

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 20-cv-81205-REINHART

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP,
INC. d/b/a/ PAR FUNDING, *et al.*,

Defendants.

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S NOTICE OF FILING
OPPOSITION TO DEFENDANTS' JOINT STATEMENT OF UNDISPUTED FACTS

Plaintiff Securities and Exchange Commission hereby files its opposition to Defendants Joseph Cole Barleta, Lisa McElhone, and, Joseph LaForte's Joint Statement of Undisputed Facts.

Dated October 28, 2021

Respectfully submitted,

By: **Amie Riggle Berlin**
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1. **Disputed.** No evidence cited in support by Defendants.
2. **Undisputed.**
3. **Undisputed.**
4. Sentence 1: **Disputed.** ECF No. 774-1, Expert Report of Melissa Davis, at 15, ¶36 (showing, for example, that Par Funding maintained its accounting records of merchant cash advance fundings, repayments, and rollover transactions in software known as MCA Suites). Par Funding internally prepared various spreadsheets including but not limited to a Funding Analysis report. See Exhibit 3, CBSG Funding Analysis Report.
Sentences 2 and 3: **Undisputed.**
5. **Disputed.** Exhibit 1, Volume I of Deposition Testimony of James Klenk, at 6:21-24 & 8:15-25 (Klenk is a Certified Public Accountant and has been the Controller of Full Spectrum Processing since 2018) and at 99:7-25 (Klenk testifying that Cole prepared these reports); Exhibit 2, Volume II of Mr. Klenk's Testimony, at 252:15-255:15 (Klenk testifying that Cole told him how he, Cole, prepared these reports); Exhibit 3, Testimony Defense Expert Joel Glick, at _ (based on Mr. Klenk's testimony, he understands that Cole drafted the reports).
6. **Undisputed** in part, and **Disputed** in part. As to whether the Funding Analysis purported to summarize the metrics set forth in this proposed Fact: **Undisputed.** As to whether the Funding Analysis results were an accurate, actual summary of the merchant cash advance accounts: **Disputed.** ECF No. 774-1, Davis Expert Report, at 29-30, ¶65 (the Wire Total was overstated in the Funding Analysis); Exhibit 1, Volume I of Deposition Testimony of James Klenk, at 6:21-24 & 8:15-25 (Klenk is a Certified Public Accountant and has been the Controller of Full Spectrum Processing since 2018); Exhibit 2, Volume II of Deposition Testimony of James Klenk, at 260:17-267:8 (the figures reported in the Financial Analysis Report were misleading; testifying under cross examination about Financial Analysis Report (deposition exhibit 7)); Exhibit 4, Financial Analysis Report introduced as exhibit 7 during Mr. Klenk's deposition); Exhibit 3, Deposition of Joel Glick, at 35:18-36:13 (defense expert assumed Par Funding's numbers were accurate and did not verify them: "We have not audited or otherwise independently verified the accuracy. I'm not saying it's accurate, but I am relying on it.") and 294:15-16-295:8 (Defendant's expert's testimony that he does not know if the Financial Analysis Report accurately reflects the uncollectible accounts receivable).

7. **Undisputed.**

8. **Disputed.** Evidence cited does not establish this proposed fact. Additionally, In the same deposition Defendants cite, Mr. Klenk went on to admit under cross examination that:

- He did not prepare these reports;
- He has no personal knowledge as to how the reports were prepared;
- His testimony was based on a conversation he had with Defendant Joseph Cole Barleta in 2018 about how a report was prepared at that time (hearsay);
- He had no information, based on hearsay or otherwise, about the reports or how they were prepared after the date of his conversation with Cole in 2018.

[Exhibit 2, Klenk Testimony, Volume 2, at 252:7-260:3].

9. **Disputed.**

As to sentence 1: ECF No. 774-1, Davis Expert Report, at 29, ¶65(a) (the Wire Total listed in the report was inaccurate because the cash actually wired to the merchants was often less than the amount listed in the factoring agreement; The Wire Total did not represent the cash funded to the merchant per the terms of the contractual agreement).

As to sentence 2: ECF No. 774-1, Davis Expert Report, at 29-30, ¶65 (the Report does not accurately portray the Exposure Percentage and is not an accurate portrayal of the default rate); ECF No. 774-1, Davis Expert Report, at 30, ¶65(c) and (d) (because the Wire Total was overstated, that resulted in the Exposure Percentage being understated).

