Par Funding employees were converted to FSP employees. Thereafter, FSP hired Cole as its Chief Financial Officer (“CFO”). *See* Exhibit 4, Cole Deposition Tr. at 8:9-21. FSP also hired other integral employees, including James Klenk as its Controller and Ariel Benjamin Mannes as its Chief Compliance Officer. *See* Exhibit 18, Klenk Deposition Tr. at 8:19-22; Exhibit 27, Declaration of Ariel Benjamin Mannes at ¶ 2.

A. Par Funding’s Daily Business Activities

4. Par Funding maintained its accounting records in QuickBooks. *See* Exhibit 11, Second Declaration of Joel Glick, ¶ 14(b). Par Funding internally prepared various spreadsheets including but not limited to a Funding Analysis report. *See* Exhibit 3, CBSG Funding Analysis Report. The information found in the Funding Analysis is also referred to as the Key Performance Indicators (“KPI”). *See* Exhibit 4, Cole Deposition Tr. at 146:17-25.

5. Par Funding’s accounting personnel prepared the Funding Analysis and provided Mr. Cole with the document for his final review. *Id.* at 147:1-12.

6. The Funding Analysis report summarized, on a monthly basis, certain financial metrics including but not limited to the number of merchant cash advance (“MCA”) deals funded, average amount funded per MCA deal, average term of each MCA deal, funds wired to merchants (“Wire Total”), accounts receivables, and the exposure on merchants deals that were written off. *See* Exhibit 11, Second Declaration Joel Glick, ¶ 17.

7. Par Funding also internally prepared other spreadsheets including but not limited to the Daily Deposit Logs and a Bank Activity Log. *See* Exhibit 11, Second Declaration of Joel Glick, ¶ 14(c). Par Funding created and maintained the Daily Deposit Logs to track merchant funding activity, merchant defaults, and daily merchant repayments. *Id.* at 16(a).

8. Par Funding pulled from various sources to generate the Funding Analysis report including the Daily Deposit Log. Exhibit 18, Klenk Deposition, p. 100:8-12. In specific, Par Funding utilized the Daily

Deposit Log to populate the “Wire Total” and the “Funding Exposure” columns of the Funding Analysis report. *Id.* at 100:18-101:5.

9. The Wire Total represents the cash funded to the merchant per the terms of the contractual agreement. Exhibit 11, Second Declaration of Joel Glick, ¶ 17(f). The Funding Exposure represents the cash portion of deals that are written off. *Id.* at ¶ 17(j). This data mirrors the “Default Tab” found in the Daily Deposit Log. *Id.*

10. To calculate the Exposure percentage, the Funding Analysis report divides the Funding Exposure column by the Wire Total column. *See* Exhibit 11, Second Declaration of Joel Glick, ¶ 19. The term Exposure % is commonly referred to as a default rate.

11. The Funding Analysis report informs any reader of the document as to what exactly is included in the Exposure percentage. *See* Exhibit 3, n.4. In specific, the Funding Analysis report provides that the Exposure percentage reflects “factoring losses realized in respective month equal to total AR balance for transactions written off against Factoring Loss reserve.” *Id.* There has never been any oral or written representation stating otherwise.

12. The Funding Analysis Report also informs any reader of the document as to how exactly the Funding Exposure is calculated. *See* Ex. 3, n.5. The report details that the Funding Exposure is the “cumulative exposure, as determined by funding amount minus collected payments, at the time that transactions were written off in the respective month to Factoring Losses.” *Id.* There has never been any oral or written representation stating otherwise.

