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.

DEFENDANT LISA MCELHONE'S RESPONSE IN OPPOSITION TO RECEIVER'S MOTION TO EXPAND THE RECEIVERSHIP TO INCLUDE THE SEP IRA ACCOUNT OF LISA M. MCELHONE (DE 916)

INTRODUCTION

Defendant Lisa McElhone, by and through her undersigned counsel, files this Response to the Receiver, Ryan Stumphauzer's Motion to Expand the Receivership to Include the SEP IRA Account of Lisa M. McElhone (ECF 916) (the "Motion to Expand").[1] According to the Receiver, approximately $147,500,000.00 has already been seized (*see* ECF 902) - far more than any amount the Court could order disgorged in equity under *Liu v. SEC*, 140 S.Ct. 1936 (2020). For these reasons and those explained herein, the Court should deny the Motion to Expand or, in the alternative, stay resolution of the motion until disgorgement is decided in due course.

APPLICABLE LAW

Pursuant to 15 U.S.C. § 78u(d)(5), "[i]n any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court

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[1] On November 9, 2021, the Receiver filed its Motion to Expand the Receivership to Include the SEP IRA Account of Lisa M. McElhone (ECF 916). On November 18, 2021, the Court granted Ms. McElhone's *ore tenus* Motion for an Extension of Time to file a Response in Opposition. (ECF 992).

may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." In *Liu v. SEC*, 140 S.Ct. 1936 (2020), "the Supreme Court affirmed the longstanding consensus among the lower courts that § 78u(d) (5) authorizes the SEC to seek disgorgement in civil suits, subject to certain equitable limitations." *SEC v. Voigt*, WL 5181062, at *7 (S.D. Texas 2021). *Liu* held:

> The Court holds today that a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under § 78u(d)(5).

Id., quoting Liu, 140 S.Ct. at 1940. In *Liu,* the Supreme Court held that "equitable disgorgement is limited to the benefit to the wrongdoer, or in other words, 'the gains made upon any business or investment, when both the receipts and payments are taken into the account.'" *Springstein-Abbott v. S.E.C.,* 989 F.3d 4, 9 (D.C. Cir. 2020) *quoting Liu,* 140 S.Ct. at 1939 (*quoting Providence Rubber Co. v. Goodyear*, 76 U.S. (9 Wall.) 788, 804, 19 L.Ed. 566 (1869)).

"Two things keep such a remedy aimed at unjust enrichment from becoming punitive: Disgorgement cannot exceed the defendants' 'net profits' and must 'be awarded for victims.'" *SEC v. Blackburn*, 15 F. 4th 676, 682 (5th Cir., Oct. 12, 2021), *citing Liu*, 140 S. Ct. at 1942. Further, disgorgement may not exceed "the amount that defendant profited from his wrongdoing [as any] further sum would constitute a penalty assessment." *Navellier, supra*, *quoting SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978). In describing how to calculate net profits for disgorgement purposes, the *Liu* Court held that "courts must deduct legitimate expenses before ordering disgorgement under § 78u(d)(5)." *Liu,* 140 S.Ct. at 1950 (emphasis added). In addition, "funds properly invested or returned to investors" must be deducted from the disgorgement amount. *SEC v. Catledge,* 2020 WL 3621311, at *3 (D. Nev. 2020). Further, tax payments and legitimate expenses may be deducted provided that documentation showing such payments is produced. *See SEC v. Voigt*, 2021 WL 5181062 at 10-11 (where defendants referenced tax calculations but did not produce the actual tax returns, the Court could not consider them in its analysis); *see also SEC v Goulding*, No. 09-CV-1775, 2020 WL 354454, at *10, n. 5 (N.D. Ill. Jan. 21, 2020)(following bench trial,

SEC filed motion for disgorgement listing defendant's salary net of taxes paid, i.e. defendant's "net compensation," for disgorgement purposes).