As to sentence 3: The evidence cited by Defendants states only that “Written off deals are referred to as deals in default as reflected in the Default tab of CBSG’s Deposit Log,” and does not state that the data is the same.

10. As to sentence 1: **Undisputed** that the column in the Funding Analysis Report labeled “exposure percentage” is the quotient of the figure in the Exposure column divided by the figure in the Wire Total column. **Disputed** that the calculation is an accurate portrayal of the Funding Analysis. ECF No. 774-1 at 29-30, ¶65 (the Report does not accurately portray the Exposure Percentage and is not an accurate portrayal of a “default rate”); *Id.* at 30, ¶65(c) and (d) (because the Wire Total was overstated, that resulted in the Exposure Percentage being understated).

As to sentence 2: **Disputed.** The Defendants cite no evidence in support of this purported Fact and therefore fail to establish it and no counter evidence is required.

11. As to sentence 1: **Disputed.** The Defendants cite nothing other than a single monthly Report itself and apparently ask the Court to interpret it and find that in the Court's opinion it is a clear presentation. This is precisely what is prohibited on summary judgment. The analysis should stop here. To the extent the Court interprets the Chart, there is counter evidence showing the Report is opaque, misleading, and not easily understood, thus preventing Defendants' Fact 11 from being deemed undisputed. *See* ECF No. 649-8, July 13, 2021 Declaration of Joel Glick, at ¶17(j) and footnote 8 (The Defendants hired an expert, Joel Glick, to decipher the Report; even Mr. Glick had to use different terms to explain the Exposure Percentage); Exhibit 2, Volume II of Deposition Testimony of James Klenk, at 260:17-267:8 (testimony by Par Funding's controller that the figures reported in the Financial Analysis Report were misleading; testifying under cross examination about Financial Analysis Report (deposition exhibit 7)); Exhibit 4, Financial Analysis Report (introduced as exhibit 7 during Mr. Klenk's deposition).

As to sentence 2: **Undisputed** in part, **Disputed** in part. It is **Undisputed** that the single Report Defendants cite as Exhibit 3 to their Statement includes a footnote stating this. It is **Disputed** whether this language is clear and accurate. *See* Responses to Defendants' Facts 6-11 above.

As to sentence 3: **Disputed.** Defendants cite no evidence. Also, *See*, e.g., Exhibit 5, Declaration of Renee Meyer, at ¶ 26 & Exh. E thereto at pp4-6 (representation that the Financial Analysis chart (ex.E to Ms. Meyer's declaration) shows the default rate); Defendants' Exhibit (ECF 823-7), at ¶ 5 (Mr. Limaye indicating he understood Funding Analysis to reflect default rate).

12. As to sentence 1: **Disputed.** The Defendants cite nothing other than the Report itself and apparently ask the Court to interpret it and find that in the Court's opinion it is a clear presentation. This is precisely what is prohibited on summary judgment. The analysis should stop here. To the extent the Court interprets the Chart, there is counter evidence showing the Report is opaque, misleading, and not easily understood, thus preventing Defendants' Fact 11 from being deemed **Undisputed.** ECF No. 649-8, July 13, 2021 Declaration of Joel Glick, at ¶17(j) and FN 8 (The Defendants hired an expert, Joel Glick, to decipher the Report; even Mr. Glick had to use different terms to explain the Exposure Percentage); Exhibit 2, Volume II of Deposition Testimony of James Klenk, at 260:17-267:8 (testimony by Par Funding's controller that the figures reported in the Financial Analysis Report were misleading; testifying under cross examination about Financial Analysis Report (deposition exhibit 7)); Exhibit 4, Financial Analysis Report introduced as exhibit 7 during Mr. Klenk's deposition).

As to sentence 2:. **Undisputed** that Defendants' Exhibit 3, a single monthly Financial Analysis Report, has this footnote, which is all the evidence Defendants cite shows.

