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 SECURITIES AND EXCHANGE COMMISSION'S RESPONSE TO DEFENDANT MICHAEL FURMAN'S MOTIONS IN LIMINE

I. INTRODUCTION

Failing to cite any case law and ignoring the allegations against him, Defendant Michael Furman seeks to exclude evidence of his lies and participation in the offer of securities to a person posing as a potential investor, on grounds the evidence is "irrelevant" and prejudicial [ECF No. 932]. Specifically, he seeks to exclude (1) testimony from the undercover posing as an investor; and (2) all testimony and evidence of his interactions with the undercover posing as an investor. As to the former, the SEC is not calling the undercover posing as an investor in its case in chief, and she is not on the SEC's witness list. Therefore, the Court should deny this portion of the Motion as moot. If the undercover investor's testimony is required for impeachment or rebuttal purposes, which need would only arise if Furman's testimony requires impeachment, then the issue should be raised and addressed at that time. As of now, there is no plan to call this witness and the SEC has not named her as a trial witness.[1]

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[1] Furman does not raise this in the Motion, but the SEC will not be inquiring of the FBI about the details of its nonpublic investigation during the trial. Instead, the same FBI Agent who authenticated the recordings for the TRO Motion is being called to briefly testify to authenticate the recordings at trial consistent with the Agent's sworn declarations of authentication that the SEC previously filed in this case.

As to the second, broader category of evidence Furman seeks to exclude, which includes the recordings, transcripts, and his own testimony, his motion fails for the reasons set forth below.

II. LEGAL STANDARDS

"In fairness to the parties and their ability to put on their case, a court should exclude evidence *in limine* only when it is clearly inadmissible on all potential grounds." *United States v. Gonzalez*, 718 F. Supp. 2d 1341, 1345 (S.D. Fla. 2010). "The movant has the burden of demonstrating that the evidence is inadmissible on any relevant ground." *Id.* "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy, and potential prejudice may be resolved in proper context." *In re Seroquel Prods. Liab. Litig.*, Nos. 6:06-md-1769-Orl-22DAB, 6:07-cv-15733-Orl-22DAB, 2009 WL 260989, at *1 (M.D. Fla. Feb. 4, 2009).

A. Rule 401 - Relevance

"Evidence is admissible if relevant, and evidence is relevant if it has any tendency to prove or disprove a fact of consequence." *United States v. Patrick*, 513 F. App'x 882, 886 (11th Cir. 2013) (citing Fed. R. Evid. 401, 402); *see also* Fed. R. Evid. 401 advisory committee's note to 1972 proposed rules ("The standard of probability under the rule is more probable than it would be without the evidence." (internal quotation marks omitted)).

B. Rule 403 - Prejudice

Relevant evidence may nonetheless be excluded under Rule 403 "if its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. "Rule 403 is an extraordinary remedy which the district court should invoke sparingly, and the balance should be struck in favor of admissibility." *Patrick*, 513 F. App'x at 886 (internal quotation marks omitted) (quoting *United States v. Lopez*, 649 F.3d 1222, 1247 (11th Cir. 2011)). Rule 403's

"major function ... is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *United States v. Grant*, 256 F.3d 1146, 1155 (11th Cir. 2001)

Rule 403 requires "unfair prejudice," which means "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403, Advisory Committee Notes; *see also also United States v. Allen*, 341 F.3d 870, 886 (9th Cir. 2003). As most evidence is prejudicial to the party against whom it is offered, Rule 403 guards only against "unfair prejudice." *United States v. Benedetti*, 433 F.3d 111, 117-118 (1st Cir. 2005). Thus, excluded evidence "must not only be prejudicial, but be *unfairly* prejudicial, and not only outweigh relevance but *substantially outweigh* relevance." *United States v. Candelaria-Silva*, 162 F.3d 698, 705 (1st Cir. 1998) (emphasis in original).

II. THE EVIDENCE AT ISSUE

The Complaint and Amended Complaint allege that Furman participated in the unregistered offering of Par Funding securities and made misrepresentations and omissions to potential investors in violation of the federal securities laws [ECF Nos. 1 & 119]. As one example, the SEC alleges that Furman participated in a phone call with a person posing as a potential investor and, while touting the Par Funding investment, said that New Jersey regulators "retracted" a prior Order entered against Par Funding and determined that the Par Funding offering was "good." *Id.* at ¶ 233. This was false. *Id.* at ¶ 234.

The SEC filed two transcripts of telephone calls between Furman and the undercover/potential investor with its Motion for a Temporary Restraining Order and Other Relief, as evidence of Furman's participation in the Par Funding offering and his lies to potential investors. [ECF No. 41-30, TRO Exh. 133 (Filed Under Seal) & ECF NO. 41-31, TRO Exh. 134 (Filed Under Seal)]. The SEC's trial exhibits include these transcripts as well as the related audio recordings.

III. CONTRARY TO FURMAN'S ASSERTIONS, THE EVIDENCE IS RELEVANT

The telephone call recordings and related transcripts are relevant for at least three reasons: (1) as evidence of Furman's participation in the unregistered Par Funding offering in violation of (Count VII of the Complaint); (2) as evidence of Furman's misrepresentations and omissions in violation of the anti-fraud provisions of the federal securities laws (Counts I-VI of the Complaint); and (3) as evidence of Furman's lack of credibility.

Furman only addresses the first reason, and ignores the remaining two. All three are discussed below.

