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.

DEFENDANTS, JOSEPH W. LAFORTE, LISA MCELHONE, AND JOSEPH COLE BARLETA'S
OMNIBUS MOTION IN LIMINE AND INCORPORATED MEMORANDUM OF LAW

INTRODUCTION

The SEC plans on introducing a number of facts into evidence that are either flatly inadmissible, irrelevant, and that the prejudicial value substantially outweighs any probative value. For the reasons explained below, they should be excluded from evidence at trial. Therefore, Defendants Joseph W. LaForte, Lisa McElhone, and Joseph Cole Barleta (collectively referred to as "Defendants") move in liminie to have the following issues excluded from evidence at trial.

MEMORANDUM OF LAW

I. Applicable Legal Standard

"The real purpose of a motion in limine is to give the trial judge notice of the movant's position so as to avoid the introduction of damaging evidence, which may irretrievably affect the fairness of the trial." *Ortiz v. Home Depot USA, Inc.*, 2013 U.S. Dist. LEXIS 156231, at *1 (S.D. Fla. Oct. 25, 2013); *See Stewart v. Hooters of America, Inc.*, 2007 U.S. Dist. LEXIS 44056, at *1 (M.D. Fla. June 18, 2007).

It is axiomatic that only relevant, probative evidence is properly admissible at trial. Fed R. Evid. 401 defines the test for relevant evidence. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Specifically, "relevancy" describes evidence that has a legitimate tendency to prove or disprove a given proposition that is material as shown by the pleadings. Fed R. Evid. 401. If the evidence is shown to have a special relevance to a disputed issue, the court must balance the probative value against the possibility of unfair prejudice. *See* Fed. R. Evid. 403.

"Rule 403 states that a court 'may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.'" *Ermini v. Scott*, 937 F.3d 1329, 1343 (11th Cir. 2019) (alteration in original) (quoting Fed. R. Evid. 403). The term "unfair prejudice … speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). Evidence should be excluded when it unduly inflames the jury or otherwise inappropriately leads them to find a defendant liable based on conduct not at issue in the trial. *Stewart v. Daimler Chrysler Fin. Services America, LLC*, Civil Action No. 07-60510, 2008 WL 11333226, at *3 (S.D. Fla. 2008). Stated another way, "[f]or purposes of Rule 403, 'unfair prejudice' occurs where there is 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *United States v. Symonevich*, 688 F.3d 12, 23 (1st Cir. 2012) (quoting Fed. R. Evid. 403 advisory committee's note).

II. ARGUMENT

A. *The SEC Should Be Precluded from Referring to the Defendants as a Ponzi Scheme or as Operating a Ponzi Scheme.*

The SEC should be precluded, pursuant to Fed. R. Evid. 401 and 403. from using the term "Ponzi Scheme" to describe Par Funding or any of the Defendants as operating a "Ponzi Scheme," or implying as such. The SEC has not alleged that that Defendants were engaged in a Ponzi Scheme. As the Court will recall, Defendants have maintained, and presented evidence showing, that the business of Par was not a Ponzi Scheme. The term is not probative of the allegations in this case, yet it is a highly charged, derogatory term. "With respect to [] inflammatory language, courts often prohibit the use of certain 'pejorative terms when such categorizations were inflammatory and unnecessary to prove a claim' and such statements 'do not bear on the issues being tried.'" *MF Glob. Holdings Ltd. v. PricewaterhouseCoopers LLP*, 232 F. Supp. 3d 558, 570 (S.D.N.Y. 2017) (quoting *Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Ams.*, No. 04-cv-10014, 2009 U.S. Dist. LEXIS 89183, 2009 WL 3111766, at *7 (S.D.N.Y. Sept. 28, 2009)). Courts have specifically found that the term "Ponzi scheme" or allegations of comingling funds are unduly prejudicial if they are not a matter framed by the pleadings. *Roda Drilling Co. v. Siegal*, No. 07-CV-400-GFK-FHM, 2009 U.S. Dist. LEXIS 55578, at *6 (N.D. Okla. June 29, 2009) ("However, the court finds that the use of colloquial, slang and inflammatory characterizations such as the terms and phrases 'ponzi scheme,' 'playing with house money,' and having 'skin in the game' are potentially prejudicial to Defendant as such terms may imply wrongdoing separate from the alleged breach of the parties' agreement."); *accord Blue Cross & Blue Shield of Minn. v. Wells Fargo Bank*, N.A., No. 11-2529 (DWF/JJG), 2013 U.S. Dist. LEXIS 83741, at *9 (D. Minn. June 14, 2013).