13. Investors were routinely provided with a copy of the Funding Analysis Report prior to investing. *See* Exhibit 4, Cole Deposition Tr. at 111:3-7, 127; Exhibit 5, June 10, 2019 email from Cole to undisclosed recipients (investors); Exhibit 6, Declaration of Dan Cistone, at ¶¶ 5, 8; Exhibit 7, Declaration of Dilip Lamaye, at ¶ 5; Exhibit 8, Declaration of Jose Alves, at ¶¶ 5, 9; Exhibit 9, Declaration of Steve Wittmer, at ¶ 5. Investors reviewed the report, including the Exposure percentage. *Id.*

14. Every month thereafter, Par Funding routinely provided investors with a copy of the Funding Analysis report. *See* Exhibit 4, Cole Deposition Tr. at 111:3-7, 127; Exhibit 5, June 10, 2019 email from Cole to undisclosed recipients (investors); Exhibit 6, Declaration of Dan Cistone, at ¶¶ 5, 8; Exhibit 7, Declaration of Dilip Lamaye, at ¶ 5; Exhibit 8, Declaration of Jose Alves, at ¶¶ 5, 9; Exhibit 9, Declaration of Steve Wittmer, at ¶ 5.

15. Investors also inquired about the Funding Analysis Report:

Can you explain the metrics on the report? Can you explain your historic trends and projected trends going forward? What are the methodologies used to determine the various columns, the calculations, and explaining the footnotes on how these numbers were derived.

See Exhibit 4, Cole Deposition Tr. at 152-1-21. This is uncontradicted in the record. When asked about

the exposure percentage, Mr. Cole explained to investors:

The exposure percentage is a dynamic number that's calculated each month. It reflects the cash-over-cash exposure for deals that were written off for that respective period of time in proportion to the amount of funding for that respective period of time.

Id. at 152:11-21; *see also id.* at 154:12-16 (“the operative word there is always cash-over-cash losses”). The record is uncontradicted that Par Funding made any representation stating otherwise.

16. The SEC alleges that Perry Abbonizio “claims to be an owner and managing partner of Par Funding and he is responsible for bringing investment capital into Par Funding.” (DE 119) (Am. Compl. ¶ 20.) Mr. Abbonizio routinely provided investors with the Funding Analysis report and utilized it to explain the default rate. *See* Exhibit 10, Perry Abbonizio Deposition Tr. at 177:2-180:5; *see also id.* at 181:5-10 (“I typically would put it that we have a 1.2 percent cash on cash default rate.”).

17. For good measure, the version of the Funding Analysis Report Mr. Abbonizio disseminated to investors further defined the default rate¹ as “reflects the proportion of cash losses under Bad Debt Exposure in proportion to new capital being funded.” *See* Exhibit 15, at 28 n.4.

18. Defendants’ expert witness, Joel Glick, analyzed the internal spreadsheets prepared by Par Funding, including the Funding Analysis Report. *See* Exhibit 11, Second Declaration of Joel Glick ¶¶ 19-21. In conducting his analysis, Defendants’ expert witness recreated portions of the Funding Analysis report to mirror the data stored and maintained in QuickBooks (“KPI Analysis”). *Id.* at 9. In particular, the KPI Analysis revealed that when the Exposure percentage is calculated based on the actual amounts wired out to merchants (e.g., the Wire Total), the revised percentage went from 1.16% to 1.19%. *Id.*

19. The SEC’s expert did not perform a similar analysis to determine what impact the Exposure percentage would have if the Wire Total column was adjusted to account for only the actual amounts wired out to merchants. The SEC did not provide any expert rebuttal report. Likewise, the SEC has not provided any witness that countered this point.

B. Par Funding Employed Credible Attorneys and Accountants for Assistance in Various Matters

Rod Ermel Associates, Inc.

20. Rod Ermel Associates, Inc. (“Rod Ermel”) is a public accounting firm based in Colorado Springs, Colorado. *See* Exhibit 4, Cole Deposition Tr. at 144:12-17. Rod Ermel was responsible for preparing Par Funding’s tax returns. *Id.* at 144:12-17, 146:1-9. Rod Ermel had full and complete access to Par Funding’s books and records through a live electronic portal. *See* Exhibit 18, Klenk Deposition Tr. at 36:23-37:17.

21. In 2016, Par Funding also enlisted Rod Ermel to review its Funding Analysis Report. *See* Exhibit 4, Cole Deposition Tr. at 150:4-18. Mr. Cole explained:

¹ The exposure percentage is also referred to as the bad debt ratio.

Lisa hired them in 2016 to perform an audit on that specific report. They issued an agreed upon letter procedure where they verified for a week. Two of their CPAs flew out to the office. They verified the deals we had reported on the report were accurate and that they were indeed funded per the terms of the agreement.

