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
______________________________________/

PLAINTIFF'S RESPONSE TO DEFENDANTS JOSEPH COLE BARLETA, LISA MCELHONE, AND JOSEPH LAFORTE'S MOTION FOR PARTIAL SUMMARY JUDGMENT[1]

The Court should deny Defendants' Motion for Partial Summary Judgment for the reasons set forth below. For the Court's convenience, this Response tracks Defendants' headings and arguments in the order in which Defendants make them in their Motion.

Because Defendants' Motion does not cite to their Statement of Facts, the Response does not cite to them unless it was clear which Fact Defendants might meant to cite.

1. The Defendants Fail To Demonstrate That "The SEC Cannot Establish That Defendants Made a Materially Misleading Omission Regarding the Cease-and-Desist Orders Issued by Pennsylvania and New Jersey." [ECF No. 804 at II(A)(1)]

Defendants present two arguments in support of their contention that the SEC cannot establish that they made a material omission about Par Funding's regulatory history, each of which fails as a matter of law and fact.

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[1] After the summary judgment motion deadline, without seeking any enlargement of time or permission from the Court, and without filing any memorandum of law, motion, argument, or statement of undisputed facts, Defendants Michael Furman, Perry Abbonizio, and Dean Vagnozzi filed "Notices of Joinder" announcing they join in the Defendants' Motion for Summary Judgment. The Defendants' Motion defines "Defendants" as Barleta, McElhone, and LaForte [ECF No 804 at 2] and does not seek summary judgment on any claim against Furman, Abbonizio, or Vagnozzi. Therefore, we do not respond to any motion for summary judgment as to Furman, Abbonizio, or Vagnozzi, as no argument was made and no facts presented for such relief in the Defendants' Motion, ECF No. 804.

First, Defendants argue that the fraud claims against them fail as a matter of law because the SEC has no evidence that Par Funding's regulatory history has any connection to or impact on its financial performance, and thus the Defendants had no duty whatsoever to disclose the regulatory history. (ECF No. 804 at 2). The Defendants made this same argument in their Motion to Dismiss [ECF No. 363 at 18-20], and the Court rejected it [ECF No. 583]. In rehashing this argument and essentially seeking an untimely motion for reconsideration, the Defendants present no additional argument and no evidence whatsoever.[2] They fail to even identify that they raised this argument previously in a Motion the Court denied. The Court should reject the argument now, as it did before.

The Complaint alleges that the Defendants "tout[ed] Par Funding while failing to disclose that Par Funding has twice been sanctioned for violating state securities laws" [ECF No. 119 at ¶ 227]; and provides some examples, *id.* at ¶ 220-232. While the Defendants cite no evidence in support of their argument, one need look no further than the evidence filed at the outset of this case for a prime example of evidence supporting the undisputed fact that LaForte, directly on behalf of Par Funding, touted the success of Par Funding while omitting the regulatory history.[3] For

[2] The Defendants rely on the same case they cited in their Motion to Dismiss, *Fries v. Oil & Gas, Inc*., 285 F. Supp. 3d 706, 719 (S.D.N.Y. 2018) – a case that is wholly inapposite. In *Fries*, the Court found that a defendant lacked a duty to disclose his uncharged criminal conduct. Those are not the facts of this case. This case involves multiple state cease-and-desist orders against Par Funding for its securities law violations and alleges the Defendants touted Par Funding while failing to disclose this regulatory history to potential investors. As the Court previously explained in the Order denying the Motion to Dismiss, the existence of a state cease and desist order is clearly relevant to a reasonable investor, who is naturally interested in whether management is following the law in marketing the securities. *See, e.g.*, *SEC v. Merchant Capital, LLC* 483 F.3d 747, 771 (11th Cir. 2007) (finding clear error where district court failed to find omission material because "[t]he existence of a state cease and desist order against identical instruments is clearly relevant to a reasonable investor, who is naturally interested in whether management is following the law in marketing the securities"); *SEC v. Physicians Guardian Unit Inv. Trust,* 72 F.Supp.2d 1342, 1351 (M.D.Fla. 1999) (allegation that promoter failed to disclose existence of state cease and desist order supported securities fraud claim); *SEC v. Paro,* 468 F.Supp. 635, 646 (N.D.N.Y. 1979) (material omission when failed to disclose cease and desist orders entered by federal and state courts against similar predecessor interests).

