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.,

_____/

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S RESPONSE TO DEFENDANT MICHAEL FURMAN'S SECOND MOTION IN LIMINE

I. Introduction

Defendant Michael Furman's Second Motion *in Limine* ignores the charges filed against him, ignores the conferral in open Court and on the record during the November 30, 2021 Calendar Call, and ignores the law. Furman seeks to exclude evidence of the Consent Judgments entered by this Court against his co-Defendants; any evidence of his co-Defendants' alleged misconduct; and any facts not alleged in the Complaint. We address each in turn.

II. Consent Judgments

Furman seeks to exclude evidence of the Defendants' Consent Judgments [Motion at ¶ 8]. As the Court and Furman are aware, this is not at issue. At the Calendar Call, Furman's counsel raised this issue and undersigned counsel immediately responded quite clearly and directly that the SEC is not introducing the consent Judgments as evidence and thus there is nothing for Furman to move to exclude. The consent Judgments have never been trial exhibits. When undersigned asked Furman's counsel why a Motion to exclude evidence when there is no issue or dispute, Furman's counsel stated they simply want a ruling on it. Our understanding and concern is that this is being sought for use as precedent or support for arguments in other civil litigation and other matters involving Furman. It is improper, and the Court should not entertain the litigation in this case of issues that are not in dispute in this case. The Motion should therefore be denied as moot as to the Consent Judgments.

III. Evidence of Co-Defendants' Conduct

Furman's argument that the Court should exclude evidence of his co-Defendants' conduct, on grounds they have settled, ignores the charges filed against him. Four of the 7 counts against Furman are for participating with the co-Defendants in a scheme to defraud investors (Counts I & IV) and engaging in transactions, practices, or courses of business which operated or would have operated as a fraud or deceit on investors (Counts III & VI). The Complaint explains the schemes, and Section IV of the Complaint, entitled "The Fraudulent Par Funding Offering Scheme," comprised of paragraphs 40 through 267 of the Complaint, lays out how the schemes worked.

A summary can be found in the Introduction to the Complaint:

> 2. To fuel the Par Funding loans and enrich themselves, the Defendants operate a scheme wherein they raise investor money through unregistered securities offerings.
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> 8. The fraudulent scheme operates behind multiple veils of secrecy built of the Defendants' lies to conceal: (1) the true nature of Par Funding's loan practices; (2) Par Funding's 4 true track record of issuing loans and the default rates of the loans; (3) the safety of investing in Par Funding's loans; (4) LaForte's criminal record, identity, and control of Par Funding; (5) three Cease-and-Desist Orders state securities regulators have entered against Par Funding for violating state securities laws; (6) the true result of the New Jersey Division of Securities' investigation of Par Funding; (7) the fact that contrary to Par Funding's representations to the Commission in its filings, it diverts investor funds to McElhone and Cole, Par Funding's CFO, and also funnels money to L.M.E. 2017 Family Trust, which is McElhone's family trust; (8) the fact that contrary to his representations to investors, LaForte has never invested in Par Funding; (9) a Cease-andDesist Order and sanctions issued against Vagnozzi for violating state securities laws in connection with the Par Funding offering; (10) a Cease-and-Desist Order and sanctions issued against ABFP for violating state securities laws in connection with the Par Funding offering; and (11) a Ceaseand-Desist Order and sanctions issued against Abbonizio for violating state securities laws in connection with the Par Funding offering.
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> 9. These lies, and the scheme the Defendants employ to perpetuate them in the unregistered securities offerings, form the basis of this action. Each Defendant plays a critical and substantial role in the fraudulent scheme to misrepresent and conceal the truth.

[ECF No. 119]. Furman's Motion essentially asks the Court to preclude the SEC from litigating at trial 4 of the 7 charges against Furman, based on nothing more than Furman's selective reading of the Complaint and failure to acknowledge the Counts alleged against him.

IV. Evidence of Facts Not Specifically Alleged In the Complaint

Relying on nothing more than an inapposite case about the pleading standards on a motion to dismiss, Furman argues that the trial should be limited to evidence concerning Furman's "fail[ure] to disclose the true nature of the New Jersey Order" and "fail[ure] to disclose the true default rate of Par Funding." *Id.* at ¶¶ 2-3.[1] This is wrong.

Furman ignores the fact that, as discussed above, Furman is alleged to have participated in schemes to defraud, and ignores the allegations of the Complaint against him. He ignores the allegations that (by way of just a few examples) he distributed Par Funding-related marketing materials and that these brochures contained misrepresentations and omissions: "Furman distributed Par Funding marketing materials, including a brochure, and touted Par Funding's management expertise and its thorough due diligence in selecting borrowers." [ECF No 119 at Para 59]. He ignores allegations that Furman invited Perry Abbonizio to give a presentation to potential investors at a sales event Furman hosted and that Abbonizio made material misrepresentations and omissions to potential investors. He ignores allegations that "Defendants" (including Furman) made certain omissions.

Furman is well aware of this, and the TRO which annotates the Complaint lays out in great specificity the granular details of many of these issues, going beyond the pleading requirements of FRCP 9(b), including on what date Abbonizio made misrepresentations and omissions to investors at Furman's event, and what he said; declarations from Furman's investors stating explicitly on what date they spoke with him and what information Furman failed to disclose. Furman has never raised an issue, until the literal eve of trial, regarding these matters that have been litigated in this case with his implied consent since day 1 of this case.

These matters are raised in the pleadings. Even assuming, for sake of argument, that they were not, the Eleventh Circuit has explained that "when relief is to be based on an issue not raised in the pleadings, Rule 15(b), Federal Rules of Civil Procedure, must be considered." *Cioffe v. Morris*, 676 F. 2d 539, 541 (11th Cir. 1982). Rule 15(b)(2) states "[w]hen an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." Accordingly, this rule "provides that unpled issues which are tried with either the express or implied consent of the parties are to be treated as if they were raised in the pleadings." *Cioffe*, 676 F. 2d at 541. Rule 15(b) explicitly permits Complaints to conform to the evidence during a trial. *See*

also Doe #6 v. Miami-Dade Cty., 974 F.3d 1333, 1335 (11th Cir. 2020) ("Rule 15(b) allows parties to add unpled issues to a case if those issues have been tried with the express or implied consent of the parties. But one must comply with the notice demands of procedural due process before an unpled issue can be added."). Here, as set forth above, these issues have been litigated since day 1 when the SEC filed its Complaint and its TRO laying out in even greater specificity the omissions and scheme conduct, which TRO Motion the Court granted.

"Implied consent under Rule 15(b) will not be found if the defendant will be prejudiced; that is: (1) if the defendant had no notice of the new issue, (2) if the defendant could have offered additional evidence in defense, or (3) if the defendant in some other way was denied a fair opportunity to defend." *Cioffe*, 676 F. at 542 (alternations made). "A party cannot be said to have implicitly consented to the trial of an issue not presented by the pleadings unless that party should have recognized that the issue had entered the case at trial." *Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach, Inc.*, 833 F.2d 1484, 1487 (11th Cir. 1987). Here, Furman has known since day 1 because the Complaint and TRO clearly lay it out. *See also SEC v. Levin*, 2013 WL 594736, *8 (S.D.Fla. Feb. 13, 2013) ("the SEC correctly points out that it is not required to plead detailed evidence concerning each and every fraudulent act alleged.").

On top of that, Furman ignores the fact that scienter is a feature of this case, and the SEC is not limited to the Complaint allegations in proving Furman acted with severe recklessness.

December 2, 2021

Respectfully submitted,

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