UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 9:20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.
_____/

DEFENDANT DEAN VAGNOZZI'S
OPPOSITION TO SEC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant DEAN VAGNOZZI (hereinafter "Defendant" or "Vagnozzi"), by and through his undersigned counsel, hereby responds to Plaintiff Securities and Exchange Commission's ("SEC") Motion for Partial Summary Judgment [Dkt. 817], and respectfully states as follows:

INTRODUCTION

The issue presented with regard to summary judgment as to Vagnozzi is very narrow – is there any genuine issue of material fact as to the SEC's allegations in Count VII of its Amended Complaint that Vagnozzi violated Section 5 of the Securities Act of 1933 by engaging in an unregistered offering that should in fact have been registered?

No other issues are on the table now. The SEC's fraud and negligence claims against Vagnozzi are not at issue in this motion. Whether he made any misrepresentations or omissions is not at issue yet – he did not, of course. Nor is whether Vagnozzi acted with scienter – again, he did not of course, as will be demonstrated at trial by his complete reliance on his counsel, among other facts.

And to be clear, the issue presented now is not merely whether Vagnozzi engaged in an unregistered offering. There is no dispute that the complained-of offerings conducted by Par Funding, ABFP Income Fund I, and ABFP Income Fund II were not registered with the SEC. But as much as the SEC would try to have this Court believe that is the end of the inquiry, that is untrue. That is because, if an offering of securities is exempt from registration pursuant to Section 4 of the Securities Act, then by definition there is no violation of Section 5.

The SEC recognizes this fact in its Amended Complaint. Paragraph 287 alleges that, with respect to the offerings at issue, "[n]o registration statement was filed or in effect with the Commission . . . and no exemption from registration existed with respect to these securities and transactions."

But in its summary judgment motion, the SEC barely makes a whisper about this critical factual and legal inquiry necessary for it to win on Count VII as pled. A scant four lines discuss the issue of exemption from registration under Section 4. Even then, the SEC attempts to brush this under the table by arguing that Defendants have the burden to prove an exemption.

The SEC completely misses the ball on this issue. The SEC is asking this Court to grant the extraordinary remedy of summary judgment against the Defendants in this case on a critical issue in the case without even attempting to argue the absence of genuine issue of material fact on that point. One wonders why the SEC would take this approach.[1]

That is not how summary judgment works. The SEC pled in its complaint that "no exemption from registration existed." It was up the SEC to prove that there no genuine issue of material fact on that question in its initial motion. They did not.

[1] It also bears noting that granting summary judgment to the SEC on Count VII of eight counts in the Amended Complaint would not actually streamline trial.

Unsurprisingly, given that the SEC chose to ignore the question, there are numerous genuine issues of material fact as to whether an exemption from registration existed. We will explain how registration of securities offerings under the Securities Act operates and demonstrate that the evidence presented on summary judgment does not eliminate all issues of fact.

This Court must deny the SEC's motion for summary judgment against Vagnozzi.

STATEMENT OF FACTS

The facts opposing summary judgment against Vagnozzi are set forth in Vagnozzi's accompanying Local Rule 56.1 Statement of Disputed Facts in Opposition to SEC's Motion for Summary Judgment ("Rule 56.1 Stmt.") and the Declaration of Dean Vagnozzi in Opposition to SEC's Motion for Partial Summary Judgment ("Vagnozzi Decl.").

As set forth in more detail in Vagnozzi's Local Rule 56.1 Statement and below, what the SEC alleges in its improper (corrected after-the-fact) 19-page Local Rule 56.1 statement in support of summary judgment (1) is completely irrelevant to Vagnozzi, (2) is irrelevant to the SEC's Section 5 registration claims, or (3) fails to establish that Vagnozzi's participation in the offering of securities constituted a non-exempt offering in violation of Section 5.

ARGUMENT

I. AN OVERVIEW OF REGISTRATION UNDER THE SECURITIES ACT OF 1933.

First, a brief primer on how the registration provisions of the Securities Act operate.

- If one sells a security using interstate commerce, every offering must be registered with the SEC, or be exempt from registration.
- Section 5 makes it unlawful to sell a security without a registration statement being in effect. 15 U.S.C. § 77e.