If the SEC wishes to present evidence supporting its claims that Par Funding was in poor financial condition, not profitable and/or performed poor underwriting of merchants, it may do so, and Defendants will respond with evidence suggesting the opposite. However, "Ponzi Scheme" or any similar pejorative terms should not be used by the SEC since there is no probative value relating to the issues to be tried, any limited probative value will be substantially outweighed by the unfair prejudice.

B. *Cash Seized from Mr. LaForte and McElhone's Home or References to Their Wealth*

The SEC should be precluded, pursuant to Fed. R. Evid. 401 and 403, from making any reference to the seizure of $2 million in cash from Mr.LaForte's home by agents executing a search warrant in this case or other gratuitous references to their wealth. The cash is not pertinent to any issue in the case. There is no evidence in the record as to the source of the funds. Specifically, the SEC has not alleged any embezzlement or theft of funds by Defendants. Given that the trial is solely about liability, not disgorgement, evidence about what assets people have or may have received from Par is

irrelevant and can only serve to bias the jury. "In general, gratuitous references to, or emphasis on, the wealth and lifestyle of the parties are not relevant and therefore are to be excluded. Roda Drilling Co., 2009 U.S. Dist. LEXIS 55578, at *7 (precluding references to the number of homes owned, cost of homes, number of household staff employed, any listing on the 'Forbes 400,' or making similar gratuitous references to wealth). Therefore, the existence of the cash and the Defendants' wealth is irrelevant. Moreover, if the SEC is not precluded from mentioning the cash, Defendants may be compelled to engage in a mini-trial to dispel any suggestion that the cash is proceeds of unlawful conduct. Thus, any reference to the cash by the SEC would be highly prejudicial and pose a waste of valuable time.

C. Guns Seized from Mr. LaForte's Home and His Arrest for the Guns and the Parallel Criminal Investigation Against Par in the Eastern District of Pennsylvania

The SEC should be precluded, pursuant to Fed. R. Evid. 401 and 403, from making any reference to Mr. LaForte's arrest for possession of firearms by a felon and the seizure of these firearms as well as the parallel criminal investigation against Par and its principals in the Eastern District of Pennsylvania. The SEC has indicated that it is planning to introduce LaForte's arrest for possession of firearms by a convicted felon. The SEC's position is that the guns "show a complete disregard of the law and rules. Everyone knows a felon cannot have guns. This shows that Joe LaForte routinely violated the law." Furthermore, the SEC has included FBI agents on its witness list and the Defense is concerned that the SEC may attempt to make reference to the parallel criminal investigation that it has been alluding to through the life of this case. However, these are both classic examples of propensity or character evidence inadmissible under Rule 404, which states "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. Rules. Evid. 404(b)(1). *See Knight v. Gen. Telecom, Inc.*, 271 F. Supp. 3d 1264, 1283 n.30 (N.D. Ala. 2017) (striking from summary judgment motion the fact that a plaintiff in an employment discrimination action "lost his subsequent employment at Camping World for similar such behavior . . . since it, and the evidence cited in support thereof, is inadmissible character and/or 'other acts' evidence.").

"Rule 404(b) forbids the admission of evidence of 'a crime, wrong, or other act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." *United States v. Hunter*, 758 F. App'x 817, 822 (11th Cir. 2018). While Rule 404(b) evidence is typically referred to as "prior bad acts" evidence, "the standard for evaluating the admissibility of a subsequent bad act under Rule 404(b) is identical to that for determining whether a prior bad act should be admitted under this Rule." *United States v. Michel*, 832 F. App'x 631, 635 (11th

Cir. 2020) (quoting *United States v. Jernigan*, 341 F.3d 1273, 1283 (11th Cir. 2003)).