[3] The SEC has alleged LaForte violated the federal securities laws directly, and that LaForte and McElhone are liable for Par Funding's violations as control persons. Accordingly, this example is relevant to each of those claims. Because Defendants cite no evidence and make a purely legal

example, at the November 2019 investor presentation – which was videotaped, recorded, and transcribed – LaForte touted the success of Par Funding to 300 potential investors and investors and cited in the same breath the fact that there are supposedly no restrictions on the capital Par Funding raises from investors.[4] Of course, there are restrictions on raising investor capital. One restriction is the securities laws. Yet, LaForte not only falsely claimed there were no such restrictions, but tied it directly to Par Funding's success and then omitted the fact that two separate state regulatory organizations had already sanctioned Par Funding for violating securities laws in connection with raising investor capital.[5] The bottom line is this – the Court rejected the legal argument previously, Defendants assert nothing new, and they do not and cannot meet their burden from preventing a jury from hearing the evidence and deciding whether or not it is a material omission.

Second, the Defendants argue that the Court should find they did not act with scienter in connection with their failure to disclose Par Funding's regulatory history because Par Funding had an outside attorney, Philip Rutledge, and Mr. Rutledge drafted note purchase agreements for Par Funding and never told them to disclose any regulatory history (Motion at 2-3). This argument fails for at least five reasons.

i. While Defendants have pleaded as an affirmative defense reliance on the advice of counsel, to establish this defense, Defendants must show they: (1) completely disclosed the facts to the attorney; (2) sought advice as to the legality of the conduct; (3) received advice that the conduct was legal; and (4) relied on and followed the advice in good faith. *SEC v. Huff*, 758 F. Supp. 2d 1288, 1349 (S.D. Fla. 2010). Defendants neither argue nor present any evidence as to any of these elements, and no Defendant even claims let alone presents evidence that they sought legal advice concerning this disclosure [ECF No. 804]. In fact, as set forth in the SEC's Motion for Summary Judgment and Statement of Facts thereto, McElhone admits that Par Funding never sought legal advice as to whether or not to disclose Par Funding's regulatory history.[6]

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argument on this issue, the SEC is not required to present any counter-evidence on this issue here (because there is nothing to counter).

[4] Facts 83-87.

[5] *Id*.

[6] [ECF 816-4 at Paragraph 6].

Accordingly, the Court cannot grant summary judgment.

ii. The Court must deny summary judgment because the Defendants are asking the Court to weigh evidence by considering that a lawyer was purportedly silent and mentioned that the Pennsylvania Order would be public, and then to judge whether or not the Defendants reasonably relied on that silence and reasonably assumed that if the Order was public then they did not need to disclose it. They ask the Court to find that it would have been "illogical" for them to conceal a public Order (Motion at p.3). Obviously, these are not undisputed facts in the case, but conclusions about evidence the Defendants are asking the Court to make – rendering these arguments improper on summary judgment. *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003) (The Court cannot weigh the evidence or make findings of fact on summary judgment).[7]

iii. The evidence cited by the Defendants provides only half the story by providing selective excerpts of Mr. Rutledge's deposition testimony while omitting key portions of his testimony that obliterate the very arguments Defendants are contorting Mr. Rutledge's words in order to make. As set forth in Facts 37, 47, and 61-75, Mr. Rutledge testified that:

- Par Funding hired him sporadically, on an as-needed basis between 2018 and 2020. He was not outside general counsel, was not hired to monitor Par Funding, and was not on a continuing retainer with Par Funding.

- Par Funding hired Mr. Rutledge to draft one note purchase agreement (which is not a disclosure document) in 2018 – *before* the first regulatory Order was entered against Par Funding. In other words, there was no regulatory history to disclose yet.

- In 2018, while defending Par Funding in the Pennsylvania securities regulators' investigation, and before any Order was entered, Mr. Rutledge advised the Defendants in writing

[7] Even the case Defendants rely on, *In the Matter of Donald F. Lathen, et al.*, Release No. 1161, 117 S.E.C. Docket 1733, 2017 WL 3530992 (August 17, 2017), is an Administrative Order entered following the presentation of evidence at the Final Hearing (the equivalent of a trial in an Administrative Proceeding). This case also does not hold that silence of an attorney negates scienter as a matter of law. Instead, the facts in *Lathen* were unique and inapposite to the present case. In *Lathen*, the issue was whether the Respondent falsely represented that this business model was legal, and the SEC found he reasonably believed his representation was true because lawyers created the business model for him, and affirmatively told him it was legal and that he did not need to make further disclosures about the possibility that it was not legal. 2017 WL 3530992, at 47. That is clearly inapposite to this case, where there is no allegation that Defendants made misrepresentations about a fact counsel advised them was true but turned out to be false, and where there is no evidence that any attorney told the Defendants they did not need to disclose facts.

that if Pennsylvania entered an Order against Par Funding then it could give rise to a disclosure requirement.