- But, in its summary judgment motion, the SEC glosses over the most practical aspect of the Securities Act, which is contained in Section 4 of the Act. 15 U.S.C. § 77d. Section 5 states a general sweeping rule, but Section 4 provides that vast categories of securities offerings are offerings to which, as stated in the preamble of Section 4, "the provisions of Section 5 will not apply." *Id.*
- For example, Section 4(a)(1)[2] exempts the sale of a security by anyone other than an "issuer, underwriter, or dealer." If you or I were to sell a share of Apple stock on the New York Stock Exchange, that transaction would be unlawful by its terms under Section 5. But Section 4(a)(1) provides that the categorical prohibition in Section 5 simply does not apply to our sale of Apple stock.
- The next important exemption (and the one that is applicable here) is contained in Section 4(a)(2). That section exempts from the ambit of Section 5 any sale of a security "by an issuer not involving any public offering." 15 U.S.C. § 77e(a)(2). This is often referred to as a "private placement." So long as there is no "public offering" of the securities, then registration is <u>not</u> required and there is <u>no</u> violation of Section 5.
- The SEC also has adopted detailed rules regarding a safe harbor for how offerings can be conducted as a private placement under Section 4(a)(2), which is called Regulation D. 17 C.F.R. § 230.501 *et seq.* As applicable here, Rule 506 of Regulation D provides an exemption for sales of securities with no dollar limitation,

[2] Section 4 of the Securities Act was renumbered in recent years to add a subjection (b). The prior substance of Section 4 was re-codified as subsection (a). For that historical reason, most securities practitioners, and many courts (especially older cases) will refer to current Section 4(a)(1) as "Section 4(1)," and current Section 4(a)(2) as "Section 4(2)."

provided that the offering meets the conditions of Rule 506. As most relevant to the allegations against Vagnozzi, Rule 506(b) exempts an offering from Section 5 if the offering has no more than 35 purchasers who are "unaccredited investors" and the securities were not sold "by any form of general solicitation." 17 C.F.R. § 230.506(b). If all investors in the offering are in fact "accredited investors," then Rule 506(c) would apply and there would be no restriction on the number of investors and no prohibition against general solicitation.

- Finally, the securities laws include a concept called "integration," by which some distinct offerings of the "same or a similar class" of the issuer's securities may be considered part of the same offering. The SEC has adopted rules that recognize this analysis "depends on the particular facts and circumstances." 17 C.F.R. § 230.502(a). The SEC also recently adopted Rule 152 which provides more guidance on when offerings may be "integrated." 17 C.F.R. § 230.152.

II. SUMMARY JUDGMENT STANDARD.

Summary judgment is appropriate only when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 407 U.S. 317, 322 (1986). The moving party bears the burden of meeting this exacting standard. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In applying this standard, the evidence -- and all reasonable factual inferences which can be drawn from that evidence -- must be viewed in the light most favorable to the non-moving party. *See Arrington v. Cobb County*, 139 F.3d 865, 871 (11th Cir. 1998). In this case, the SEC's motion for summary judgment must be denied, because Vagnozzi has sufficiently demonstrated that there are genuine issues of material fact that require a trial on Count VII. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 248 (1986). It is not the court's role to weigh conflicting evidence or to make credibility determinations; the non-movant's evidence is to be accepted for purposes of summary judgment." *See Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996).

III. THE SEC MUST DEMONSTRATE NO GENUINE ISSUE OF MATERIAL FACT ON ITS SECTION 5 CLAIMS IN COUNT VII.

In order to establish a *prima facie case* for a violation of Section 5 of the Securities Act, "the SEC must demonstrate that (1) the defendant directly or indirectly sold or offered to sell securities; (2) through the use of interstate transportation or communication and the mails; (3) when no registration statement was in effect." *SEC v. Calvo*, 378 F.3d 1211, 1214–15 (11th Cir. 2004). Courts have recognized "participant liability," under which anyone who was a "necessary participant" and a "substantial factor" in the transaction may be held liable. *Id.* This standard requires the SEC to demonstrate that a defendant was *more than* a "but for" cause of the unlawful sale. *See SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1255 (9th Cir. 2013); *see also SEC v. Genovese*, 2021 WL 1164654, *3 (S.D.N.Y. Mar. 26, 2021) ("not every individual in the causal chain is a necessary participant" within the meaning of Section 5).