As to sentence 3: **Disputed**. Defendants cite no evidence in support of this fact and therefore fail to prove it. Also, See, e.g., Exhibit 5, Declaration of Renee Meyer, at ¶ 26 & Exh. E thereto at pp4-6 (representation that the Financial Analysis chart (ex.E to Ms. Meyer's declaration) shows the default rate); Defendants' Exhibit (ECF 823-7), at ¶ 5 (Mr. Limaye indicating he understood Funding Analysis to reflect default rate); Defendants's Exhibit 8 (Alves Declaration (ECF 823-8), paragraphs not numbered, second page, first bullet (indicating he understood Funding Analysis to reflect default rate)

13. Disputed. As to sentence 1: The evidence Defendants cite does not prove that the Report (Defense Exhibit 3) was routinely provided to investors, let alone prior to investing (which is the only way this fact could conceivably be relevant). Defense Exhibit 5 is unauthenticated and Defendants present no evidence that the recipients are, as Defendants merely state, investors. Exhibits 6-9 cannot be considered as the Defendants withheld this evidence from discovery (see Response brief). Even if the Court considers Exhibits 6-9, they show at best that four people received something called a "Funding Analysis" – a document not attached to the Declarations, and thus there is no evidence the Declarants are referring to what Defendants identify as the Funding Analysis they file as Defense Exhibit 3. Mr. Cistone (Defendants' declarant exhibit 5) is, it turns out, a Par Funding finder who received commissions from the note sales to investors). (Composite Exhibit 7 hereto). His credibility should be considered by the jury.

As to sentence 2: Not supported by evidence cited.

14. Disputed. The evidence Defendants cite does not show that CBSG routinely provided all investors with a copy of the report every month. The testimony Defendants cite in the Cole transcript makes no mention of this occurring every month. Defense Exhibit 5 is unauthenticated and Defendants present no evidence that the recipients are, as Defendants claim in this proposed Fact, investors. Defense Exhibits 6-9 cannot be considered as the Defendants withheld this evidence (see Response brief). Even if the Court considers these declarations, the declarations fail to attach what they received and therefore Defendants cannot prove what document or version of Exhibit 3, if any, these people received. Mr. Cistone (Defendants' declarant exhibit 5) is, it turns out, a Par Funding finder who received commissions from the note sales to investors). (Composite Exhibit 7 hereto). His credibility should be considered by the jury.

15. Sentence 1: **Undisputed** as to what the evidence Defendants cite shows – namely, that sometimes investors would call Cole and occasionally he would speak with them and these are the types of questions they would ask.

Sentence 2 (beginning “When asked...”): **Disputed** to the extent Defendants are claiming all investors inquired and Cole said this each time. His testimony Defendants rely on is that sometimes investors would call and he would respond.

Sentence 3: **Disputed**. There is evidence that Defendants told potential investors the chart reflects the default rate. *See, e.g.*, Exhibit 5, Declaration of Renee Meyer, at ¶ 26 & Exh. E thereto at pp4-6 (representation that the Financial Analysis chart (ex.E to Ms. Meyer’s declaration) shows the default rate); Defendants’ Exhibit (ECF 823-7), at ¶ 5 (Mr. Limaye indicating he understood Funding Analysis to reflect default rate); Defendants’ Exhibit 8 (Alves Declaration (ECF 823-8), paragraphs not numbered, second page, first bullet (indicating he understood Funding Analysis to reflect default rate)

16. Sentence 1: **Undisputed**.

Sentence 2: **Undisputed** in part, and **Disputed** in part. **Disputed** that Mr. Abbonizio “routinely provided” any report to investors: The evidence Defendants cite does not discuss, let alone prove, that Mr. Abbonizio provided investors with any report whatsoever and therefore they fail to prove this fact. If they did, this would support the SEC’s claim that Defendants distributed this chart and told potential investors the default rate was about 1% based on it. **Undisputed** that Mr. Abbonizio told investors that there was 1.2% default rate on the MCA loans.

17. **Disputed**. Defense Exhibit 15 shows only that Alexis Abbonizo of Par Funding sent Defendant Dean Vagnozzi an email attaching “marketing materials.” There is no evidence that these materials were disseminated by Perry Abbonizio – or anyone for that matter – to investors.