- After Mr. Rutledge advised Par Funding of this disclosure issue, Par Funding did not hire Mr. Rutledge to draft its disclosure documents in 2018 or 2019.

- Had Par Funding hired Mr. Rutledge to draft its disclosure documents in 2018 or 2019 (after a regulatory Order was entered), then he would have advised Par Funding to disclose the regulatory history.

- Par Funding did not hire Mr. Rutledge again or hire him to draft any disclosure document until 2020 – after Par Funding was caught defrauding investors for failing to disclose its regulatory history.

- Specifically, Par Funding hired Mr. Rutledge in 2020 after the Texas securities regulators entered an Emergency Cease-and-Desist Order against Par Funding, alleging securities fraud for, among other things, failure to disclose the Pennsylvania and New Jersey regulatory actions against Par Funding.

- Now, having been caught, Par Funding hired Mr. Rutledge to draft disclosure documents to disclose the Pennsylvania and New Jersey Orders against Par Funding - and finally, and for the first time ever, *some* investors were provided these disclosures that should have been made all along. It was *April 2020*, when Par Funding offered the so-called Exchange Offering.

- Prior to the Exchange Note offering of April 2020, Par Funding had never asked Mr. Rutledge to draft any disclosures whatsoever – arguably, because the Defendants knew what his answer would be and wanted to avoid disclosure.

These facts provide evidence of the Defendants' scienter demonstrating there is a material issue in dispute, because once Mr. Rutledge advised them the regulatory Order might trigger disclosure requirements the Defendants stopped retaining him and did not retain him again for two years, after they had been caught by the Texas regulators for concealing these facts and were forced to disclose them. Again, this is an issue for the jury to decide after weighing the evidence and assessing the Defendants' credibility. Further, since McElhone and LaForte are asserting the Fifth Amendment, there is no evidence of what they actually believed or relied on; instead, they improperly ask the Court to guess on summary judgment.

iv. As set forth in the Response to the Defendants' Statement of Facts, many of the Defendants' facts are not supported by the evidence Defendants cite.[8]

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[8] For example, the Defendants claim that Rutledge "repeatedly advised Cole that Defendants had no duty to make disclosures to their accredited investors." (Motion at p3). In support, Defendants cite testimony by Mr. Rutledge that ***before*** the first regulatory Order was entered, he discussed

2. Defendants Fail To Demonstrate That There Is No Evidence They Engaged in a Scheme to Defraud Pennsylvania Securities Regulators. [ECF No. 804 at II(A)(2)]

In connection with the misrepresentations to the Pennsylvania securities regulators, Defendants present three arguments and each one is meritless. ***First***, Defendants ask the Court to find that when LaForte decided to implement the Agent Fund structure in 2018 after learning of the Pennsylvania securities regulators' investigation, he did not make the decision because of the investigation (Motion at pp 3-4). They cite no evidence other than the fact that Vagnozzi had previously proposed the Agent Fund structure to Cole and LaForte in 2016 and 2017. The SEC alleged this same fact in the Complaint [ECF No. 119 at 64] and argued in its TRO Motion and at the Preliminary Injunction hearing that this fact proves the opposite of what Defendants now argue – namely, that LaForte knew about the Agent Fund model for years, but did not adopt it *until* he needed to in 2018 in order to keep his fraudulent operation going after the Pennsylvania regulators sanctioned Par Funding for using sales agents [ECF No. 14]. On summary judgment the Court must weigh inferences in favor of the nonmoving part and therefore cannot grant summary judgment on this issue, which is a matter for the jury to decide.