Id. at 150:4-14. This review was performed once. Though Mr. Ermel would continue to receive the Funding Analysis Report in his individual capacity as an investor, Mr. Cole did not ask Mr. Ermel to verify the Funding Analysis Report every month thereafter. *Id.* at 150:19-151:7.

22. Rod Ermel confirmed the accuracy of the procedures utilized in the Funding Analysis. *See* Exhibit 17, Agreed Upon Procedures Letter.

Insurance Broker

23. In 2018, Par Funding received assurances from its licensed insurance broker, Anthony Bernato, that it could help them obtain insurance to cover merchant defaults. *See* Exhibit 25, Declaration of Anthony Bernato at ¶¶ 5-6. Mr. Bernato has over 30 years of experience. Mr. Bernato affirmed:

I have read the Securities and Exchange Commission's claim in its lawsuit that Par Funding and/or its agents falsely told investors that it had insurance to back up investor funds in the event of a default by a merchant.

In fact, I know Par Funding's assertions about its insurance coverage to be true since I was the insurance broker for Par Funding who secured insurance for the company in the event of a merchant default.

Id.

24. To obtain the insurance, Par Funding submitted a list of merchant transactions that Par Funding wanted insured. *See* Exhibit 25, Declaration of Anthony Bernato at ¶ 9. Mr. Bernato explained that he entered the list of merchant transactions into the insurance carrier's portal and provided the list to the carrier to conduct its own internal due diligence review. *Id.*

25. Mr. Bernato secured the insurance coverage for Par Funding through Euler Hermes (hereinafter "Euler"), a \$800 billion global credit default insurance company. *See* Exhibit 25, Declaration of Anthony Bernato at ¶ 7. Euler did not extend coverage until its own underwriting process was satisfied. *Id.* Euler eventually increased their policy coverage to \$150MM. *See* Exhibit 25, Declaration of Anthony Bernato at ¶ 11. In the end, Par Funding paid millions in insurance premiums. *Id.* at ¶ 12.

Legal Counsel

26. In or about January of 2018, the Pennsylvania Department of Banking and Securities ("PADOB") issued a subpoena to Par Funding to investigate Par's payment of commissions to finders in connection with the sale of notes ("PADOB Subpoena"). *See* Exhibit 1, Rutledge Deposition Tr., at Vol I, at 13-14.

27. Shortly thereafter, Par Funding hired G. Philip Rutledge, partner at Bybel Rutledge LLP, to respond to the PADOB subpoena. *Id.* Norman Valz, Par Funding's then general counsel, contacted Mr. Rutledge regarding the PADOB subpoena. *Id.*

28. Mr. Rutledge's points of contact at Par Funding were Mr. Cole, Mr. Valz, and after Mr. Valz's departure, Cynthia Clarke, Par Funding's subsequent in-house general counsel. *See id.* at 15.

29. Mr. Rutledge graduated from law school in 1978. *Id.* at 12. For 25 years thereafter, he worked for the Pennsylvania Legislative and Budget Committee, and then for the Pennsylvania Securities Commission. *Id.* By the time he left the Commission, he held positions there as the Director of the Division of Corporate Finance and Chief Counsel to the Commission. *Id.* at 13. In 2012, the Pennsylvania Securities Commission combined with the Pennsylvania Department of Banking to create the Pennsylvania Department of Banking and Securities. *See id.* at 13.

30. After entering private practice, Mr. Rutledge specialized in the areas of "securities and the corporate, and the area of securities dealing with broker dealers and investment advisors." *See* Exhibit 2, Rutledge Deposition Tr., at Vol. II, 165.

31. Mr. Rutledge taught securities law and regulation as a professor at various universities in the United States and England including the well-renowned Wharton School of the University of Pennsylvania, Widener University Commonwealth, Penn State Dickinson School of Law, BPP University Law School and the University of London. *Id.* at 165-166.

32. In connection with the PADOB Subpoena, Mr. Rutledge advised Par Funding to stop selling notes immediately. *Id.* at 169-171, Dep. Ex. 132. Defendants followed his advice. He also told them that any final order would be public and searchable on the internet. *Id.* at 170-171.

