

**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

**DEFENDANT LISA MCELHONE’S MOTION FOR LEAVE TO FILE A REPLY TO
THE SEC’S RESPONSE TO THE MOTION TO AMEND ADMISSIONS**

Defendant Lisa McElhone moves for permission to file the accompanying 3-page reply to the SEC’s response (DE 973) to the Motion to Amend Admissions, filed on November 8, 2021. (ECF 914)(“Mot. to Amend”). On November 15, 2021, this Court directed the SEC to respond and instructed that no reply would be permitted. (DE 946). Counsel respectfully seeks leave to file the reply because subsequent events have occurred since the filing of the motion that are relevant to the merits of the requested relief. These include the designation of exhibits and witnesses by the parties as well as Joe LaForte’s decision to waive his fifth amendment privilege and testify at trial.

Counsel has conferred with the SEC today and is advised today that it takes no position on this request for leave to file.

November 18, 2021

Respectfully Submitted,

LAW OFFICES OF ALAN S. FUTERFAS

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By: /s/ Joel Hirschhorn
JOEL HIRSCHHORN
Florida Bar #104573

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(a)(3)

I HEREBY CERTIFY that counsel for the movant has conferred with all parties or non-parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues and their respective positions are addressed in this motion.

/s/ Alan S. Futerfas
ALAN S. FUTERFAS
Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served on all counsel of record via electronic mail this 18th day of November, 2021.

/s/ Joel Hirschhorn
JOEL HIRSCHHORN
Florida Bar #104573

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**DEFENDANT LISA MCELHONE’S REPLY TO
THE SEC’S RESPONSE TO THE MOTION TO AMEND ADMISSIONS**

Defendant Lisa McElhone respectfully replies to the SEC’s response (DE 973) to her Motion to Amend Admissions. (D.E. 914) (“Mot. to Amend”).

ARGUMENT

The SEC argues that it will be prejudiced if Ms. McElhone is now permitted to amend admissions by invoking the fifth amendment because, had it known, the SEC would have undertaken additional evidence-gathering “in order to meet its burden of obtaining an adverse inference” i.e. it would “conducted discovery” and “identified witnesses.” (SEC Reply at 5) This claim has no support. First, there was ample evidence that Ms. McElhone intended to continue asserting her fifth amendment rights in this case – as she had done so on every occasion. (*See* Mot. to Amend at 2-3)

As importantly, there is no additional document or witness the SEC might conceivably have sought had it only known that Ms. McElhone was asserting her fifth amendment right to the request for admissions. To the contrary, the SEC has contacted numerous Par employees in the

course of its investigation and plans to call Par witnesses at trial. Depositions by the SEC in this case included Par's outside counsel, Brett Berman and Philip Rutledge. The SEC deposed defendant Joe Cole and had the opportunity to cross-examine witnesses deposed by Defendants, including James Klenk, the financial controller. There is no conceivable document that would be pertinent to obtaining an adverse inference against Ms. McElhone beyond the 540-plus exhibits that the SEC has already indicated it will introduce at trial in order to prove the very same allegations against co-defendants Joseph LaForte and Joseph Cole Barleta. And there are no conceivable witnesses that the SEC can call other than those on the SEC's witness list that is 11 pages long and contains the names of 67 witnesses, including senior staff of Par.

There is simply no additional issue pertinent to Ms. McElhone that the SEC has not pursued in discovery against Mr. LaForte and Mr. Cole. The notion that there is some magical document or witness about these matters that is not already part of this trial is illusory. The SEC has not been prejudiced by an imaginary deficit of proof.

Further, events subsequent to our motion to amend show the insincerity of the SEC's position. Presented with the recent opportunity to depose Joseph LaForte, the individual who the SEC's entire case claims is a principal of Par, the SEC reversed its position (to permit his deposition before trial), and then moved on November 12th to preclude his deposition and testimony. (*See* DE 937) Testimony of Mr. LaForte would obviously allow the SEC ample opportunity to obtain additional proof of the elements of its case against Ms. McElhone and other defendants, if such evidence exists. Mr. LaForte is the only Par witness the SEC has not been able to contact, other than Ms. McElhone, because he previously asserted his fifth amendment; but now the SEC does not want to depose him or examine him at trial. Accordingly, the SEC's claims about needing further discovery for Ms. McElhone are belied by the facts.

Lastly, the potential for jury confusion is very high if the requested relief is not granted. How is the jury to understand that a person who has consistently invoked the fifth amendment somehow admitted certain facts? There is no reason to confuse the jury when Ms. McElhone has already asserted her fifth amendment privilege, and the SEC can request an adverse inference from her deposition questions – a deposition which went on for hours. For these reasons, and for the reasons set forth in recent cases in this district cited (Mot. to Amend at 4-5), it is respectfully submitted that the motion to amend be granted.

CONCLUSION

For the reasons stated herein, the Court should grant Ms. McElhone's Motion to Amend her Admissions.

November 18, 2021

Respectfully Submitted,

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/s/ Alan S. Futerfas
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/s/ Joel Hirschhorn
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