Second, the Defendants claim the Court should find that Vagnozzi had a lawyer, and the Defendants thought Vagnozzi's lawyer must have approved it and therefore relied on the fact that Vagnozzi had a lawyer. (Motion at pdf 5). This fails for a couple of reasons. The Defendants cite no evidence whatsoever. They merely provide hollow assertions and even go so far as to contend that McElhone and LaForte understood what Vagnozzi and his counsel were doing, even though it is undisputed that neither of them has testified and that both are asserting the Fifth Amendment and will thus never testify as to what they supposedly understood. Even if Defendants had presented evidence, they do not address and obviously cannot prove the elements for a reliance on advice of counsel defense concerning someone else's lawyer they do not even claim they sought and received advice from. Further, Whether Defendants may avoid liability based on this affirmative defense is not a threshold question, but rather one that must be left to the jury to weigh

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with Mr. Cole that if Par Funding was selling only to accredited investors then it did not need to make the specific disclosures listed in ***Regulation D***. This has nothing whatsoever to do with the issue in this case – namely, whether if the Defendants touted the success of Par Funding, then they would have to tell the whole truth and disclose the regulatory actions against it. Defendants also ignore the fact that, as set forth above, Mr. Rutledge testified that he advised Defendants that the regulatory Order could trigger disclosure requirements.

and decide. *See*): *SEC v. Bankatlantic Bancorp, Inc.*, 661 F. App'x 629, 637-38 (11th Cir. 2016); *Vernon*, 723 F.3d at 1269.

Third, the Defendants again point to Mr. Rutledge and claim that he knew Par Funding was using agent funds, he drafted a note purchase agreement, and he advised against seeking assurance from regulators as to the legality of the new offering (Motion at pdf 5).

This argument fails for the same reason discussed above in Section 1 – Defendants do not address let alone prove any element of the reliance on advice of counsel defense, and this is a mater for a jury. *Id.* Further, the Defendants' facts are wrong. Mr. Rutledge testified that when he drafted the February 2018 letter to the Pennsylvania regulators stating Par Funding was no longer compensating the finders in connection with the CBSG promissory notes, he made that representation because Cole told him that Par Funding had ceased all compensation to people for raising investor funds through the offer and sale of securities.[9] Rutledge did not know that Par Funding was creating investment funds to offer promissory notes that would raise money for Par Funding, and paying agent fund managers to do so – because Cole did not tell him.[10] Instead, Defendants kept Mr. Rutledge in the dark. Mr. Rutlege also testified that he told Cole that Par Funding could *not* be involved in the agent funds' securities offerings,[11] and that had he known Par Funding was participating and paying the agent fund managers, he would have never represented, on behalf of Par Funding, to the Pennsylvania regulators that Par Funding was no longer compensating people for raising investor funds.[12] As for the Defendants' claim that they wanted assurance from the Pennsylvania regulators and Mr. Rutledge rejected that idea, there is no evidence that Defendants wanted assurance about the conduct at issue – participating in agent fund offerings, using agent funds to raise money for Par Funding, and paying people to raise that investor money. Instead, the Defendants' facts show only that it was to seek assurance about Par Funding selling a note to a pooled investment fund, and nothing more.

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[9] Fact 47

[10] Fact 47

[11] Facts 47 and 61-75

[12] Exhibit 2, at 404:15-408:22

Thus, there are legal and fact issues precluding summary judgment on Defendants' second argument.

3. The Defendants Fail To Demonstrate That "The SEC Cannot Establish That Defendants Made False or Misleading Representations Regarding Par Funding's Default Rate." [ECF No. 804 at II(A)(3)]

Defendants argue that: (i) the default rate was accurate; (ii) any misrepresentation about the default rate was not material; and (iii) there is no evidence of scienter (Motion at 4-9). Defendants do not meet their burden as to any of these arguments, each of which fails as a matter of law and fact.

i. Accuracy of the Financial Analysis Report is Irrelevant

As to the first argument, the Defendants argue that the 1% default rate is accurate because it accurately reflects the accurate calculation shown in Par Funding's "Financial Analysis Report." (Motion at 4-6). This argument fails for two reasons. First, the Financial Analysis Report does not reflect the default rate on the MCA loans at all. Instead, it purports to show something else – namely, the "exposure percentage," which correlates not to the loans in default but instead to the amounts LaForte and Cole decided in their discretion to write off the books and records. The Defendants used this Financial Analysis Report with some potential investors so they could point to the 1% figure in that document and claim verbally that it was the default rate. It is not.