18. **Disputed** in its entirety. Exhibit 3, Deposition of Joel Glick, at 35:18-36:13 (defense expert assumed Par Funding’s numbers were accurate and did not verify them: “We have not audited or otherwise independently verified the accuracy. I’m not saying it’s accurate, but I am relying on it.”) and 294:15-16-295:8 (Defendant’s expert’s testimony that he does not know if the Financial Analysis Report accurately reflects the uncollectible accounts receivable); Defense Summary Judgment Exhibit 11, at Footnote 7 and at ¶19 (Mr. Glick stating he did not perform his own, independent analysis and simply accepted Par Funding’s Funding Analysis Report without opining on the accuracy or reliability of the data and performed calculations based on that data; stating Mr.

Glick offered no opinion on the accuracy of the Factoring Losses which drives the calculation of the Exposure Percentage).

19. Disputed in its entirety. ECF No. 774-1, Davis Expert Report (Showing the Commission’s expert performed extensive analysis to demonstrate the Exposure percentage, the Funding Exposure, and the Factoring Losses as reported by Par Funding were consistently inaccurate and/or understated, and that Glick’s analyses were flawed). *Id.* at ¶65(c) (The Funding Exposure was the difference between the actual cash advanced to the merchant and the actual cash collected from the merchant for the merchant advance transactions that Par Funding’s management haphazardly deemed to be uncollectible and were included in the Factoring Losses. This amount was understated for the same reasons as Factoring Losses because it only included the merchant cash advance receivables that Par Funding’s management deemed to be uncollectible); *Id.* at ¶122 (The Factoring Losses were understated because they did not include merchant cash advance receivables with historical cash losses and millions of dollars in merchant cash advance receivables remaining to be collected); *Id.* at ¶123 (The merchant cash advance receivables included a significant number classified as “active” but whose merchants had not made payments during the eight weeks prior to the Receivership and in some cases a longer period, yet they were not included in the Factoring Losses; in addition certain merchant cash advance receivables that Par Funding considered active had generated significant cash losses on a historical basis, many of which were not then-currently performing but were not included in Par Funding’s calculation of Factoring Losses).

20. Sentences 1 and 2: Undisputed.

Sentence 3: Disputed. The evidence cited does not show that Rod Ermel was given access to all books and records (only Quickbooks), and therefore the Defendants fail to demonstrate this proposed fact. To the extent relevant to any issue, the SEC does not dispute that Par Funding Quickbooks records were put on a portal Rod Ermel had access to at one point in time.

21. Sentence 1: Undisputed.

Sentence 2: Undisputed that this accurately states the Cole testimony transcript.

Sentences 3 and 4: Undisputed.

22. Disputed. Defense Exhibit 17 is an unauthenticated document and is hearsay, and therefore it cannot support the Defendants’ proposed fact on summary judgment that Rod Ermel made findings. Even if Exhibit 17 was authenticated and was not hearsay (which is not the case) and

could therefore be considered on summary judgment, the exhibit purports to discuss only procedures used in 2013, 2014, and 2015, and therefore shows nothing about the relevant time period of this case.

23. Sentence 1: Disputed. The evidence cited by Defendants makes no reference to any assurances given. Therefore, the Defendants fail to demonstrate this proposed Fact.

Quoted language from Bernato Declaration: Disputed that this Fact provides the complete quote from Mr. Bernato's Declaration. The Defendants omitted language from the Declaration they quote. Specifically, Mr. Bernato identifies and testifies in his Declaration about two specific complaint allegation paragraphs, Complaint ¶¶ 205-206 (Defense Ex. 25 at ¶5).¹ Otherwise, **Undisputed** that these words appear in the Bernato Declaration at paragraphs 5 and 6 therein.

24. Undisputed.

25. Sentence 1: Disputed. The evidence Defendants cite [ECF No. 823-25 ¶7] does not prove Mr. Bernato secured insurance coverage for Par Funding through Euler Hermes; it only shows that Mr. Bernato "approached" Euler Hermes. To the extent Defendants intended to cite to other paragraphs about what Euler Hermes supposedly did and did not do, this is hearsay and the Declaration provides no evidence that Mr. Bernato has any personal knowledge about what the insurance company did and did not do internally.

Sentence 2: Disputed. The evidence Defendants cite [ECF No. 823-25 ¶7] does not even address this proposed Fact, that Euler did not extend coverage until its own underwriting process was satisfied. Therefore, Defendants fail to prove this fact. Further, there is no evidence that Mr. Bernato, who does not even claim to work for Euler, has any personal knowledge to testify about what Euler Hermes did with respect to underwriting and its coverage decision in connection with underwriting, and is hearsay.