33. In a letter to PADOB on February 5, 2018, Mr. Rutledge wrote that "[a]lthough CBSG believed at the time that its promissory notes were purchased by accredited investors ... CBSG went back to each noteholder to confirm such status." *Id.* at Dep. Ex. 124, p. 2. Mr. Rutledge repeatedly argued to PADOB (including the February 5 letter) that the notes were not securities. *Id.* at 232-233.

34. He also successfully argued to PADOB that the notes were exempt from registration under Rule 506(b) of Regulation D because Par Funding held a reasonable belief that all of Par Funding's investors were accredited. *Id.* Mr. Rutledge believed that the Phase 1 notes were exempt under Rule 506(b). *Id.* at 183-186. Mr. Rutledge also told Mr. Cole the same. *Id.* at 184-186.

35. In a series of emails in March 2018, Mr. Rutledge and Mr. Cole discussed the accreditation confirmations for Par Funding's Phase 1 [individual] noteholders. *See id.* at Dep. Ex. 126. Mr. Rutledge explained that he filed a supplemental production with PADOB that included the additional accreditation confirmations. *Id.* at Dep. Ex. 126, p. 2. Mr. Rutledge asked Mr. Cole whether he had any additional

accreditation confirmation letters and whether Par Funding has sold any other notes “sans [without] finders fees.” *Id.*

36. Mr. Cole responded that they have no other accreditation confirmations, and that they have sold notes to PPM Funds. *Id.* Mr. Cole explained that Par Funding is no longer taking any new notes from individuals and are directing individuals whose notes mature to the PPMs. Mr. Cole stated, “I’ll assume no news is good news,” and asked Mr. Rutledge to review Par Funding’s “note/security agreement language for the PPMs.” *Id.* Mr. Rutledge testified that as of March 30, 2018, he understood that Par was pivoting away from selling to individuals and instead selling to PPM Funds, which he understood to be pooled investment vehicles. *Id.* at 250-251.

37. Mr. Rutledge was therefore aware as early as March 2018 that Par Funding was changing its structure from the use of finders to selling their notes exclusively to Agent Funds. *Id.* at 192-193. This was before Mr. Rutledge settled the PADOB matter in November 2018. *Id.* at 238-239; Dep. Exhibit 136.

38. Before Mr. Rutledge settled the matter with PADOB in 2018, Mr. Cole told Mr. Rutledge in an email dated September 21, 2018, that he was gathering documents from the PPM Funds, which Rutledge understood to be pooled investment vehicles, to certify that they were also accredited investors. *Id.* at 196-198, 259-262; Dep. Exhibit 127, at p. 7-8..

39. In a subsequent email dated September 25, 2018, Mr. Cole told Mr. Rutledge that Par Funding wanted to increase its retainer reserve for Mr. Rutledge to handle the upcoming response to the PADOB and to “draft agreements” “for the funds we work with.” *Id.* at Dep. Ex. 127, at 1.

40. In an email dated September 28, 2018, Mr. Rutledge attached a draft of a note purchase agreement (“NPA”) template he prepared for Par Funding’s use to sell notes to Agent Funds. *Id.* at 220; Exhibit 128, at p. 7.. Mr. Rutledge understood that the NPA template he was preparing would be for Par to use to sell notes to Agent Funds, *id.* at 215-218, and this was several months after he learned that Par Funding was pivoting away from selling notes to individuals and was instead selling notes to Agent Funds. *Id.* at 258.

41. The NPA included a provision at Section 2.05 where the Purchaser [the Agent Fund] and Seller [Par Funding] agree that a bargained for provision of this Agreement is that Seller shall offer to sell notes to Purchaser only if Purchaser is an Accredited Investor as that term is defined in Rule 501 of Regulation D...” *Id.* at 220; Exhibit 128, at p. 2 of NPA. The NPA included another provision at Section 4.05 under “Representations and Warranties of the Purchaser” for the Purchaser [Agent Fund] to certify its status as an accredited investor. *Id.* at p. 4 of NPA.