Vagnozzi does not dispute the existence of the second and third prongs of the SEC's *prima facie* case. With regard to the offerings by ABFP Income Fund LLC ("ABFP Income Fund I") and ABFP Income Fund II LLC ("ABFP Income Fund II"), Vagnozzi does not dispute the first prong of the test either. However, with regard to his alleged role in the offering during the "Finders' Fee" phase, I which Par Funding – not Vagnozzi or any of his entities – issued promissory notes directly to noteholders, Vagnozzi does dispute the first prong.

Finally, as noted above, the analysis of the SEC's *prima facie* case under Section 5 and *SEC v. Calvo* is not the end of the inquiry of course. The SEC has alleged in paragraph 287 of the

Amended Complaint that Section 5 was violated because no exemption was available. Therefore, the SEC also must show an absence of disputed fact on that issue.

III. THERE EXIST GENUINE ISSUES OF FACT WHETHER VAGNOZZI VIOLATED SECTION 5 OF THE SECURITIES ACT.

For the SEC to win summary judgment against Vagnozzi, its summary judgment motion needed to establish that there is no genuine issue of material fact that Vagnozzi violated Section 5. The motion fails to do so.

A. THE SEC HAS NOT MET ITS BURDEN UNDER RULE 56.

It is not enough for the SEC to declare through fiat that "having met its burden, the burden shifts to the Defendants to prove the securities qualified for a registration exemption." SJ Motion at 10. While that may (or may not) be the case at trial, it certain is not the case at summary judgment. The SEC cannot win summary judgment when the totality of its argument on this critical point consists only of twenty-one words in a brief: "[T]here is no evidence in the record to demonstrate that any exemption applies, and therefore the Defendants cannot meet their burden." *Id.* This argument stands summary judgment jurisprudence on its head. It is the SEC's burden under Rule 56 to establish the absence of a genuine issue of material fact; not just to declare that there is no evidence in the "record" to demonstrate that an exemption applies. *See Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) ("[e]ven after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial."). "Instead, the moving party must point to specific portions of the record in order to demonstrate that the nonmoving party cannot meet its burden of proof at trial." *See United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1438 (11th Cir. 1991).

Similarly, courts have denied summary judgment where a movant fails to address the entirety of a burden-shifting framework, and thereby fails to demonstrate the absence of any

genuine issue of material fact on the defendant's arguments. *See, e.g., Gist v. TVA Bd. of Dirs.*, 2010 WL 2465484 *4 n. 4 (E.D. Tenn. June 14, 2010) (denying motion for partial summary judgment in employment discrimination case because the court "cannot address the rest of the burden-shifting framework on the Motion before it"; movant did not assert legitimate, non-discriminatory reason for the hiring until reply brief; court found it would be "improper to assess a Motion for Partial Summary Judgment with the benefit of Defendants' asserted legitimate nondiscriminatory reason, but without any evidence of pretext from Plaintiff").[3]

Without even beginning to address factual issues regarding the existence of an exemption from registration under Section 4(a)(2) or Regulation D, there is no way the SEC can ever win summary judgment. *See SEC v. Tuchinsky*, No. 89-6488, 1992 WL 226302, at *5 (S.D. Fla. June 29, 1992) (finding "the Commission has not demonstrated the presence of facts in the record which would indisputably establish the unavailability of an exemption"); *SEC v. N. Am. Acceptance Corp.*, No. C75-230A, 1978 WL 1130, at *6 (N.D. Ga. Nov. 7, 1978) (finding that the SEC failed to demonstrate that there were no triable issues of material fact as to whether the defendants' affirmative defenses applied to Section 5(a) and 5(c)). And it is too late now. The SEC cannot cure this deficiency.

[3] As noted, the SEC affirmatively alleged in its Amended Complaint that "no exemption from registration existed." Am. Compl. ¶ 287. As a result, Vagnozzi did not assert an affirmative defense of exemption. To the extent the SEC argues, or the Court believes that this issue is more properly in the nature of an affirmative defense, Vagnozzi would respectfully request leave to amend his Answer to assert that affirmative defense. Such leave should be freely granted because there is absolutely no prejudice to the SEC given that it raised the issue of exemption in its pleading.

B. THERE EXIST GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER VAGNOZZI'S OFFERINGS WERE EXEMPT PRIVATE PLACEMENTS UNDER REGULATION D AND SECTION 4(a)(2).