The Defendants' lengthy argument that their expert confirmed that the Financial Analysis Report accurately shows the deals Par Funding (Cole and LaForte) wrote off the books and records is not relevant. The SEC did not allege that the Defendants made misrepresentations or omissions about the amount Par Funding wrote off the books. [ECF No. 119]. Instead, the Defendants are alleged to have made misrepresentations and omissions about the amount in default, which was misleading and did not include disclosure of the 2,000 lawsuits Par Funding filed against merchant borrowers in which Par Funding alleged they were in default or the deals and amounts that were actually in default. *Id.* Pointing to the Financial Analysis Report that shows a 1% figure for something else, and falsely claiming it showed the default rate (which was in reality 10 times that) is just another trick Defendants used to lure potential investors into believing Par Funding's business was a success. Whether that Report is true, false, or otherwise is a distinction without a difference. However, because the Defendants' motion and undisputed facts exhaustively discuss this issue, the SEC's opposing statement shows quite clearly that nearly every fact Defendants

assert about the Report is simply wrong, not supported by any evidence, or disputed with evidence. Therefore, the Defendants' first argument utterly fails and reflects nothing more than their effort to complicate this case and detract from the simple issues that will be presented to the jury.

ii. Defendants' Materiality Argument Fails As a Matter of Law and Fact

Defendants next argue that because Defendants provided some investors with the Financial Analysis Report, this proves conclusively that potential investors had all the information (Motion at 6-7). To the contrary, and as set forth above, this fact proves that the Defendants misled potential investors by showing them the Report and telling them it reflected the "default rates" on the MCA loans – which is not true. The Defendants used the Report to mislead potential investors into believing the false story about the 1% default rate. The Report was just another weapon in the Defendants' securities fraud arsenal. And on top of that, the evidence shows the Report itself was also misleading. There are dueling expert witnesses on the Report, which precludes summary judgment.

As the Court found in denying the Defendants' Motion to Dismiss, borrowers defaulting on the MCA loans affects Par Funding's ability to repay investors, and therefore misrepresentations about the default rate and the fact that it was ten times higher than what Defendants claimed it was is material information a reasonable investor would have wanted to know before investing. [ECF No. 583 at 27].

iii. Defendants' Scienter Argument Fails As a Matter of Law and Fact

Defendants' claim that there is no evidence they acted with scienter (Motion at 8-10). The TRO Motion sets forth ample evidence of Defendants' scienter, and Defendants' proposed facts on this issue are all disputed or unsupported. As the Court found in denying the Motion to Dismiss, these facts support an inference of scienter in that the Defendants knew or should have known about the MCA loans in default. [ECF No. 583 at 27]. As for Defendants' assertion that any scienter is extinguished by the fact that professional accountants worked on the Financial Analysis Report, this argument fails for many reasons. As set forth above, that Report does not reflect the default analysis but instead reflects the deals Cole and LaForte, in their discretion, chose to write off on the books. Further, even if the Report's accuracy was at issue, the evidence demonstrates that it was misleading.[13] Further, Defendants do not address, let alone demonstrate, any of the

[13] Fact

elements for a reliance on advice of accountants defense (the same as advice of counsel discussed above), and therefore the argument on summary judgment fails as a matter of law. *Markowski v. SEC*, 34 F.3d 99, 105 (2nd Cir. 1994) (party asserting reliance on professional defense bears the burden of establishing the essential elements). Finally, Defendants rely on facts not supported by the evidence they cite to support them.

4. The Defendants' Cannot Meet Their Burden On Their Request for Summary Judgment Concerning The Misrepresentation About Vigorous Underwriting [ECF No. 804 at II(A)(4)]

Defendants contend that the Court should grant summary judgment because there is no issue of disputed fact that Par Funding *did* conduct the underwriting it told investors it did (Motion at 10-13). However, in support of this argument Defendants point to evidence or make baseless arguments about other underwriting Par Funding did, while failing to address or acknowledge the evidence that they did not engage in the onsite inspections or take 48-72 hours to assess MCA loan applicants.

For example, Defendants claim that they only approved 17% of the merchant applications and that is below the industry average (Motion at 11). Even assuming this is true for purposes of summary judgment, it is irrelevant to show what underwriting was done on the applications Par Funding did approve – which is the only issue. Defendants claim that "Par had an entire underwriting department." (Motion at 11). Again, this says nothing about what underwriting was actually done. The Defendants go on to claim that the underwriting involved a host of things that are not at issue or alleged to be misrepresentations in this case – and thus also are not relevant to whether or not the representations made to investors were true.

