

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.

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**DEFENDANTS' REPLY IN SUPPORT OF MOTION *IN LIMINE* TO  
EXCLUDE EXPERT TESTIMONY AND REPORT OF MELISSA DAVIS**

Defendants, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta respectfully file this Reply in Support of their Motion in Limine to Exclude the Expert Testimony and Report of Melissa Davis (ECF No. 803), pursuant to Fed. R. Evid. 402, 403, and 702, and, in support thereof, state as follows:

**1. Davis Must Be Precluded from Offering Any Testimony on the Issue of Par Funding's Profitability.**

The Commission has taken the position that Melissa Davis “never analyzed whether Par Funding as an entity was profitable and has offered no opinion on that issue.” (SEC Response at 1.) This may come as somewhat of a surprise to Davis, who stated in her report that she “analyzed the cash profitability of the merchant advances” and that her “conclusions [were] based on [her] analysis of Par Funding’s historical cash activity and the profitability of the Merchant Advances.” (Davis Report, ECF No. 836-1, at ¶20.) Given that Par Funding’s merchant advances were the core of its revenue generating business, the Commission’s claim that her analysis of those advances did

not happen is telling. That said, the Court should certainly preclude Davis from testifying about an analysis the SEC says she did not do and an opinion it says she did not offer.

Moreover, if Davis “did not offer an opinion on the issue” of Par Funding’s profitability, she should not be permitted to offer testimony undermining Joel Glick’s opinion on the issue. In her report, Davis states that she disagreed with Par Funding’s credit loss provisions, which are a component of profits on an accrual basis. The SEC should not be permitted to “back door” an opinion on the company’s profitability by suggesting Glick’s opinion on Par Funding’s profitability relies on inaccurate credit loss provisions. She either has “an opinion on the issue” or she does not. Given the SEC’s clear position that she does not, Davis should be precluded from testifying or opining regarding Par Funding’s credit loss provisions or their impact on Par Funding’s profitability. But this would not be enough.

**2. The SEC Has Erected a Strawman to Deflect Attention from Davis’s Flawed Methodology.**

Unless the Court excludes Davis’s first opinion in its entirety as requested in Defendants’ motion, the SEC will have Davis offer an opinion on Par Funding’s profitability (using a cash analysis they know violates GAAP) by cloaking it in different terms. The definition of profit in Black’s Law Dictionary (11th ed. 2019) is “[the] [e]xcess of revenues over expenses for a transaction.” Davis’s opinion is that “the cash flow from Par Funding’s Merchant Advances was not sufficient to pay the promised investor returns and operational expenses.” (Davis Report, ECF No. 803-1, ¶13, p. 7.) Consequently, her opinion simply replaces the GAAP-approved accrual-based assessment of revenue generated by the Merchant Advances with her cash-based assessment of those same Merchant Advances. GAAP makes clear, however, that an accrual-based analysis is the only way to accurately assess profit, that is, a company’s ability to generate the revenue necessary to cover its expenses.

Notably, the SEC’s Response *never once* (and could not in good faith) argue that GAAP permits Davis’s cash-based methodology to assess profitability. Instead, they engage in this sleight of hand and argue that Davis isn’t opining on Par Funding’s ability to pay its expenses using its revenues, i.e., its profitability, even though she is clearly opining on its ability to pay its expenses using cash generated from merchant advances. So why is the SEC taking this position?

The reason is simple. The SEC cannot dispute that Par Funding generated sufficient revenue from merchant advances on a GAAP-approved accrual basis to pay investor returns and operational expenses. And because the SEC cannot argue that a cash-based assessment is an appropriate method to assess a company’s ability to cover its expenses, *i.e.*, generate a profit, they have no choice but to change the argument. The SEC should not be permitted to trot out this flawed opinion to mislead the jury into believing Par Funding couldn’t cover its expenses when the only appropriate methodology for this purpose says otherwise.

On the issue of GAAP, because the SEC cannot dispute that an accrual-based method is the only proper method of assessing whether Par Funding can cover its operational expenses, *i.e.*, whether it is profitable, it once again erects a strawman to recast the argument to better suit its position. This time, the SEC argues that none of the Defendants’ cases “hold that only GAAP is appropriate for all financial or accounting analyses.” (SEC Response at 15.)<sup>1</sup> Of course, Defendants did not cite those cases for this proposition. Defendants’ argument—clearly stated on page one of their Motion and quoting directly from Davis’s report—is that her analysis “*of the cash profitability of the Merchant Advances* on an individual basis to determine their profitability” is unreliable because “GAAP makes clear that a cash flow analysis alone is not appropriate to determine a company’s profitability.” So, while Defendants agree there may be “many situations

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<sup>1</sup> Notably, the SEC does not cite to Defendant’s Motion on this point.

where an analysis under GAAP is not appropriate,” (Response at 15), this, according to GAAP and even the Receiver, is not one of them.