"To be admissible under Rule 404(b), the evidence must (1) be relevant to an issue other than the defendant's character; (2) be sufficiently proven to allow a jury to find that the defendant committed the extrinsic act; and (3) possess probative value that is not substantially outweighed by its risk of undue prejudice under Federal Rule of Evidence 403. *Hunter*, 758 F. App'x 817, 822 (11th Cir. 2018) (citing *United States v. Matthews*, 431 F.3d 1296, 1310-11 (11th Cir. 2005)). While Rule 404(b) evidence is typically referred to as "prior bad acts" evidence, "the standard for evaluating the admissibility of a subsequent bad act under Rule 404(b) is identical to that for determining whether a prior bad act should be admitted under this Rule." *United States v. Michel*, 832 F. App'x 631, 635 (11th Cir. 2020) (quoting *United States v. Jernigan*, 341 F.3d 1273, 1283 (11th Cir. 2003)). "The Supreme Court has set identified four factors for courts to consider him in exercising their discretion under Rule 404, stating that '[p]rior bad-acts evidence must be (1) offered for a proper purpose, (2) relevant, and (3) substantially more probative than prejudicial. In addition, (4) at defendant's request, the district court should give the jury an appropriate limiting instruction." *Dougherty v. Cty. of Suffolk*, No. CV 13-6493 (AKT), 2018 U.S. Dist. LEXIS 67465, at *19-20 (E.D.N.Y. Apr. 20, 2018) (quoting *United States v. Downing*, 297 F.3d 52, 58 (2d Cir.2002) (citing *Huddleston v. United States*, 485 U.S. 681, 691-92, 108 S. Ct. 1496, 99 L. Ed. 2d 771, (1988))).

LaForte's pending charge for possession of a firearm by a felon cannot meet any of these standards and must be excluded from evidence. First, it is not offered for a proper purpose. As stated by the SEC, they intend to use this evidence to show that LaForte routinely violated the law. This is classic inadmissible 404(b) excluded propensity evidence. As admitted by the SEC, it is not relevant to an issue other than LaForte's character. Next, it is simply not relevant to any of the allegations in this case. This is a case involving alleged securities laws violations. Whether or not LaForte was illegally in possession of a firearm is not probative or remotely relevant to whether or not securities laws were violated. Character evidence that is not relevant to the matters at issue is especially inadmissible. *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19md2885, 2021 U.S. Dist. LEXIS 53167, at *40-41 (N.D. Fla. Mar. 22, 2021) ("The Court finds that evidence and argument regarding Keefer's Article 15 proceeding is irrelevant to his claims in this litigation. Additionally, evidence regarding the circumstances of Keefer's Article 15 proceeding and demotion constitute improper evidence of prior bad acts under Fed. R. of Evid. 404.").

Next, the case has not been significantly proven to allow the jury to find that LaForte committed this extrinsic act. As explained in the pending criminal case, LaForte's wife, who is licensed to carry a firearm in Pennsylvania, purchased these firearms legally, after she was robbed at knifepoint

at her place of business. *See USA v. LaForte*, 2:20-cr-00231-PBT DE# 9 at p. 1. Given that these are pending charges that have not been proven before a jury, they certainly cannot be considered significantly proven here.

Finally, these unproven allegations do not possess probative value that is not substantially outweighed by its risk of undue prejudice under Federal Rule of Evidence 403. As explained above, the pending firearm case is not relevant at all to the triable issues in this case. Evidence of the firearm case would only prejudice the jury against LaForte without adding any probative value. Furthermore, by prejudicing the jury against LaForte, the evidence will prejudice the jurors against the other defendants given their association. This prejudice substantially outweighs any probative value—because there is none—and any reference to the pending firearm case should be excluded from trial.

As to the parallel criminal case, it is even more prejudicial and even less probative. First, no case has been filed, and the fact that a criminal investigation is pending against Par and its principals would certainly prejudice the jury about whether Par has done what the SEC alleges in this case. Since no case has been filed, and one may never be filed, making reference to this investigation is extremely prejudicial and an amorphous criminal investigation lacks any probative value. Defendants would further be prejudiced because with only an investigation, Defendants have not had the opportunity to test or even know what the allegations against them are. Therefore, any reference the parallel investigation should be excluded from trial.

D. Usury

The SEC should be precluded, pursuant to Fed. R. Evid. 401 and 403, from using the word "usury," "usurious," "loan sharking," "predatory lending" or any variation of these words or any words that suggest that Par's merchant cash advances were illegal, at trial. Despite using such language in its complaint and amended complaint, the SEC backed off these allegations, stating that the legality of the Par's business model is not relevant to this case. Defendants have maintained, and have presented significant evidence showing, that the merchant cash advance (MCA) agreements at the heart of its business activities were legal contracts to purchase accounts receivables -- not loans. (See, e.g. DE 649-1(courts recognize lawfulness of MCA transactions); DE 132-1 (Declaration of Norman Valz)) "Usury" is a legal term meaning "the practice of lending money at interest, [especially] at an exorbitant or illegal rate of interest." *See Webster's Dictionary of the English Language*, Lexicon Publications, Inc., p. 1083 (1990).