42. Mr. Rutledge testified that he asked Par Funding to instruct the Agent Funds to include in the Section 4.05 certification the specific provision they believed applied under Rule 501 to confirm their

status as accredited, as some had merely marked an “X” instead of the applicable numerical subparagraph of Rule 501. *Id.* at 278. Mr. Rutledge agreed that Mr. Cole followed his advice in carrying out this instruction. *See id.* at 301-302. Mr. Rutledge, however, testified that it was not necessary for Agent Funds to certify in the NPA that they were accredited for the exemption to apply, but it is “good practice.” *Id.* at 226-227.

43. On November 8, 2018, after receiving this email that Mr. Cole was gathering documents certifying that its new noteholders, the Agent Funds, were accredited, Mr. Rutledge wrote a letter to PADOB that Par Funding: (1) sold notes exclusively to accredited investors in good faith reliance on Rule 506(b); (2) had no duty to make disclosures to accredited investors under Rule 502(b); and had provided documentary evidence to PADOB that Par Funding had a reasonable basis to believe that all of its note purchasers were accredited. *See id.* at Dep. Exhibit 135, p. 2. At the time of this letter, it is undisputed that Rutledge knew that Par was selling notes to Agent Funds, who were in turn selling notes to investors.

44. In an email dated November 12, 2018, Mr. Rutledge attached a draft letter to Mr. Cole and Ms. Clark, attaching a draft of his final settlement offer to PADOB. *See id.* at 267; Dep. Ex. 149.

45. In a series of emails that follow, both Mr. Cole and Ms. Clark wanted Mr. Rutledge to disclose more about the new plan Par Funding pivoted to:

Does that language encompass or *can it be broadened to encompass the manner in which CBSG currently offers and sells notes* (i.e., a statement or acknowledgement that the current manner in which CBSG offers or sells notes is not in violation of Pennsylvania law)? Our concern is that CBSG has modified the manner in which notes now being offered/sold (beyond the notes that are specifically the subject of the current investigation) and that the Department could initiate a new investigation after the date of the consent order with respect to those sales being made under the new procedures after the date of the order. Please advise. Thanks, Cindy.

Id.

46. Rutledge understood this email to mean that Ms. Clarke was asking whether Par Funding could provide more information describing what Par Funding was doing in November 2018, namely selling its notes to Agent Funds, to make sure they were compliant. *See* at 269-276. Mr. Rutledge responded that what Ms. Clark was requesting was a “no action letter,” which is a request that PADOB approve of the new structure that Par Funding is using. Mr. Rutledge advised Ms. Clark that PADOB’s “Corp. Fin.” [Division of Corporate Finance] Section would not be likely to grant that request. *See id.* at 273-276; Dep. Ex. 149, at p. 3. Instead, Mr. Rutledge suggested in an email dated November 13, 2018, that they add language referencing the new NPA. *Id.* Rutledge testified that he understood Ms. Clark’s email to mean

that she wanted language in the consent order “to cover as much about the current manner which they are selling notes as is possible?” *Id.* at 276-277.

47. In his final letter to PADOB on November 14, 2018, Mr. Rutledge told PADOB that Par Funding had revised its practices regarding the sale of notes, was only selling notes to accredited investors under Rule 506(b), was no longer using brokers, and was using a new note purchase agreement (“NPA”) where no commission was paid to brokers. *See id.*; Dep. Exhibit 136, at p.4. Mr. Rutledge understood the new structure involving PPM Funds by then and was drafting the NPA for this new structure. *Id.* at 266-267. Despite Defendants’ request that he include specific language about the sale of notes to Agent Funds, Mr. Rutledge did not do so.

48. In an email dated March 3, 2020, Mr. Rutledge raised a concern for the first time that a regulator might deem the sale of notes by Par Funding to Agent Funds to be a commission if the interest on the note received by the Agent Fund was more than the amount the Agent Fund was charging to its noteholders. *See id.* at 310, SEC Exhibit 66.

49. Even though Mr. Rutledge knew that Par Funding was selling notes to Agent Funds, and those Agent Funds were selling notes to investors whose funds were going to CBSG, he never asked anyone at Par Funding the amount of interest the Agent Funds were paying, what the Agent Funds were paying on the notes they sold, and never instructed Par Funding to stop selling notes to Agent Funds. *See id.* at 314-316; 320-322. There is no evidence in the record that Par played any role in or had any control over what the Agent Funds paid their noteholders.