Sentence 3: Disputed. Hearsay.

Sentence 4: Disputed. No evidence cited in support.

26. Disputed. Not supported by evidence cited.

¹ Defendants proposed Fact is only that Bernato's Declaration includes these two paragraphs. In the additional facts section of the Response, the SEC provides facts to demonstrate that these and other portions of Bernato's Declaration are false.

27. Sentence 1: **Undisputed** that Mr. Rutledge was retained in January 2018; **Disputed** that Mr. Rutledge was retained “shortly after” Pennsylvania Regulators issued a subpoena (no evidence cited that supports this).

Sentence 2: **Disputed** that Mr. Valz was the general counsel of Par Funding because it is not supported by the evidence cited (which says only that Mr. Valz provided “general counsel-type advice”) and relies on hearsay because Mr. Rutledge is testifying about what Mr. Valz told him.

28. **Undisputed.**

29. **Undisputed.**

30. **Undisputed.**

31. **Undisputed.**

32. Sentence 1: **Disputed**. Not supported by the evidence cited, which discusses only the cessation of payments to finders.

Sentence 2: **Disputed**. No evidence cited to support this.

Sentence 3: **Undisputed.**

33. Sentence 1: **Disputed** because no evidence cited to support this

Sentence 2: **Undisputed** that Mr. Rutledge argued this; **Disputed** as concerns the February 5 letter, which is not cited or filed

34. Sentence 1: **Disputed**. The evidence cited does not support this or even reference these facts. *But see* Exhibit 2, Rutledge Deposition Transcript, Volume II, at 233:13-25 (testifying he made the argument but “[t]hat does not mean that we prevailed in the argument.”)

Sentence 2: **Disputed** as what Mr. Rutledge; **Undisputed** as to what Mr. Rutledge argued in the Pennsylvania securities case.

Sentence 3: **Disputed**. Evidence cited concerns Mr. Rutledge’s letter to Pennsylvania regulators and discussion with Cole about those arguments regarding exemption. [Exhibit 2, Volume II of Rutledge Transcript, at 206:7-12, 233:13-234:14, 349:19-25].

35. **Undisputed.**

36. Sentence 1: **Disputed**; no evidence cited

Sentence 2: **Disputed**; no evidence cited

Sentence 3: **Disputed**; evidence cited does not support proposed fact. See also Exhibit 2, Rutledge Volume II, at 257:2-20 (Cole never directed him to review or revise the note or security agreement, and he did not do so)

Sentence 4: Undisputed

37. Sentence 1: **Disputed** in part. Undisputed that the testimony cited by Defendants (Exhibit 2, Volume II or Rutledge Testimony, at 192-193) shows Mr. Rutledge was aware Par Funding was selling to pooled investment vehicles; disputed that the testimony includes selling to PIVs being in place of using finders or sales agents (as opposed to selling to PIVs and not to individuals).

Sentence 2: Undisputed

38. Undisputed that Mr. Rutledge testified that Mr. Cole told him this. Hearsay as used by Defendants.

39. Undisputed.

40. Undisputed except to the extent Defendants are trying to prove Mr. Rutledge understood the Pooled Investment Fund note buyers were “Agent Funds” as that term is defined in the Complaint and TRO Motion. If so, disputed, as the evidence cited for this proposed Fact does not support a finding that Mr. Rutledge knew the PIVs would operate with Par Funding the way the pleadings allege.

41. Undisputed.

42. Sentence 1: Disputed; testimony cited does not include this detail; undisputed that, as the testimony cited states, Mr. Rutledge told Cole the accreditation forms were not acceptable because they were not completed properly. [Exhibit 2, Volume II of Rutledge Deposition, at 277:12-278:8].

Sentence 2: Disputed. [Exhibit 2, Volume II of Rutledge Deposition, at 277:12-279:6]

Sentence 3: Disputed. Evidence cited does not support proposed fact. Mr. Rutledge testified in portion Defendants cite that it was best practice to get written confirmation from potential investor of accredited status, but it is not the exclusive way to obtain verification of accredited investor status. [Exhibit 2, Volume II, Rutledge Deposition, at 226:19-227:6].