Consequently, this is not “a disagreement over expert witnesses’ methodologies.” (SEC Response at 2.) The issue raised in Defendants’ motion to exclude Davis’ testimony and opinion is not whether one expert’s methodology is an equally acceptable but better method of assessing whether a company is able to cover its expenses. As GAAP Guidance and the Receiver, himself a former CPA, state, there is only one proper way to accurately assess a company’s ability to cover its expenses, and that is with accrual-based revenues from operations as opposed to “mere” cash.<sup>2</sup> And just as Davis failed to do when asked at deposition, the SEC fails to point this Court to a single provision in GAAP that says otherwise, opting instead to change the conversation. Rather than respond to the errors in Davis’s methodology, the SEC opts to make clever sounding arguments like “accounts receivable don’t pay bills” (SEC Response at 9). However, the truth is that when revenues are recorded on an accrual-basis, which is what GAAP prefers and is how Par Funding kept its books, from an accounting perspective, *receivables are revenue and do pay the bills*. It is ironic indeed that the SEC, which requires public companies to keep their books on a GAAP-approved accrual basis which recognizes that receivables can and must be booked as revenue, is taking this position. GAAP matters. This Court has asked the SEC on more than one occasion whether Davis’s opinions are GAAP-approved and there is now no dispute that they are not.

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<sup>2</sup> Statement of Financial Accounting Concepts No. 1 states: “...Modern business activities are largely conducted on credit and often involve long and complex financial arrangements or production or marketing processes. ... Similarly, receivables and the related effects on earnings must often be accrued before the related cash is received, or obligations must be recognized when cash is received and the effects on earnings must be identified with the periods in which goods or services are provided. The goal of accrual and deferral of benefits and sacrifices is to relate the accomplishments and the effects so that reported earnings measures an enterprise’s performance during a period **instead of merely listing its cash receipts and outlays**. (Emphasis supplied.)

### 3. The SEC Ignores Other Errors in Davis's Report.

Finally, the Court should grant Defendants' Motion because the SEC could not address other glaring errors in Davis's methodology which were raised in Defendant's Motion. First, in an effort to lend credibility to her flawed cash-flow analysis, Davis suggested that her analysis "marries" to the more accurate GAAP-approved assessment, but only if the collection cycle applicable to the receivables she analyzed were "complete." The SEC says absolutely nothing in its Response about the fact that the 120-day collection cycle Davis relies on for this purpose is not applicable—by her own admission no less—to the receivables in 2020 and the latter part of 2019. And they say nothing about the fact that Davis's own exhibits demonstrate that the collection cycle for Par Funding's merchant receivables well exceeded 120 days and extended over years, which is consistent with the testimony of Par Funding's Controller, James Klenk. The fact that Davis's collection cycle did not comport with reality should not be surprising given that she admitted during her deposition testimony that she did not even attempt to individually calculate the collection cycles for each of the merchant advances. As explained in Defendants' Motion to Exclude Davis's Opinion and Report, this glaring error renders her methodology unreliable with respect to the vast majority of the active accounts receivable because those deals were still outstanding at the time the Receiver took over in July 2020. The SEC simply ignores this error.

But the SEC's head-in-the-sand approach does not end there. In addition to Davis's flawed approach to recognizing Par Funding's revenue, Davis also puts her finger on the scale in assessing the other side of the equation—Par Funding's obligations to pay investor returns and operational expenses. Even though it is undisputed that Par Funding extended its payment obligations for *seven years* through its exchange note offering, Davis freely admitted that, incredibly, she simply did not

consider those facts in assessing whether Par Funding would be able to meet those obligations. For these reasons as well, Davis's opinions should be excluded as unreliable.

**CONCLUSION**

WHEREFORE, the Defendants Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta respectfully request that this Court grant their Motion and exclude the opinions and expert testimony of Melissa Davis referenced herein.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been filed on the Court's CM/ECF system which will serve a copy on all counsel of record via notices of electronic filing on this 28<sup>th</sup> day of October 2021.

*/s/ Alejandro O. Soto*

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