50. On March 11, 2020, Rutledge wrote an email to Mr. Cole, and counsel for Fox Rothschild and Haynes Boone. In the email, he prepared a draft of regulatory disclosures he suggested should be made to convince the Texas Securities Regulators to resolve their case against Par Funding. *See id.* at Exhibit 122, p. 2.

51. Mr. Rutledge explained that the disclosure would show that the PADOB Order “stated that Par Funding could continue sales in Pennsylvania in compliance with the order, recognized that it had stopped paying sales commissions, and stated that the order should not be a basis for any disqualification under federal or state laws.” *Id.* at Dep. Ex. 122. Mr. Rutledge also explained in the email that, “interestingly... the TX Order [] does not state to whom CBSG failed to make these disclosures, which I think is important because, with respect to paragraph 61, CBSG is not required under Rule 502(b) to provide this type of business disclosure to accredited investors. *Id.* Mr. Rutledge also testified that no disclosures need to be made to accredited investors to comply with Regulation D and advised Cole of the same. *See id.* at 208-209.

52. Paragraph 61 of the Texas Order alleges that Par Funding, A Better Financial Plan, and Defendant Perry Abbonizio failed to disclose the identity, the business repute and qualifications, and experience of the principals and managers of Par Funding. (*Id.* at Dep. Exhibit 131, p. 10.)

53. Mr. Rutledge's advice was that Defendants did not need to make these disclosures under Rule 502(b) to its accredited investors. *Id.* at Dep. Ex. 122, p. 2. Mr. Rutledge testified that Par Funding had a reasonable basis to believe that its investors were accredited. *Id.* at 183-186. Mr. Rutledge also explained in the March 11, 2020, email that any disclosures regarding Par Funding's civil litigation [involving merchant suits] "equally would be within the realm of Rule 502(b)." *Id.* at Dep. Ex. 122.

54. Par Funding also hired attorney Martin Hewitt to handle Par Funding's response to the New Jersey Securities Regulator's investigation. Hewitt advised Cole that he had resolved the matter with New Jersey and that CBSG's notes were exempt from registration. (See Exhibit 31, March 1, 2019 email from Hewitt to Cole.) There is no evidence in the record that Mr. Hewitt ever advised anyone at Par Funding that it had to disclose the NJ investigation to investors.

Loan Practices

55. The SEC alleged that Par Funding, through Lisa McElhone and Joseph Laforte, made usurious loans. (ECF No. 119 at ¶¶ 1, 2, 8, 45, 46).

56. What the SEC alleged were loans, however, were in fact "advances" made on "factoring agreements." (*See* Exhibit 4, Cole Dep., Tr. At 54:8-13.) Fox Rothschild, who represented Par Funding in lawsuits filed in connection with those advances, filed legal briefings in various court proceedings representing that the advances were not usurious, but were in fact legal and enforceable. (*See* Exhibit 30, Berman Dep. Tr. at 105:13-106:21; 237:6-9.) Courts across the country have upheld the enforceability of the advances and legality of the merchant cash advance business. (*Id.* at 237:9-11.)

57. Cole and Par Funding's general counsel received copies of Fox Rothschild's briefings. (*Id.* at 236:2-8.) Counsel for Fox Rothschild, Brett Berman, spoke with Cole about this issue. Cole was "very well aware" of the court opinions holding that the MCA business was legal and that the loans were not usurious based on his conversations with Berman and other lawyers Par Funding had hired before Berman. (*Id.* at 237:18-238:21; 239:7-21.)

58. The SEC has not pursued evidence to support its "loan" assertions in discovery. At the Preliminary Injunction hearing in August 2020, the SEC conceded that it did not care, and it did not matter if the Defendants were selling loans or not (*See* ECF No. 193 at 29-30).

