

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

**LISA MCELHONE, JOSEPH LAFORTE,
JOSEPH COLE BARLETA, DEAN VAGNOZZI,
PERRY ABBONIZIO, AND MICHAEL FURMAN,**

Defendants.

MOTION TO STRIKE DECLARATION OF MICHAEL FURMAN [ECF NO 891-1]

Defendant Michael Furman is trying to have it both ways – asserting his Fifth Amendment rights in response to Requests for Admissions during discovery [ECF No. DE 177-22, Furman Response to Requests for Admissions], and then filing a sworn declaration to avoid summary judgment in which he swears under oath and affirmatively testifies to deny these same facts [ECF No. 891-1]. It is not a mistake or inadvertent error. After reviewing the declaration filed with summary judgment, undersigned contacted Furman’s counsel, who replaced counsel representing Furman at the time of the Admissions, to confer and to ensure they were aware of the prior Admissions. Today Furman, through his counsel, responded to the SEC and advised that Furman’s Fifth Amendment Assertions in response to the Requests for Admissions remain in effect. According to his counsel, Furman intends to selectively assert the Fifth Amendment at trial, asserting the Fifth Amendment at trial in response to some matters but not others he specifically testified about in his deposition testimony.

For purposes of summary judgment, because Furman asserted the Fifth Amendment in response to the Admissions, the Court should not consider his self-serving Declaration on these same issues for purposes of summary judgment. As the Court recently found in granting the SEC’s Motion to Preclude Defendant Joseph LaForte from testifying at trial after asserting his Fifth Amendment rights during trial:

Although many circuits across the country have addressed the withdrawal of a prior Fifth Amendment invocation, the Eleventh Circuit has not. *Aim Recycling of Florida, LLC v. Metals USA, Inc.*, No. 18-cv-60292, 2020 WL 209860, *9 (S.D. Fla. Jan. 13, 2020). Generally, courts should be inclined to allow parties to withdraw their claims of Fifth Amendment privilege when the opposing party would not suffer “undue prejudice from the litigant’s later-regretted decision to invoke the Fifth Amendment.” *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 547 (5th Cir. 2012) (quoting *United States v. Certain Real Prop. And Premises Known as 4003-4005 5th Ave., Brooklyn, N.Y.*, 55 F.3d 78, 84 (2d Cir. 1995)). However, withdrawal is not permitted if the litigant is trying to gain any type of unfair advantage over the opposing party. *Davis-Lynch, Inc.*, 667 F.3d 539 at 547. “Generally, withdrawing the Fifth Amendment privilege at a late stage places the opposing party at a significant disadvantage because of increased costs, delays, and the need for a new investigation.” *Id.*

[ECF No. 990].

Furman’s self-serving Declaration should not be considered as to the following matters he attempts to establish to avoid summary judgment, to which he previously asserted the Fifth Amendment in his Admissions (and to which he claims, even today, that he asserts the Fifth Amendment).

<p style="text-align: center;">Furman Declaration ECF No. 891-1</p>	<p style="text-align: center;">Admissions to Which Furman Asserts His Fifth Amendment Privilege ECF No. DE 177-22</p>
<p>“I was not involved in and do not have any knowledge of the discussions or events leading to the Russ [Meyer’s] investment.” [ECF No. 891-1 at ¶ 12].</p>	<p>On January 3, 2018, Furman was still soliciting investors for the Par Funding Promissory Notes and that he emailed investor Russ Meyer a Par Funding promissory note and subscription agreement for Meyer’s signature [ECF No. DE 177-22 at ¶¶ 45 & 46].</p>
<p>“No person or entity affiliated with Par Funding, or any of the other Defendants paid me or Fidelis money to set up Fidelis or to procure investors in Par Funding.” [ECF No. 891-1 at ¶ 20]</p>	<p>Par Funding compensated You for selling Fidelis Promissory Notes. [ECF No. DE 177-22 at ¶ 75]. The difference between what the Par Funding Promissory Notes paid Fidelis and the amount Fidelis paid investors, was the compensation for Furman and Fidelis for raising investor funds for Par Funding. [ECF No. DE 177-22 at ¶ 76].</p>