43. First sentence: Disputed in part and undisputed in part. Disputed as to “On November 8, 2018, after receiving this email that Mr. Cole was gathering documents certifying that its new noteholders,” as no evidence is cited to support this in proposed Fact 43. Undisputed that Deposition Exhibit 135 was authenticated by Mr. Rutledge and that he makes these arguments to the Pennsylvania regulators in this letter.

Sentence 2: Disputed. Defendants cite no evidence to support this proposed fact.

44. Undisputed

45. Undisputed that the evidence cited by Defendants states what it states.

46. Disputed as written. Defendants' use of "Agent Funds" inserts a fact not included in the evidence they cite, and Agent Funds has a specific meaning in this case beyond just a pooled investment vehicle that bought notes from Par Funding, which is what Mr. Rutledge testified about in the excerpt Defendants cite. Exhibit t_, Rutledge Volume II, at 270:20-271:9.

Remaining sentences: undisputed

47. Sentence 1: Undisputed

Sentence 2: Disputed. Mr. Rutledge did not know that the pooled investment vehicles buying notes from Par Funding and selling them to investors, and being compensated through the difference between the interest paid by Par Funding on its notes and the interest paid by the PIVs on their notes; he did not know that Par Funding and Perry Abbonizio and other Par-related Defendants were involved in soliciting investors to invest in the PIVs, and he was not given all the information about the fact that PIVs were compensation and the integration of the Par Funding offering and the PIVs' offerings; had he known this, it would have impacted his opinions and his letter to the Pennsylvania letter in which he stated Par Funding was no longer compensating people to raise money through the offer and sell of securities. [Exhibit _, Rutledge Volume I, at 41:12-44:19, 50:3-15, 58:13-59:23; Rutledge Volume II, at 382:6-20, 386:5-387:13, 388:20-391:16].

Sentence 3: Disputed. Defendants cite no evidence to support this fact. As set forth above, Mr. Rutledge was never told all the facts. See cites above provided for Sentence 2.

48. Undisputed that he raised it for the first time then; disputed to the extent Defendants imply he was asked for legal advice about this before then. [Exhibit _, Rutledge Volume 2 at 380:24-381:12, 382:6-20]

49. Sentence 1: Disputed. Not supported by evidence cited.

Sentence 2: Disputed. Defendants cite no evidence.

50. Undisputed

51. Sentence 1: undisputed

Sentence 2: proposed fact not support by evidence cited

52. Disputed. No evidence cited or filed in support of this proposed fact

53. Disputed. No evidence cited or filed in support of this proposed fact

54. Disputed. No evidence cited or filed in support of this proposed fact

55. Disputed. No evidence cited or filed in support of this proposed fact

56. Sentence 1: disputed. 535-1 at p.13 (paragraph 39) states only that according to a chart found on “CRM” it appears 17% were approved, and that this would “demonstrate [Par Funding] *has an underwriting process*” – with no reference made to nature or character of the underwriting done (emphasis added).

Sentence 2: disputed. [Exhibit 3, Glick Deposition, at 138:9-139:23 (admitting that the reports he relied on, which are based on polls of about 240 people or less, are actually not “authoritative” and that they do not reliably demonstrate the approval rate)

57. First sentence: Disputed. No evidence cited or filed in support of this proposed fact
Second and third sentences: undisputed that Metro Site Inspections was the company that did on-site inspections when they were done. Disputed that the underwriting process always included an on-site inspection. See, e.g., Exhibit 8, Villarose Deposition Transcript, at 69:15-74:6, 75:16-79:16.

58. First sentence: Undisputed that Par Funding did not always perform on-site inspections, disputed whether it was based on “principled underwriting guidelines,” which the evidence cited does not discuss. Exhibit 8 at 70 (no discussion of there being principled underwriting guidelines)
Sentences 2 and 3: Undisputed that Par Funding did not do on-site inspections. Exhibit 8 at 69:15-74:6, 75:16-79:16.

59. Disputed. No evidence cited that the SEC accuses Par Funding of not meeting any “underwriting standards” that the SEC created. The SEC has alleged that Par Funding did not do what they told potential investors they would do. [ECF No 119]. Evidence cited by Defendants for this proposed Fact addresses whether on-site inspections were done pre-approval vs pre-funding; however, the undisputed evidence shows that they were not always done, period – before approval and also before funding. Exhibit 8 at 69:15-74:6, 75:16-79:16.