A. Participation In The Unregistered Par Funding Offering

Furman argues that recording is "irrelevant" to show his participation in an unregistered offering under Section 5 of the Securities Act of 1933. He contends that because the person posing as a potential investor called him, and not the other way around, it is irrelevant to show "a solicitation." [ECF No. 932 at 3]. This argument is absurd for at least two reasons. First, whether Furman dialed or answered is a distinction without a difference. Furman cites no case law for his novel theory, because there is none. Second, the issue is not "solicitation," but participation in an *offering*. The recording of the phone call is evidence of Furman's participation in the offering. He speaks with the potential investor about the offering, touts Par Funding, lies about the New Jersey Order, and then after the call Furman connects her directly to Defendant Perry Abbonizio at Par Funding to seal the deal.

The calls show an initial call and follow up call in connection with the Par Funding offering. In [TRO Exhibit 133, filed under seal as ECF No 40-30], the potential investor/undercover contacts Furman and generally expresses interest in investing in *something*. Furman then offers numerous investments, including Par Funding. Furman pitches the Par Funding merchant cash advance investment by, among other things:

- Providing the investment terms.
  - ECF No. 41-30 at 8:11-17 (one year, with monthly interest at 9 percent for a $50,000 investment or 15% for a $500,000 investment); and 20:12-22:1
- Touting the success of the MCA business
  - *Id.* at 8:19-24 (they have $1.9 million in accounts receivables)
  - *Id.* at 33:7-34:4 (the default rate is 1% and they take their time before advancing money and do an onsite inspection)
- Touting the safety, quality, and success of the investment.
  - *Id.* at 9:1-8 (a "wonderful investment")
  - *Id.* at 9:1-9 (clients have made $25 million)
  - *Id.* at 9:1-4 (Furman has been working with them for eight years and they have never missed an investor payment)
  - *Id.* at 17:3-7 (they have $400-$500 million in the bank, and they have been "independently audited" by one of the "top accounting firms")
  - *Id.* at (stating that once investors "get it, or if they trust me, then they try it and they're like, well, that's my favorite investment.")
  - *Id.* at 32:19-33:5 ("So everything is 100 percent collateralized and insured. And that's why their default rate is down to like 1.1 percent, which the average is like 18 in the industry.")
- Raising the New Jersey regulatory fines as a positive aspect of the investment.
  - *Id.* at 17:-18:7 (saying it is good that regulators are watching to make sure "everything is running smoothly").
  - *Id.* at 18:8-22 (Indicating – falsely – that the New Jersey regulators not only retracted their Order against Par Funding, but also supported the offering.
  - *Id.* (stating – falsely – that the regulators "backed off" and said "then they said you're doing it right, and all of your books are good and we love it;" and the regulators "retracted [the Order and fines] and said you're good.").

The other call [ECF No. 40-31] includes audio of Furman explaining the investment and returns, *id.* at 6:2-18 and telling the undercover potential investor he will send her the marketing materials, *id.* 16:18-17:7. The two calls are part of the evidence of Furman participating in the

offer of Par Funding securities, and it continues from these two calls through several pieces of other evidence that culminates in Par Funding sending the promissory note.

Ignoring the substance of the calls, Furman seeks to exclude them from trial on grounds the calls are "irrelevant" to showing a solicitation because he answered the phone and did not dial to initiate the calls [ECF No. 932, Furman Motion in Limine, at 1-2]. He cites no case to support his unique theory that participation in an offer or sale of a security requires that the defendant initiate rather than answer any phone call during which the defendant participates in a securities offering. Because there is none.

The substance of the call is direct evidence of Furman's participation in the Par Funding offering, and therefore it is relevant to the Section 5 claim against him.

B. Misrepresentations and Omissions

Furman ignores the relevance of the calls to the fraud claims against him. The SEC's Complaint alleges that Furman made misrepresentations and omissions during the very call he seeks to exclude as "irrelevant." Specifically, the SEC alleges that Furman violated the anti-fraud provisions of the federal securities laws when, among other things, he falsely told the undercover potential investor that New Jersey securities regulators had retracted their case against Par Funding, decided Par Funding was "good," and in fact "loved" Par Funding. [ECF No. 119 at ¶¶ 233-234; ECF No. 14, TRO Motion, attaching transcript of audio recording]. Accordingly, the call is direct evidence relating to the SEC's fraud claims against Furman, and is therefore relevant.

C. Credibility and Scienter

During this same phone call, Furman engages in conduct and makes representations that are contrary to his sworn testimony in this case. The audio recording is therefore also relevant to issues concerning his credibility.

IV. THE EVIDENCE IS NOT UNFAIRLY PREJUDICIAL

Furman next seeks to exclude the audio recordings and transcripts on grounds they are prejudicial and will confuse the jury because "at most" they show Furman is responding to the undercover potential investor [ECF No. 932 at 3]. This is wrong. The evidence shows Furman pitching a menu of investments and making myriad representations about the MCA investment, which is Par Funding. As discussed above, it does not matter who initiates a call – the securities laws do not discriminate based on who dials whom.

The evidence at issue is comprised of audio recordings of Furman touting the investment and making misrepresentations and omissions in connection with the investment offering. Far from confusing a jury, this evidence will assist the jury because they will be able to hear for themselves what Furman said to someone he believed was a potential investor. Furman might not like the evidence, but this does not make it unfairly prejudicial.

In addition to being evidence of Furman's misrepresentations, the call will also help the jury understand one of the ways in which Furman participated in the Par Funding offering – a feature of the Section 5 claim against him. The call is one of a series of recorded events, which include subsequent recordings evidencing Furman having put the potential investor in contact with Par Funding management to help close the deal. This flow, from Furman to Par Funding, is directly relevant to proving how the Par Funding offering worked, as well as one of the ways Furman participated in the offering as Par Funding's sales agent/agent fund manager.

V. CONCLUSION

For the reasons set forth above, the Court should deny the Motion.

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Respectfully submitted,

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