As for the representations about underwriting that the SEC alleges were false, Defendants rely exclusively on excerpts of the testimony of Victoria Villarose, Par Funding's former head of underwriting, to support their argument that they did not lie when they represented that onsite inspections always occurred (Motion at 11). In doing so, however, Defendants ignore the remainder of Ms. Villarose's testimony in which she testifies that Par Funding did not conduct onsite inspections: (1) if it was not deemed necessary (2) if the underwriting department instead chose to instead "google" the business; (3) if the applicant sent Par Funding their own photos; (4) if the application sought less than $25,000 from Par Funding; (5) if the application sought funding under a term of less than the standard 88 to 120 day loan term; (6) if the application was by a

merchant who had previously applied, regardless of how many years had transpired; or (7) if the merchant was not comfortable with an on-site inspection ("it was hard to get every merchant to accept an on-site"). Ms. Villarose also testified that after December 2019, the on-site inspection was not used at all, not even for these occasional inspections. These facts are set forth in the opposition to Defendants' Facts at numbers 57-58. Thus, the testimony of the witness upon whose testimony Defendants rely shows that the Defendants' representations about underwriting were false and misleading.

Defendants do not dispute any of these facts or claim that Ms. Villarose is mistaken. Instead, they pivot and argue without evidentiary support that onsite inspections are not necessary. To the extent Defendants are making a materiality argument, the Par Funding brochures and Mr. Abbonizio's testimony support materiality because both tell investors that onsite inspections are critical to the success of Par Funding.

As for the Defendants' representation that they spent 48-72 hours doing rigorous underwriting, Ms. Villarose testified that the applications were approved *the same day they were received.*[14] The Defendants pivot on this issue and ask the Court to find for them on summary judgment because faster underwriting is actually better (Motion at 12-13). This ignores the allegations and evidence in this case. The evidence shows, as the SEC alleged, that Defendants told investors that Par Funding had a rigorous underwriting process that took 48-72 hours to complete and that it included an onsite inspection. In truth, it was a same-day review that sometimes relied on a "google" search to verify the business. This is what the undisputed evidence shows, and the Defendants cannot succeed on their summary judgment motion.

5. Defendants Cannot Meet Their Burden For Summary Judgment on the Insurance Misrepresentations [ECF No. 804 at II(A)(5)]

The Defendants make myriad arguments, and they fail for a few simple reasons.

i. Defendants' "In Connection With" Argument is Wrong

Defendants argue there is no evidence they made misrepresentations or omissions about insurance "in connection with the offer or sale of securities." (Motion at 12-13). Their argument is based on in an incorrect and narrow reading of that element, and ignores the evidence in this

[14] Exhibit 9, Villarose Deposition, 26:1-9.

case. "The Supreme Court has counseled that the 'in the offer or sale of' requirement of § 17(a) is to be read broadly because the 1933 Securities Act was intended not just to protect investors, but also 'to achieve a high standard of business ethics ... in every facet of the securities industry.' " *Naftalin*, 441 U.S. at 773–75, 99 S.Ct. 2077. The Eleventh Circuit reads the "in connection with" test broadly, and has explained that the "in connection with" requirement is satisfied where the fraud "touch[es]" the transaction in some way, including situations where "the purchase or sale of a security and the [preceding] proscribed conduct are part of the same fraudulent scheme." *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1046 (11th Cir. 1986) (internal citations omitted); *see SEC v. Zandford*, 535 U.S. 813, 822 ("It is enough that the scheme to defraud and the sale of securities coincide."). Here, the Defendants made the representation both verbally and in the marketing brochure distributed to potential investors during the securities offering. Therefore, the representation is in connection with the offering.

ii. The Defendants' Scienter Argument Fails

The Defendants argue that they attempted to get insurance coverage after learning the policy they were able to obtain did not actually cover their business at all, and therefore the Court should find that they had no intent to defraud investors (Motion at 14). This misses the mark completely. The issue is whether the representations to potential investors about insurance were false or misleading, and not whether the Defendants were trying to gain the insurance coverage they lacked. On this point, the Defendants claim the evidence shows that they "believed in good faith that Par Funding had insurance to cover merchant defaults," and cite one thing to prove this – namely, the declaration of Anthony Bernato (ECF 804 at 13). Mr. Bernato's declaration says nothing of what he told Defendants or whether there was insurance coverage, let alone when. Defendants offer zero proof on the issue of what Defendants knew, and when, and present no evidence that there was insurance during the time they made the insurance representations to potential investors, directly (through verbal representations and the brochure) or indirectly (through the agent fund managers).