60. Undisputed that these three specific items do not appear in the Par Funding brochure Defendants cite (debt schedules, profit margins, or expenses).

SEC’S FACTS IN OPPOSITION

Rutledge

61. Phil Rutledge, Esq. sent the February 2018 letter on behalf of Par Funding to the Pennsylvania securities regulators, stating that Par Funding had discontinued the practice of paying finder to locate investors. [Exhibit 1, Rutledge Transcript 1, at 41:12-41:20].

62. Rutledge made the representation set forth in proposed Fact 61, based on what Cole told him; when Rutledge sent the February 2018 letter he did not know Par Funding was utilizing investment funds to raise money for Par Funding through the offer and sale of the investment funds' promissory notes. [Exhibit 1, Rutledge Transcript 1, at 41:12-44:19].

63. When Rutledge made the representation set forth in proposed Fact 61, he did not know that Par Funding's finders/sales agents had been invited to create investment funds through which they would continue raising money for Par Funding, albeit through investment fund offerings of promissory notes. *Id.* at 50:3-15.

64. Rutledge would not have made the representation to the Pennsylvania securities regulators that Par Funding was no longer providing compensation (set forth in proposed Fact 61) had he known that Par Funding was compensating people at the investment funds for raising money for CBSG through the offer and sale of promissory notes. *Id.* at 58:13-59:23.

65. Cole told Rutledge that Par Funding was no longer compensating anyone in connection with the offer and sale of promissory notes. *Id.*

66. Mr. Rutledge testified that the arguments to regulators were just that, arguments, and that he told Mr. Cole at the outset that the notes were securities, and he told Cole at the time of settlement with the Pennsylvania Regualtors that Par Funding should stop arguing this because it was a losing argument. Exhibit 2, Rutledge Deposition Transcript, Volume II, at 233:13-234:15.

67. Mr. Rutledge's positions in letters to Pennsylvania regulators were his arguments, and not necessarily his opinions about the notes not being securities. [Volume II, at 206:7-12, 233:13-234:14, 349:19-25]

68. Par Funding never sought advice from Mr. Rutledge about using the pooled investment vehicles as agents for Par Funding to raise money from investors until after the Texas Securities Regulators issued a February 2020 cease and desist Order against Par Funding for this violation. [Rutledge Volume 2 at 380:24-381:12]

69. Mr. Rutledge did not know that there was a difference between what Par Funding paid as interest to the pooled investment funds and what the PIVs paid as interest to their investors, resulting in compensation or profit to the pooled investment fund. [*Id.* at 382:6-20]

70. Mr. Rutledge told Cole he needed to obtain information about accredited investors *before* they invested in the notes. *Id.* at 386:5-387:13 (emphasis added)

71. When Mr Rutledge was told Par Funding was going to sell to PIVs instead of investors in 2018, he told Par Funding that it had to remain independent, could not participate in those offerings, could not send investors to them, and the PIVs had to be completely independent. *Id.* at 388:20-391:16

72. To this day, no one at Par Funding has disclosed to Mr. Rutledge that Par Funding was paying the PIVs by offering more in its interest rate than the PIVS were paying to their investors (a “Spread”). *Id.*

73. Mr. Rutledge’s advice about Par Funding’s disclosures was based on what he was told. No one told him that Par Funding participated in the PIVs or that Par Funding was paying the PIVs. Had he known this, it would have affected his opinions. *Id.*

74. Mr. Rutledge was not told Joseph LaForte had involvement in the company, Par Funding’s other external lawyer told Mr. Rutledge about LaForte’s convictions in March 2020, and Rutledge asked Cole about LaForte’s involvement in Par Funding but Cole told Rutledge that LaForte did not have involvement. Exhibit 2 at 36:16-39:22.