The term "usury" is inapposite to the MCA business and the allegations in this case. Yet, like the term "Ponzi scheme," "usury" has a derogatory connotation in common discourse. The SEC can reference the relative high cost to merchants of entering into cash advance agreements with Par Funding without resorting to a term that is factually and legally inaccurate and prejudicial. Moreover,

to the extent the SEC claims that the word "usury" is unavoidable since Mr. Cole purportedly said it during a conversation about a plan to purchase a Texas bank, discussed *infra*, Defendants dispute the SEC's characterization of that recording, and the attribution to Mr. Cole, and seek to preclude the entire Texas bank narrative as collateral to any issue in this case.

E. Mr. Cole's Purported Plan to Purchase a Bank

The SEC should be precluded, pursuant to Fed. R. Evid. 401 and 403, from introducing any evidence in support of its allegation that Mr. Cole was planning to purchase a bank. (See SEC's TRO Mem., ECF 14, p. 77 and Ex. 129 part 2 thereto). The allegation, as posited by the SEC, is complicated. The SEC has indicated that it believes Mr. Cole, Mr. LaForte, Mr. Vagnozzi and Mr. Abbonizio, were actually planning to move away from the MCA business and into the bank business. Further, these Defendants were supposedly soliciting investors to invest in the purported bank deal at the same time that they were advising Par Funding's investors that expected repayments would be reduced due to COVID. The SEC draws support for its narrative from a consensually recorded conversation in which participants talked over one another while allegedly discussing the plan. (ECF 14-129 part 2)

Counsel for the defense have vigorously challenged the SEC's claims that Defendants were planning to purchase a bank, the accuracy of the transcript of the consensual recording, and the SEC's interpretation of that recording. (Motion to Dismiss the Complaint, ECF 663, pp. 16-17; August 25, 2021 Hearing, T. 25-26) Notably, the SEC's transcript does not even identify Mr. Cole as one of the speakers, and the defense disputes the context in which an unidentified male speaker purportedly commented about usury laws. (See ECF 663 p. 17 citing ECF 14 p. 73; ECF 14-129 part 2)

The SEC's narrative includes the claims that (a) the MCA business was not profitable, because Defendants were planning to leave it for something better; (b) that Defendants purportedly misrepresented to Par Funding's noteholders that Par could not make the expected repayments due to Covid when they were actually secretly planning to divert those funds to a new business opportunity; and (c) a recorded conversation reveals Defendants discussing such a plan. Defendants will vigorously dispute each of these component parts at trial.

The notion that Defendants were considering the purchase of a bank is simply irrelevant to the SEC's claims that Defendants are liable for omissions and misrepresentations in the note offering. While the allegation is not probative of any issue in this case, it is a complicated story that risks prejudice to Defendants and will require a fulsome response at trial. Since probative value is minimal, the risk of prejudice is high, and the claim will necessitate a mini-trial to refute a wholly collateral issue, the Court should preclude the SEC's evidence under Fed. R. Evid. 401 and 403.

F. Prior Convictions of Mr. LaForte

The SEC should be precluded, pursuant to Fed.R.Evid. 401, 403, 404(a) and 404(b), from introducing evidence of Mr. LaForte's criminal history, except to the limited extent relevant to the SECs nondisclosure claims. The SEC has placed at issue only whether Defendants failed to disclose Mr. LaForte's criminal history to investors. (ECF 119 ¶¶ 213-219) As to that issue, Mr. LaForte is prepared to stipulate to the basic facts:

On October 4, 2006, Mr. LaForte was convicted of state charges in New York for grand larceny and money laundering. In 2009, Mr. LaForte pled guilty to federal criminal charges in the District of New Jersey for conspiracy to operate an illegal gambling business. *See* ECF 119 ¶ 118.