59. Courts across the nation have held that merchant cash advances based upon the purchase of merchant accounts receivable are not loans. (*See* ECF No. 663, Exhibit 2, Declaration of Norman Valz, ¶¶ 20-24, 26; and Exhibit 4 at pp. 2-4 (Relevant Background), 9-13 (Allegation of Usury), 15-21 (Granting Summary Judgment as to Count 1 because the Agreement is not a loan). The SEC has not adduced any

evidence supporting its assertion in the Amended Complaint that the advances made by Par Funding can be characterized as usurious loans.

C. Par Funding's Underwriting Process

60. Par had an entire underwriting department that preapproved deals and then conducted further underwriting after a merchant accepted an offer. This process included collecting the necessary documents and a site inspection as the final prerequisite to funding.

61. As a result of this vigorous underwriting process, it funded only 17% of the merchants that applied. *See* Glick Report, DE 535-1 at 13. This is far below industry standards. Two studies from the Federal Reserve show average approval rates of 79% in 2017 and 84% in 2021. *Id.*

62. As part of Par's rigorous underwriting process, Par examined the financial stability of the merchant's company by, among other things, running credit profiles, reviewing bank statements, and conducting background searches (including criminal history). *See* Exhibit 21, Villarose Dep. Tr. at 20-21. Included in the underwriting process were on-site inspections originally completed by Metro Site Inspections. *Id.* at 78. The on-site inspections involved a third-party hired to inspect and photograph the premises and, where possible, to photograph the merchant's credit terminals. *See* Exhibit 21, Villarose Dep. Tr. at 78.

63. While there were certainly some cases where an on-site was not performed, it was done so based on principled underwriting guidelines, such as a transaction amount being very low, and Par could verify the business's existence other ways such as an internet search. *See id.* at 70. Alternatively, sensitive businesses such as law firms or a childcare facility could be verified through other means. *Id.* at 75-76. Furthermore, if a merchant had an existing relationship with Par, there was no need to do another site inspection since they already had the information it needed, to wit, that it was a real business. *Id.* at 69.

64. Additionally, some of the underwriting standards that the SEC accuses Par of failing to meet are simply made up by the SEC. For example, the SEC argues that the on-sites were not performed before Par "approved" the cash advance. However, this concept of approved is made up by the SEC. Par would pre-approve a deal to make an offer to a merchant, but there was no obligation on Par's behalf until the deal was funded. *Id.* at 87; *see* Exhibit 23.

65. Par did not promise noteholders that it requested information about debt schedules, profit margins, or expenses. 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* Exhibit 24.

Dated: October 6, 2021

Respectfully submitted,

FRIDMAN FELS & SOTO, PLLC

2525 Ponce de Leon Boulevard, Suite 750

Coral Gables, FL 33134

Telephone: 305-569-7701

asoto@ffslawfirm.com

Attorneys for Joseph W. LaForte

/s/ Alejandro O. Soto

ALEJANDRO O, SOTO, ESQ

Florida Bar No. 172847

**KOPELOWITZ OSTROW
FERGUSON WEISELBERG GILBERT**

One W. Las Olas Blvd., Suite 500

Fort Lauderdale, Florida 33301

Attorneys for Joseph W. LaForte

/s/ David L. Ferguson

DAVID L. FERGUSON

Florida Bar Number: 0981737

Ferguson@kolawyers.com

JOSHUA R. LEVINE

Florida Bar Number: 91807

Levine@kolawyers.com

LAW OFFICES OF ALAN S. FUTERFAS

565 Fifth Avenue, 7th Floor

New York, New York 10017

Telephone: 212-684-8400

asfuterfas@futerfaslaw.com

Attorneys for Lisa McElbone

/s/ Alan S. Futerfas

ALAN S. FUTERFAS, ESQ.

Admitted Pro Hac Vice

LAW OFFICES OF BETTINA SCHEIN

565 Fifth Avenue, 7th Floor

New York, New York 10017

Telephone: 212-880-9417

bschein@bettinascheinlaw.com

Attorneys for Joseph Cole Barleta

/s/ Bettina Schein

BETTINA SCHEIN, ESQ.

Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel of record via the Court's CM/ECF Filing Portal on this 6th day of October, 2021.

/s/ Alejandro O. Soto _____
ALEJANDRO O, SOTO