The SEC itself has made clear that whether a securities offering qualifies as an exempt private placement is an inherently factual question. Going back almost sixty years, the SEC stated:

> Whether a transaction is one not involving any public offering is essentially a question of fact and necessitates a consideration of all surrounding circumstances, including such factors as the relationship between the offerees and the issuer, the nature, scope, size, type and manner of offering.

SEC Rel. No. 33-4552 (Nov. 6, 1962). That sage guidance still applies today, and is what this Court should consider in evaluating the SEC's claims here.

Even though the SEC ignores the issue, it is clear that Vagnozzi's offerings of securities were intended to be exempt private placements under Regulation D and Section 4(a)(2). When Vagnozzi sold interests in ABFP Income Fund I and II, he engaged experienced securities counsel (in fact, a former SEC lawyer) from the Eckert Seamans law firm in Philadelphia. Pennsylvania, John Pauciulo to instruct him how to conduct the offering. Vagnozzi Decl. ¶¶ 5-6. Pauciulo prepared and filed a Form D with the SEC stating that the offerings were exempt under Rule 506(b). *Id.* ¶ 2; *See also* Exhibits 50 and 52 referenced in the SEC's Notice of Filing [Dkt. No. 820] ("SEC Exs.").

Those Form Ds on their face demonstrate compliance with Rule 506(b) by indicating that each offering had 35 or fewer unaccredited investors. As a matter of fact, there were a total of only 35 unaccredited investors in both offerings combined. *Id.*

These Form Ds submitted by the SEC as part of its summary judgment papers alone create a genuine issue of material fact that the offerings were in fact exempt private placements under Rule 506(b) and Section 4(a)(2). *See, e.g., SEC v. Webb*, No. 11-C-7152, 2019 WL 1454532, at *6 (N.D. Ill. Apr. 2, 2019) (denying summary judgment where genuine issues of material fact

existed as to "whether regulation D's exemption from registration applied to the issuer's offer and sale of securities").

It also is disputed whether Vagnozzi engaged in a "general solicitation" that would destroy the applicability of an exemption under Rule 506(b) for his offerings. In actuality, Vagnozzi was extremely careful not to engage in such a general solicitation. *See* Vagnozzi Decl. ¶¶ 5-6, 13-18. Rule 502(c) describes the prohibition on general solicitation. It prohibits offering or selling "*the securities* by any form of general solicitation or general advertising." 17 C.F.R. § 230.502(c) (emphasis added).[4]

The SEC has presented absolutely no evidence that Vagnozzi sold any interests in ABFP Income Fund I or II by "any form of general solicitation or general advertising." Their summary judgment brief does not even address the issue. The SEC's Rule 56.1 statement attempts to address this, but arguing that he advertised the investment through "radio, television ads, the Internet, the Facebook page for ABFP, one-on-one presentations at the ABFP office, and dinner seminars." SEC 56.1 Stmt. ¶ 65.

First, it is hard to see how a "one-on-one presentation" could ever be considered a general solicitation.

Second, the SEC actually proffered no real evidence that Vagnozzi ever specifically advertised the "securities." That is because he did not. Let us be clear, Vagnozzi did advertise his business. Yes, he did testify that he spent a lot of money on advertising. But nowhere does the SEC point to any advertising of specific securities. There is absolutely nothing wrong with an investment advisor, broker, or insurance professional advertising his services and the general

[4] Many commenters have suggested that the SEC should eliminate the "general solicitation" prohibition because it is too cumbersome. For example, Congress recently curtailed this concept in Section 201(a) of the JOBS Act.

nature of what he does. That happens every day. The SEC can point to no rule that prohibits such advertising, under Rule 502 or otherwise.

The Vagnozzi Declaration makes clear that his advertising was all general, and was extremely careful (based on his lawyer's instructions and advice) not to discuss specific securities. *See* Vagnozzi Decl. ¶ 14. This alone is more than sufficient to establish a genuine issue of material fact. The Vagnozzi Declaration also describes the process of vetting new clients and that they are not sold securities in an initial setting. *Id.* ¶¶ 17-18. The evidence submitted by the SEC is consistent with this fact. The SEC submitted recordings and affidavits from people who did not purchase securities at an initial meeting.