Furman Declaration	Admissions to Which Furman Asserts His Fifth Amendment Privilege
<p>Fidelis operated completely independently of Par Funding, and only engaged in arm's length transactions with Par Funding." [ECF No. 891-1 at ¶ 19].</p>	<p>Furman solicited investors to purchase Par Funding Promissory Notes in at least 2017. [ECF No. DE 177-22 at ¶ 25].</p> <p>Furman distributed Par Funding marketing materials in at least 2017 to get potential investors to invest in <i>Par Funding</i> promissory notes. [ECF No. DE 177-22 at ¶ 31].</p> <p>Beginning in 2018, Furman sent investor proceeds from the offer and sale of Fidelis Promissory Notes to Par Funding. [ECF No. DE 177-22 at ¶ 66].</p> <p>Beginning in 2018, Par Funding issued Par Funding Promissory Notes to Fidelis in exchange for the investor funds Furman and Fidelis sent Par Funding. [ECF No. DE 177-22 at ¶ 67].</p> <p>In at least 2019 Furman hosted dinner presentations to which you invited investors and potential investors for the purpose of soliciting them to invest in Par Funding Promissory Notes. [ECF No. DE 177-22 at ¶ 81].</p> <p>Perry Abbonizio attended at least one of the dinner presentations Furman hosted, for the purpose of helping Furman solicit investors to purchase Fidelis Promissory Notes.. [ECF No. DE 177-22 at ¶ 82].</p>
<p>"I also did not cause money to be transferred to Fidelis' chosen investment [identified in preceding paragraph as Par Funding] simultaneous with the transfer of funds." [ECF No. 891-1 at ¶ 25].</p>	<p>Beginning in 2018, Furman sent investor proceeds from the offer and sale of Fidelis Promissory Notes to Par Funding. [ECF No. DE 177-22 at ¶ 66].</p> <p>Beginning in 2018, Par Funding issued Par Funding Promissory Notes to Fidelis in exchange for the investor funds Furman and Fidelis sent Par Funding. [ECF No. DE 177-22 at ¶ 67].</p>

Furman Declaration	Admissions to Which Furman Asserts His Fifth Amendment Privilege
<p>“None of the investors that I worked with intended to directly invest their money with Par Funding.” [ECF No. 891-1 at ¶ 22].</p>	<p>Furman solicited investors to purchase <i>Par Funding</i> Promissory Notes in at least 2017. [ECF No. DE 177-22 at ¶ 25].</p> <p>To solicit investors to purchase <i>Par Funding</i> promissory notes, Furman distributed Par Funding marketing materials, told investors about Par Funding’s business and management, told them the investment in Par Funding was safe and secure, and directed them how to invest through retirement accounts in the Par Funding notes. [ECF No. DE 177-22 at ¶¶ 28-40].</p> <p>In at least 2019 Furman hosted dinner presentations to which he invited investors and potential investors for the purpose of soliciting them to invest in <i>Par Funding</i> Promissory Notes. [ECF No. DE 177-22 at ¶ 81].</p> <p>Furman distributed Par Funding marketing materials in at least 2017 to get potential investors to invest in <i>Par Funding</i> promissory notes. [ECF No. DE 177-22 at ¶ 31].</p>
<p>“From the years 2018-2020, my counsel Erik Weingold filed all necessary forms and documents with the SEC, including the required Form D” [ECF No. 891-1 at ¶ 28].</p>	<p>In May 2018 Furman filed the Fidelis Form D with the Securities and Exchange Commission. [ECF No. DE 177-22 at ¶ 13].</p> <p>In May 2019 Furman filed the Fidelis Form D with the Securities and Exchange Commission. [ECF No. DE 177-22 at ¶ 14].</p> <p>In May 2019, Furman filed the Fidelis Amended Form D with the Securities and Exchange Commission. [ECF No. DE 177-22 at ¶ 15].</p>

Furman cannot have it both ways. The SEC seeks summary judgment against Furman based on his participation in the offering of *Par Funding* promissory notes, for which he raised investor funds. Issues about waiving his Fifth Amendment privilege and testifying about these same matters at trial is an issue for trial, as is the treatment of the Requests for Admissions that he has failed to amend – including whether they should be deemed admitted or the SEC should get

an adverse inference. At present, the SEC's summary judgment motion remains pending and having been unable despite several efforts, to resolve this issue with Furman, the SEC asks the Court to not consider Furman's self-serving declaration on summary judgment. *See also* ("It is well- settled that conclusory affidavits, submitted by a nonmoving party in opposition to a motion for summary judgment, will not create an issue of fact for trial") *citing Rodda*, — F.Supp.3d at —, 2021 WL 2290826, at *2 ("Conclusory allegations without specific supporting facts have no probative value.") (additional internal cites omitted); *United States v. Stein*, 881 F.3d 853 (11th Cir. 2018) (Conclusory affidavits, submitted by a nonmoving party in opposition to a motion for summary judgment, will not create an issue of fact for trial); *McGahee v. Massey*, 667 F.2d 1357, 1362 (11th Cir.1982)) ("The Fifth Amendment privilege cannot be invoked to oppose discovery and then tossed aside to support a party's assertions.").

WHEREFORE, the Court should not consider Furman's self-serving declaration on summary judgment.

November 26, 2021

Respectfully submitted,

s/Amie Riggle Berlin

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CERTIFICATE OF CONFERRAL

Undersigned Counsel conferred with defense counsel about Furman's prior assertion of the Fifth Amendment in discovery and his subsequent declaration in an effort to resolve these issues in this case, including at trial, to no avail.

s/Amie Riggle Berlin