Yet, the SEC seeks to introduce much more evidence of Mr. LaForte's criminal history for the jury's perusal - the publicly available records -- the indictments, plea agreements, plea allocutions and judgments in the two prior cases. These documents provide extensive details of the criminal allegations against Mr. LaForte, having no plausible relevance to the claims at issue in this case. SEC disclosure rules do not require publicly posting these documents. (See Item 401 of Regulation S-K regarding disclosure requirements) They are pure "bad character" proof squarely prohibited by Fed. R. Evid. 404(a) (evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait). And the SEC cannot satisfy any of the limited exceptions for introducing prior criminal acts under Fed. R. Evid. 404(b).

No doubt the SEC would like the jury to conclude from these documents that Mr. LaForte is a criminal and that his involvement in Par Funding is a continuation of a life of crime. Yet, the Federal Rules of Evidence guard against just such improper propensity proof by clearly delineating when allegations of criminal behavior may, and may not, be paraded in front of the jury, and requiring the balancing of any probative value against the risk of undue prejudice. Fed. R. Evid. 403. As the Court is aware, the defense has vigorously challenged whether disclosure of the prior convictions was even required under the law and is prepared to show at trial that Mr. LaForte's criminal history was, in fact, known to investors. Given the very limited purpose for which Mr. LaForte's criminal history is at issue in this case, the significant risk of undue prejudice in admitting details of that criminal history, and the prohibition against propensity proof (Fed. R. Evid. 404(a)), the Court should preclude the SEC from introducing or referencing Mr. LaForte's criminal history beyond the content of a bare-bones stipulation.

G. Prior Regulatory Action against Ms. McElhone

The SEC should be precluded, pursuant to Fed. R. Evid. 401, 403, 404(a) and 404(b), from introducing any evidence, including the Final Consent Order, of a 2012-2013 Oregon State Regulatory

Action against Lisa McElhone. The existence of the Oregon State Regulatory Action does not support or pertain to any of the SEC's causes of action. In the Amended Complaint, the SEC mentions the the matter in passing only once in the paragraph describing Ms. McElhone as a Defendant. (ECF 119 ¶ 16) The Oregon State Regulatory Action concerns events before the facts at issue in this trial and have no probative value whatsoever. The SEC no doubt seeks to introduce this evidence for the same improper purpose it seeks to introduce the evidence of Mr. LaForte's gun possession charge or details about his prior criminal convictions: as improper proclivity and "bad character" proof. The Court should not permit the SEC to do so. *See supra* Sections C. & F. Rather, given the complete lack of probative value, and the substantial likelihood of prejudice, the Court should preclude the SEC from introducing evidence of the Oregon State Regulatory Action.

H. Bradley Sharp Should Be Precluded from Testifying

Throughout the litigation, this Court has ruled that the Receiver and his agents are an arm of the Court vested with judicial immunity. *See e.g.*, DE# 156-57. The SEC has included Bradley Sharp, the Receiver's vendor with DSI, on its witness list. Mr. Sharp should be precluded from testifying because as the Receiver's agent he was not subject to deposition, because he lacks personal knowledge of anything that occurred pre-receivership, and he is not an expert witness qualified to provide an opinion on any matters.

As argued by the Receiver, and agreed by this Court, the Receiver and his retain a status of officers and agents of the Court who enjoy quasi-judicial immunity. *Ftc ex rel. Yost*, No. EP-19-CV-196-KC, 2020 U.S. Dist. LEXIS 134523, at *7 (W.D. Tex. May 26, 2020) ("'this conclusion follow[s] from the case law' as well as the court's order that the Receiver and his staff 'shall have the status of officers and agents of this Court'") (quoting *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2007 U.S. Dist. LEXIS 99340, at *19 (E.D. Cal. Nov. 29, 2007)). In fact, this Court's Amended Receivership Order confirmed that both the Receiver and his agents like Mr. Sharp enjoy such immunity.

> The Receiver and his agents, acting within scope of such agency ("Retained Personnel") are entitled to rely on all outstanding rules of law and Orders of this Court ***and shall not be liable to anyone*** for their own good faith compliance with any order, rule, law, judgment, or decree. ***In no event shall the Receiver or Retained Personnel be liable to anyone for their good faith compliance with their duties and responsibilities as Receiver or Retained Personnel***, nor shall the Receiver or Retained Personnel be liable to anyone for any actions taken or omitted by them except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties.

(ECF# 141 at 16) (emphasis added). Furthermore, quasi-judicial immunity was grounds under which the Receiver moved to quash a subpoena against him, which was granted by this Court. (DE# 156-57).