Third, the SEC's proffered evidence regarding alleged dinner seminars does not establish summary judgment. The SEC points to vague SEC testimony in another investigation about prior seminars for the sale of life settlement investments, which have nothing to do with Par Funding. The only specific "seminars" offered by the SEC consist of a November 2019 dinner and a proposed March 2020 dinner. The Vagnozzi Declaration establishes that Vagnozzi invited current clients to the November 2019 dinner. That can hardly be considered a "general solicitation." *See* Vagnozzi Decl. ¶¶ 19-23. Perhaps more important, this dinner post-dates by more than one year the offerings that the SEC alleges in its Amended Complaint constituted Vagnozzi's unregistered offerings, so they could not be considered even a solicitation – let alone a general solicitation – with respect to the alleged unregistered offerings pled in Count VII.

The SEC's proffered evidence regarding a proposed March 2020 dinner event fares no better. First, that dinner never even happened due to the pandemic. So what is the SEC left with? Vagnozzi sent an email to five people (financial professionals) with whom he had a previous professional relationship. And in that email he asked them to invite people they already "know."

See Vagnozzi Decl. ¶¶ 25-26. While the SEC might not like Vagnozzi's exuberance about the Par Funding investment that he thought was a fantastic investment (because it was; Par Funding had consistently delivered double-digit returns for Vagnozzi's clients), that exuberance and colorful language cannot turn a private email to five people for an event that never happened into a "general solicitation."

Even if the offerings did not comply with Rule 506(b) (and at a minimum there is a genuine issue of material fact as to that issue), the offerings still should be deemed exempt as private placements under Section 4(a)(2) of the Securities Act. *See Faye L. Roth Revocable Trust v. UBS PaineWebber, Inc.,* 323 F. Supp. 2d 1279, 1297-98 (S.D. Fla. 2004) ("if a court cannot use the clarifying and unifying Regulation D… in determining whether an offering is exempt, an alternate route [is] obtaining Section 4(2) exempt status"); *SEC v. Life Partners, Inc.*, 912 F. Supp. 4, 10 912 F. Supp. 4, 10 (D.D.C. 1996) ("when an issuer tries to comply with Rule 506 but fails, the issuer may still rely on the statutory exemption of section 4(2)").

With regard to the "Finders' Fee" phase in which Par Funding directly sold promissory notes to noteholders, Vagnozzi was not the "issuer" of those securities. While he acted as a finder, that mere fact alone as cited by the SEC is insufficient to establish liability as a matter of law. Vagnozzi was not a "necessary participant" and a "substantial factor" in those offerings, as necessary to satisfy the first element of a Section 5 claim. This "usually involves a question of fact for the jury." *SEC v. Jammin Java Corp.*, 2016 WL 6595133, *15 (C.D. Cal. July 18, 2016) (citation and quotation omitted).

In its summary judgment papers, the SEC fails to set forth any facts to establish that Vagnozzi was a "necessary participant" or "substantial factor" in the Par Funding offering. Vagnozzi did not work at Par Funding or have any role there. *See* Vagnozzi Decl. ¶ 4. All the

SEC argues is that he had a contract with Par Funding to be compensated for any individuals he introduced to Par Funding, and that Vagnozzi allegedly "located and solicited" investors. *See* SEC 56.1 Stmt. ¶¶ 18, 37; SEC SJ Br. At 9. Vagnozzi did not work for Par. *See* Vagnozzi 56.1 Stmt. ¶ 18. That is not enough to eliminate all issues of material fact. These bare-bones allegations do not come close to establishing that he was "necessary" or that he was a "substantial factor" in the offering, and at a minimum create issues of fact precluding summary judgment. *See SEC v. Mapp*, 2017 WL 5177960 (E.D. Tex. Nov. 8, 2017) (denying summary judgment notwithstanding that founder of computer hardware company was "responsible for the fundraising campaign and had signatory authority over . . . bank accounts," hosted in-person presentations for investors, and provided a private placement memorandum to them); *SEC v. Universal Express, Inc.*, 475 F. Supp. 2d 412, 435–36 (S.D.N.Y. 2007) (denying summary judgment on Section 5 claim against defendant investment advisor because, even though SEC offered "abundant" evidence that he had orchestrated the sale of the unregistered shares, defendant pointed to "some evidence that could support a contrary conclusion").

Finally, Vagnozzi also relies on the arguments set forth by Defendants LaForte, Cole, and McElhone regarding whether the offering of notes directly by Par Funding constituted an exempt offering, and the genuine issues of material fact presented thereby.