The Defendants' facts about the insurance are not supported by the evidence they cite, or are disputed by evidence in this case. For example, Defendants claim they learned about the lack of insurance in July 2019 and immediately tried to stop agent fund managers from telling potential investors that Par Funding had insurance. In support, they present nothing more than one unauthenticated letter to one of the more than 30 agent fund managers – and even that letter does

not state what Defendants claim it does. In fact, the letter does not even reference insurance. [ECF No. 823-29]. Defendants also claim there is no evidence they continued making the representations about insurance after July 2019, but present no evidence of this fact. Meanwhile, evidence shows that Par Funding, through Abbonizio and agent fund managers, continued touting the insurance after July 2019.

And this was all by design. The evidence shows that LaForte was telling potential investors there was insurance before Mr. Bernato even entered the picture to try to obtain insurance coverage in November 2018; Bernato tried to obtain insurance in November 2018; by December 2018, just one month later, Mr. LaForte and Mr. Cole knew there was a problem with the policy Mr. Bernato sold them not providing coverage for the MCA Loans; this was further confirmed to Defendants when the insurance company declined Par Funding's insurance claims; and after learning that there was no coverage, Defendants decided to continue paying the insurance premiums so that their agent fund managers could continue raising money for Par Funding by claiming there was insurance, even though Defendants knew the insurance was in name only and did not provide coverage to protect investors or Par Funding.[15]

6. The Court Should Not Entertain The Defendants' Request For Summary Judgment On The Claim Defendants Invent Against Themselves For "Unlawful Loan Practices"

Defendants seek summary judgment on the SEC's supposed claim that Defendants "engaged in unlawful loan practices" (Motion at 14-17, quote at 15). There is no such cause of action in the Complaint, and there is no allegation that the MCA loans were legal or illegal. Defendants assert the SEC made this claim and abandoned it, but the Complaint is clearly bereft of any allegation about the legality of the MCA loans. Instead, this is a relatively simple action by the SEC concerning two types of violations of the federal securities laws: (1) violations of the registration provisions of the federal securities laws; and (2) violations of the anti-fraud provisions of the federal securities laws. Whether or not the MCA loans were themselves legal or illegal is not relevant to whether Defendants participated in the unregistered offer or sale of promissory notes. Nor is it relevant to the fraud claim, as the SEC did not allege that Defendants made any misrepresentation or omission, or engaged in any scheme or fraudulent conduct concerning the

[15] Exhibit 6, Mannes Letter

legality of the MCA loans. Nor have Defendants asserted that this is a defense to the SEC's claims – nor could they, since no claim concerns these issues.

Defendants know this. The Complaint sets forth the misrepresentation and omissions at issue quite clearly, and the Court explained to Defendants in August 2020 that nature and legality of the MCA loans is not a feature of this case.[16] The Court should not entertain Defendants' effort to expand this case or to somehow add claims on behalf of the SEC.[17] Defendants are battling these issues in another forum, and are possibly desperate to get some legal opinion about the legality of their conduct that they can use there. It is wholly improper to do so in this civil securities enforcement action that does not charge these issues and does not concern whatever laws govern the legality of MCA loans.

If the Court decides to rule on this issue, then the Court must deny Defendants summary judgment. They ask for a ruling that their MCA Loans were legal, but provide no law whatsoever to enable the Court to make that determination, and the SEC cannot be required to guess what laws are applicable for assessing the legality of MCA loans, let alone what feature of them is at issue. Defendants do not even identify what law they are asking the Court to find they did not violate. Moreover, Defendants' proposed facts on this issue are all disputed and immaterial, and the allegations in the Complaint cited by Defendants (not of which allege the MCA loans were legal or illegal) are all supported by evidence, as set forth in the response to Defendants' Statement.

7. Defendants Cannot Meet Their Burden For Demonstrating Reliance on Advice of Counsel Regarding The Failure to Disclose Mr. LaForte's Criminal Record

Defendants seek summary judgment that they lacked scienter in failing to disclose LaForte's criminal record to potential investors, on the ground they relied on the advice of counsel. This argument fails for at least 3 reasons. First, Defendants do not address the elements of the reliance on advice of counsel defense. Nor do they present any evidence whatsoever on any of the

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[17] The Court's rulings allowing the Receiver to lift litigation freezes are already being interpreted by the Head of Litigation at Fox Rothstein as rulings that the Par Funding deals were legal MCAs and not loans, even though that issue has never been presented to this Court. Any ruling by this Court on the MCA vs loan distinction will be used in other cases in other forums where these legal issues have been pending and litigated for years, and could arguably have a significant effect on this industry and within those other cases.