Defendant McElhone understands that this Court will undertake a full disgorgement analysis in the months ahead and Ms. McElhone, though her counsel, will make a very substantial presentation in that regard both on the facts and applicable law. This brief Response is not intended to be that fulsome analysis. Nonetheless, even a cursory review of the math shows that the Receiver has seized more than necessary for disgorgement.

DISCUSSION

In the Receiver Ryan K. Stumphauzer's Quarterly Status Report Dated November 1, 2021, (ECF 902), the Receiver reported that:

> By way of summary, the Receivership Estate consists of, among other things, Par Funding's and the other Receivership Entities' accounts receivable, the value of which are not yet determined, as well as approximately $53 million of real property, $3 million in other assets the Receiver has brought into the Receivership Estate (including boats, cars, artwork, and luxury watches), and over $86.2 million in cash (as of September 30, 2021). As of October 31, 2021, the total cash balance increased to over $91.5 million.

ECF 902. Using these numbers, the Receiver has collected approximately $147,500,000.00. In addition, the Receiver is still collecting Par's outstanding Accounts Receivable ("AR") (*see* ECF 902), which exceeds $350,000,000 in AR, plus an additional $150,000,000 in amounts subject to collection proceedings as of late July 2020, for a total of more than $500,000,000 in total collectibles. This is additional to the $147,500,000 in assets already seized. As shown below, even a back of the envelope analysis shows that the Receiver has already seized more than necessary to repay investors as per the dictates of *Liu*.

Both the Defense and the SEC agree that Par collected about $492,000,000 from investors. *See* SEC TRO Request (ECF 14 at 74). Further, the SEC's expert, Melissa Davis, concedes that Par returned principal to note-holders in the amount of $178,662,344 and paid interest to noteholders in the amount of $118,330,348 for a total of $296,992,692. *See* M. Davis Report Dated August 13, 2021 (DE 744-1) at Ex. H. Further, the August 13, 2021 Davis Report records Par's SG&A (selling, general and

administrative) expenses as $184,096,717. *Id.* The sum of the principal returned to note-holders, the interest paid to note-holders and Par's SG&A is $481,089,409 – an amount less than $10,000,000 shy of a *Liu* disgorgement. *See SEC v. Catledge,* 2020 WL 3621311, at *3 (D. Nev. 2020) ("funds properly invested or returned to investors must be deducted from the disgorgement amount."). *See also Liu,* 140 S. Ct. at 1950 ("courts must deduct legitimate expenses before ordering disgorgement under 78(u)(d)(5)").

Yet the Receiver has seized, to date, an additional $147,500,000 in cash and assets and, according to the Receiver's own reports, Par has another $354,600,000 in AR and about $150,000,000 in default collections for a total of $504,600,000 – all of which is securitized by liens, notes and confessions of judgment – and all of which the Receiver is in the process of collecting. Using Par's eight-year historical collection rates – about 92 percent of outstanding AR - the Receiver should collect about $326,000,000 on the $354,600,000 of AR and a significant portion of the $150,000,000 in default collections. The Receiver has recently lifted litigation stays to commence litigation on the AR and collections portfolio. (*See e.g.* ECF 906, 907) Even discounting the Receiver's collection rate by 20% yields around $450,000,000 in collections above and beyond the $147,500,000 in cash and assets it has already collected or seized. This - where Par's disgorgement differential under *Liu* is likely less than $10,000,000. Such an excess of funds easily covers any personal disgorgement amount owed by the Defendants. For these reasons, the funds in Ms. McElhone's SEP IRA are not needed for either the purposes of disgorgement or to make investors whole and this Court should either deny the Receiver's motion or hold it in abeyance pending the disgorgement hearing. It bears noting that Ms. McElhone is subject to this Court's original order and thus is bound not to disturb these funds.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Receiver's motion be denied or held in abeyance pending further proceedings.

November 24, 2021

Respectfully Submitted,

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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 24th day of November, 2021.

/s/ Joel Hirschhorn
JOEL HIRSCHHORN