It was similarly, the grounds upon which the Receiver asserted that Mr. Sharp could not be deposed when the Defendants sought to depose him. It would be a significant deprivation of due process to allow the Receiver and his Retained Personnel to hide behind this Court's order and case law to avoid being subject to deposition, but at the same time allow the SEC to call him as a witness.

In addition to the lack of discovery, Mr. Sharp lacks firsthand knowledge of any issues in the case. First, he cannot authenticate any documents from before the Receivership. While he or the Receiver may be in possession of these documents now, they were not around when the documents were created and lacks firsthand knowledge of whether they were created and maintained in the ordinary course of business and whether it was the practice of the business to maintain such documents, such that they would satisfy the business-record exemption to the rule against hearsay. *See* Fed. R. Evid. 803(6). On the other hand, the Receiver did retain some of Par's former employees who have such knowledge. They are on the SEC's witness list, and they should be the ones to authenticate and admit any relevant business records of Par.

Since the documents cannot be introduced into evidence through Mr. Sharp, he cannot testify as a fact witness as to their content. He is also not an expert witness because he is neither qualified as one as a non-CPA, and because he was not disclosed as an expert by the SEC. In fact, the Receiver himself acknowledged that Mr. Sharp's declaration was not intended to serve as an expert report. (DE# 577 at 17). The SEC has retained an expert witness, Mellissa Davis, who has produced a report opining on the financial state of Par. While the Defense has moved to exclude her because her report is not GAAP complaint, allowing a second witness to testify as a matter that is the province of a purported expert witness is cumulative and unduly prejudicial because it will cause the jury to add additional credibility to Ms. Davis's opinion even though Mr. Sharp would, at best, be a fact witness who lacks personal knowledge and would only confuse the Jury. Thus, Mr. Sharp should be precluded from testifying.

I. The SEC Should Be Precluded from Introducing Evidence That Some Noteholders Were Repaid During the Covid-19 Pandemic and Others Signed Exchange Notes

The SEC should be precluded, pursuant to Fed. R. Evid. 401, 403 and 404(a) from introducing evidence concerning Defendants' alleged repayment of some noteholders during the financial turmoil brought on by the Covid-19 pandemic. As Covid bore down on commercial activity in March 2020, Defendants prudently anticipated that Par Funding's revenues would be dramatically affected by forces beyond their control and promptly offered exchange notes to all investors. These exchange notes provided a lower interest rate over a longer term than the existing notes. The majority of noteholders accepted this exchange offer. Some noteholders did not. As to those who declined, Defendants

allowed–on a case-by-case basis–for some of these noteholders to receive a return of their principal and interest to date. These repayment decisions were made with consideration for the financial predicament of individual noteholders. This is also misleading to the jury because all of those noteholders who signed the exchange notes, agreed to accept the exchange notes, which offered a better long-term return even if the short-term return was less.

There is no possible relevance of these events to the issues in this case. The SEC may seek to introduce the repayments to some—but not other–noteholders who declined the exchange offer to suggest that Defendants acted recklessly, in their self-interest, or without regard for all noteholders. Whatever inference the SEC seeks to draw, it is classic propensity proof precluded under Fed. R. Evid. 404(a) that is also unduly prejudicial, Fed. R. Evid. 403. Defendants will be compelled to refute the SEC's inference of malfeasance and/or self-interest by introducing extensive proof showing the strength of the business model and the reasonableness and prudence of their handling of the noteholders' interests amid the unprecedented circumstances present by the Covid-19 pandemic. This will include evidence that Par stopped raising capital yet was still able to fund approximately 130 million dollars in cash advances and pay approximately $19 million to noteholders experiencing hardship as determined on a case-by-case basis. Necessitating such a side-show of proof to refute a wholly irrelevant claim also warrants preclusion of the repayments to some noteholders during Covid under Fed. R. Evid. 403.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the foregoing issues, evidence, and testimony be excluded from trial.

S.D. Fla L. R. 7.1(a)(3) Certification of Counsel

I certify that counsel for the Defendants conferred with counsel for the SEC, and was informed Plaintiff opposes the relief requested in this Motion.

Dated: November 10, 2010,

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel of record via the Court's CM/ECF Filing Portal on this 10th day of November 2021.

/s/ Joshua R. Levine
JOSHUA R. LEVINE