elements. Therefore, the Court cannot grant them summary judgment on this affirmative defense. Second, Defendants rely exclusively on an email from a lawyer in March 2020 to seek summary judgment that they lacked scienter from 2015 until March 2020 – before they ever received this email. For what are hopefully obvious reasons, Defendants cannot claim reliance on advice of counsel for conduct they engaged in before receiving that advice. And last but not least, Mr. Rutledge testified that he never knew that LaForte was actually involved in Par Funding and that he had actually asked about LaForte's role and was told LaForte was not involved in Par Funding. Mr. Rutledge went on to testify that had he known, he would have advised Defendants to disclose it. But they lied to him to, and thus he never knew – not even in March 2020 when he wrote that email message. This obliterates the defense, as a matter of fact as well as law. Making a full disclosure to the attorney whose advice is sought and relied upon is an essential element of the defense, without which the defense fails as a matter of law. Therefore, the Court must deny summary judgment on the reliance on advice of counsel defense.

8. The Court Should Not Entertain The Defendants' Request For Summary Judgment On The Claim Defendants Invent Against Themselves For Lying About Being At Risk Of Defaulting On Promissory Notes And Insolvency

Defendants seek summary judgment on the claim that they did not make material misrepresentations or omissions about being at risk of defaulting on promissory notes or insolvency (Motion at 18). The SEC did not allege this [ECF No. 119]. Defendants point to two allegations in the Complaint about co-Defendant Dean Vagnozzi and his lawyer's participation in the Exchange Offering – specifically:

> 139. Based on representations by Par Funding and Vagnozzi's attorney that Par Funding would otherwise default on payments altogether or enter bankruptcy, and based on Vagnozzi's attorney's recommendation, as a lawyer, that they accept the offering, investors opted for the Exchange Offering and entered into new promissory notes.
>
> 140. Based on the representations made to them, investors felt they had no choice but to agree to the Exchange Offering and to replace their existing notes in the ABFP Funds and Fidelis Planning Fund with new notes that offered less interest and thus a lower rate of return. which do not even reference Defendants – and then seek summary judgment on a claim and allegations Defendants invent.

[ECF No. 119]. From these allegations – which neither reference Defendants nor allege any misrepresentation or omission – Defendants seek summary judgment on a claim they invent. It seems they are charging themselves with fraud for making misrepresentations and omissions about

Par Funding possibly having to default on promissory notes or enter bankruptcy, and asking the Court to rule in their favor on that charge. This is improper, and the Court should not entertain it. If the Court does, then it must deny summary judgment. Defendants claim reliance on advice of counsel, but fail to present any evidence that they provided Mr. Rutledge with information about the financial status of Par Funding, that they asked him for advice, or that they reasonably relied on it. Nor do they present any evidence at all supporting their assertion that Par Funding was at risk of defaulting on notes or was on the brink of bankruptcy.

9. The Court Must Deny Defendants' Request for Summary Judgment That The SEC Cannot Establish That Defendants Failed to Disclose That the Texas Emergency Cease-and-Desist Order

Defendants ask the Court to find that the SEC cannot demonstrate that they failed to disclose the February 2020 Texas Emergency Cease and Desist Order to investors (Motion at 18). In support, they cite Mr. Rutledge's testimony that he drafted a disclosure about this in the Exchange Note Offering that occurred in April 2020. Defendants fail to cite any evidence that they provided this to any potential investor. Nor can they. The issue is not whether Mr. Rutledge drafted a disclosure for Defendants; the issue is what was disclosed to potential investors.

Defendants claim that the disclosure Mr. Rutledge drafted appears in the Exchange Note referenced in paragraph 138 of the Complaint. This is not true. As set forth in the annotated Complaint allegations of the Temporary Restraining Order [ECF No 14], this paragraph is supported by a different exhibit that does not include that language. That Exchange Note was distributed to an investor, and it is silent on the Texas Cease-and-Desist Order.

Finally, we note that the Declarations of Bernato and the investors were withheld from production and Rule 26 disclosures and were only produced when they were filed. They should stricken for this reason.

Accordingly, the Court must deny the Motion.

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Respectfully submitted,

By: **Amie Riggle Berlin**

Amie Riggle Berlin, Esq.
Senior Trial Counsel
Florida Bar No. 630020
Direct Dial: (305) 982-6322
Email: berlina@sec.gov
Attorney for Plaintiff

SECURITIES AND EXCHANGE
COMMISSION
801 Brickell Avenue, Suite 1800
Miami, Florida 33131
Telephone: (305) 982-6300
Facsimile: (305) 536-4154