C. THERE EXIST GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER VAGNOZZI'S OFFERINGS WOULD BE "INTEGRATED."

Consistent with its approach to summary judgment, the SEC completely ignores the concept of "integration" under Regulation D and the securities laws. However, Vagnozzi will briefly address that issue as a preemptive matter.

Regulation D addresses integration. In essence, this doctrine sometimes can result in different offerings being combined together and thereby destroy a private placement exemption,

perhaps by exceeding the number of permitted offerees or integrating a private offering with an offering that involved a public or general solicitation. *See also* 17 C.F.R. § 230.152(a) ("offers and sales will not be integrated if, *based on the particular facts and circumstances*, the issuer can establish that each offering either complies with the registration requirements [or is exempt]." (emphasis added)

First, Rule 502(a) provides a safe harbor for offerings that are made more than six months after completion of another Regulation D offering. Clearly Vagnozzi's offering of equity interests in ABFP Income Fund II were made more than six months after the end of the "Finders' Fee" era. *See* Vagnozzi Decl. ¶ 2. So those offerings fall within the safe harbor and the SEC would not be entitled to "integrate" them.

Second, for offerings that do not qualify for the safe harbor, Rule 502 provides that certain factors should be considered to determine if integration is appropriate:

(a) whether the sales are part of a single plan of financing;

(b) whether the sales involve issuance of the same class of securities;

(c) whether the sales have been made at or about the same time;

(d) whether the same type of consideration is being received; and

(e) whether the sales are made for the same general purpose.

17 C.F.R. § 230.502(a).

It is clear that genuine issues of material fact exist regarding integration. The three discrete offerings complained of by the SEC clearly did not "involve issuance of the same class of securities" under the second factor. Par Funding promissory notes are different from the promissory notes issued by ABFP Income Fund I, and both are definitely different from the equity interests issued by ABFP Income Fund II. ABFP Income Fund II did not even offer debt securities

at all, and also included a separate 20% investment in publicly traded securities of a company called FS Investment Corp. *See* Vagnozzi Decl. ¶ 6.[5]

In fact, the SEC makes much in its complaint about the fact that the defendants allegedly "restructured its offering" in 2018, and that "things changed." *See* Am. Compl. ¶¶ 62-66. The SEC's own allegations establish that the offerings actually were different, and the SEC could not win summary judgment in the face of these inconsistent allegations. This was not "part of a single plan of financing." As mentioned above, the timing of the two offerings also was different. In short, to the extent the SEC attempts to argue that there is no exemption available because the various offerings should be "integrated," its own allegations of three distinct phases and the facts marshalled on summary judgment create genuine issues of material fact regarding that subject.

D. THE SEC HAS NOT ADDRESSED VAGNOZZI'S AFFIRMATIVE DEFENSES THAT COULD DEFEAT SUMMARY JUDGMENT ON COUNT VII.

Finally, Vagnozzi raised numerous affirmative defenses in his Second Amended Answer [Dkt. No. 712]. While admittedly not every such defense would go to Count VII, it is clear that Vagnozzi's affirmative defense of Estoppel would apply. Vagnozzi was previously investigated by the SEC for the exact same conduct alleged here, and reached a settlement with the New York office in July 2020. *See* Vagnozzi Decl. ¶ 27. In fact, as we have repeatedly pointed out to the Court, much of the evidence submitted against Vagnozzi comes from that investigation. And this summary judgment motion is no different. The SEC points to Vagnozzi's testimony in that investigation to support summary judgment, and to documents he produced in that investigation to support summary judgment. However, the SEC has done absolutely nothing to negate

[5] Moreover, there were only a total of 35 unaccredited investors in ABFP Income Fund I and II combined, so even if those offerings were integrated, the Rule 506(b) exemption still would be available. At a minimum there is a genuine issue of material fact.

Vagnozzi's affirmative defense of estoppel, which creates genuine issues of material fact that would completely preclude granting summary judgment in the SEC's favor.

CONCLUSION

For the reasons stated herein, this Court should deny the SEC's motion for partial summary judgment against Vagnozzi under Count VII of the Amended Complaint.

Dated: October 28, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2021, a true and correct copy of the foregoing brief was served via the Court's CM/ECF System upon all counsel of record.

/s/ Brian P. Miller
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