75. No one at Par Funding told Mr. Rutledge that the agent funds had been invited to be formed to raise money for Par Funding, Exhibit 1 at 50:3-11; and Rutledge was only hired on an as-needed basis between 2018 and 2020, Exhibit 2 at 377:10-15

Bernato

76. Bernato’s Declaration is also false for the following sworn statements in it that the Defendants did not cite in their motion: “I have never previously heard the name Joe or Joseph LaForte, Mack, or Macki. My dealings were always with Anthony Zingarelli.” [Composite Exhibit 9: December 20, 2018 email from Bernato to LaForte about insurance; November 2018 email to Bernato and “Joe Mack” stating Bernato already knows him.

77. Bernato admits in his declaration that there was no insurance coverage. Defense Exhibit , ECF No. 823-25, at ¶ 12

78. Complaint ¶ 205 reads: “On June 5, 2018, LaForte also told a potential investor in Maryland that if a merchant defaulted on his loan, Par Funding had insurance to back up investor funds, thus reassuring the investor that her investment was safe and secure.” [ECF No. 119 at ¶ 205 (emphasis added)].

79. Mr. Bernato’s declaration that Mr. LaForte’s *June 5, 2018* representation (ECF No 119 at ¶ 205) was true and that he had secured this insurance for Par Funding by then is false, as he was

not even involved then. (823-25 at ¶¶ 5-6; Exhibit 6, Memorandum from Par Funding CCO to Joseph LaForte and Joseph Cole Barleta (“In *November of 2018*, CBSG was referred by ROC Funding to an insurance broker named Anthony Bernato who claimed to have developed a new set of policies that cover the Advance Factoring/Merchant Cash Advance sector through Euler Hermes, a major international insurance carrier.”) (emphasis added).

80. Complaint ¶ 206 reads: “At an event in Florida to solicit investors in RE Income Fund 2 in August 2019, Abbonizio told potential investors that Par Funding’s merchant loans were insured.” [ECF No. 119, at ¶ 206].

81. Mr. Bernato’s claim that Mr. Abbonizio told the truth when he made this August 2019 representation set forth in proposed Fact 80 (823-25 at ¶¶ 5-6) is belied by the evidence. [Exhibit 6 hereto; ECF No 290-14, TRO Exhibit 230 (June 21, 2019 cease and desist letter from insurance company to Par Funding)].

82. By no later than July 2019 (before the Abbonizio representation), Par Funding knew the insurance policy Bernato sold them did not cover their type of business at all [ECF No 290-18 (TRO Ex 234), Declaration of Par Funding Compliance Director Ben Mannes, at ¶¶ 1-6 & Exhibit A thereto]. This fact was discussed with Mr. Abbonizio. *Id.* at ¶¶ 1-5; Exhibit 6 hereto].

83. LaForte touted the success of Par Funding generally, telling about 300 potential investors that “we had such success over the years, it's been -- it's been a big grind to make sure that your capital is safe.” [Exhibit 10 hereto (TRO Exhibit 20) at pdf p 58, Lines 15-17]. He did not disclose that Par Funding was sanctioned twice for raising this investor capital. *Id.*

84. In this same presentation, Mr. LaForte touted the success of Par Funding and linked it directly to there being *no restrictions* on the capital Par Funding raised from investors:

Our success has been being able to innovate and create products ***without covenants and restrictions on our capital***. And you guys have helped us do that. Most institutions -- as Dean pointed out -- we have good institutions to get capital. We could have done it. We could have done it several times. We could do it tomorrow. We choose not to. We choose to work with you because you understand the fact that we can do what we need to do, and Dean [Vagnozzi] could come to us, and we could talk about corporate policy in a way that's outside the scope of what Dean talks about -- outside of Wall Street, outside of different types of investments.

Id. at pdf p 59, Lines 8-20.

85. Par Funding was sanctioned twice for violating the laws that place restrictions concerning raising capital from investors. ECF No. 20-6, 20-7.

86. By November 2019, Dean Vagnozzi had been sanctioned by Pennsylvania securities regulators for violating the securities law in connection with raising capital for Par Funding [ECF No. 24-8, Cease and Desist Order entered against Vagnozzi].

87. During the November 2019 dinner set forth in proposed fact 84, LaForte did not disclose the regulatory actions set forth in proposed facts 85 and 86. [TRO Exhibit 20, attached hereto for the Court's convenience at Exhibit 10].

88. LaForte admits the MCA deals are not merchant cash advances. [ECF No. 816-10 at pdf 50, transcript page 16:1-12].