UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Case No. 20-CIV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff

v.

MICHAEL FURMAN, et al.,

Defendants.

_____/

DEFENDANT'S MOTION FOR LEAVE TO FILE MEMORANDUM IN CONNECTION WITH UNPLED CLAIMS OF INTEGRATION DOCTRINE

Defendant, MICHAEL FURMAN ("Defendant"), by and through the undersigned counsel hereby requests that the Court permit him to submit a Memorandum In Connection with the Unpled Claims of Integration, and in support thereof states:

1. Throughout the course of this litigation the SEC has claimed that it is not pursuing integration with respect to its claims for the unregistered sale of securities by Fidelis Financial Planning, LLC to Par Funding.

2. However, the SEC has also claimed that it is not trying to litigate any issues with respect to Par Funding, creating confusing as to the issue.

3. During argument on the issue, the Court directed the undersigned to submit authority which supports the position that the SEC cannot seek to consolidate a series of transactions without pleading an integration claim.

4. Although the Court subsequently stated that it would conduct independent research on the issue, the Court also directed Furman to submit a detailed proffer of the proposed testimony

of all of his witnesses so that the Court could further narrow the issues that are to be presented to the Jury.

5. As a result, the undersigned prepared a memorandum of law, attached hereto as **Exhibit A**, which addresses when and how a series of transactions can be consolidated into a single transaction, to facilitate the Court's understanding of issues presented as it decides what witnesses Furman can seek to introduce.

6. Accordingly, Furman requests that the Court consider the memorandum of law that was prepared on the issue of integration and how a party, such as the SEC can consolidate a series of transactions into a single one. The foregoing memorandum would facilitate trial on the merits and help the parties streamline issues in this case

7. The undersigned has conferred with counsel for the SEC which opposes the relief sought.

WHEREFORE Furman respectfully requests that the Court enter an Order: (i) Authorizing the filing of the Memorandum attached hereto as Exhibit A; and (ii) Granting such further relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **13th** day of December 2021, the foregoing was filed using the Court's CM/ECF Filing system which will transmit Notices of Electronic Filing generated by CM/ECF to all counsel of record.

By: *s/ Zachary P. Hyman*
Zachary P. Hyman

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DEFENDANT'S MEMORANDUM IN CONNECTION WITH UNPLED CLAIMS OF INTEGRATION

Defendant, MICHAEL FURMAN ("Defendant"), by and through the undersigned counsel hereby submits this memorandum of law concerning Plaintiff, the Securities and Exchange Commission's claims for the sale of unregistered securities.

SUMMARY

During the course of trial in this matter, Plaintiff, the Securities and Exchange Commission, has attempted to argue that the Court should disregard the corporate form, and the separation between the two different corporate entities, Fidelis Financial Planning, LLC and Par Funding, in determining whether Furman had engaged in the sale of unregistered securities. However, the Plaintiff misconstrues the applicable law, and appears to be seeking an integration claim, without pleading the elements of one and without any claim that would entitle it to such. During the course of argument on these issues, the Court asked the counsel for Furman to submit additional authority on the propriety of the SEC's efforts to do so, but then stated that it would do its own research on the matter. Notwithstanding the Court's comments, and although the SEC should bear the burden

of showing how the Court can disregard the separate nature of the transactions at issue, Furman has elected to submit this memorandum to facilitate a fair trial on the merits, in the hopes of getting clarification as to whether he will need to establish that the sale of Par Funding notes was also exempt from registration.

SECTION 5 LIABILITY

"In order to establish a prima facie case for a violation of § 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." *S.E.C. v. Calvo*, 378 F.3d 1211, 1214 (11th Cir. 2004).

By its plain language, the statute does not apply to people or entities that *purchased* securities. As a result, Furman and Fidelis cannot be liable for violations of Section 5 of the Securities and Exchange Act for *purchasing* Par Funding notes. They must have been engaged in *the sale* of such securities. Violation of Section 5 claims are also normally based on the particular security that was *sold* not *bought*. Therefore, the entire analysis must only revolve around the actions in which Defendant sold securities, which is only a small, limited subset of the overall allegations by the SEC.

To establish Section 5 liability, courts rely on the "necessary participant" and "substantial factor" tests which require significant involvement in the sale and apply the *but for* test. *See S.E.C. v. Murphy*, 626 F.2d 633, 651 (9th Cir. 1980) ("This 'necessary' participant test is equivalent to the first prong of the proximate cause analysis detailed above: it essentially asks whether, but for the defendant's participation, the sale transaction would not have taken place); *SEC v. Elliot,* 2011

WL 3586454 (S.D. N.Y. 2011) ("The 'necessary participant test ... essentially asks whether, but for the defendant's participation, the sale transaction would not have taken place.'"); *SEC v. PV Enters., Inc.* 2016 WL 8808697, at * 4 (S.D. Fla. June 28, 2016); *SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1255 (9th Cir. 2013); *SEC v. Genovese*, 2021 WL 1164654, at * 3 (S.D.N.Y. Mar. 26, 2021). Here, there is no question that Furman and Fidelis did not sell or offer to sell Par Funding notes, but rather only sold notes in Fidelis.[1] As such, the Court and jury should only consider Furman's involvement in that transaction.

"[W]hether a defendant is a substantial factor in the distribution of unregistered securities is a question of fact requiring a case-by-case analysis of the nature of the securities scheme and the defendant's participation in it." *S.E.C. v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1258 (9th Cir. 2013). In other words, courts look to each sale of securities in determining liability under Section 5. Because Furman did not sell Par Funding Promissory Notes to investors, he cannot as a matter of law be a substantial factor in the sale of Par Funding promissory notes. As a result, the Court cannot disregard the fact that Furman only sold promissory notes for Fidelis Financial Planning, LLC and not for Par Funding, unless there is a basis to disregard the corporate form.

There is a strong public policy against piercing the corporate veil, and SEC has failed to demonstrate sufficiently strong arguments to overcome that presumption of corporations being treated as an independent entity. *See, e.g., Gov't of Aruba v. Sanchez,* 216 F. Supp. 2d 1320, 1362 (S.D. Fla. 2002)("courts are reluctant to pierce the corporate veil and will do so only in exceptional cases where there has been extreme abuse of the corporate form")(citing *Resolution Trust Corp. v.*

[1] There is also a dispute over Furman's involvement in the purchase by Russel Meyers of a note with AFPB Fund, LLC.

Latham & Watkins, 909 F.Supp. 923, 930–32 (S.D.N.Y.1995)(collecting cases)); *In re Paul C. Larsen, P.A.*, 610 B.R. 684, 687–88 (Bankr. M.D. Fla. 2019), aff'd, 626 B.R. 446 (M.D. Fla. 2021) ("courts are reluctant to pierce the corporate veil and will do so only in exceptional cases where there has been extreme abuse of the corporate form"). But more importantly, the SEC has failed to plead the necessary elements to pierce the corporate veil and has failed to bring a claim that would entitle it to do so. *See Faulkner Press, L.L.C. v. Class Notes, L.L.C.,* 1:08CV49-SPM, 2009 WL 5879033, at *2 (N.D. Fla. Mar. 31, 2009) ("To pierce the corporate veil, there must be **pleading** and proof") (emphasis added); *Century Sr. Services v. Consumer Health Ben. Ass'n, Inc.*, 770 F. Supp. 2d 1261, 1265 (S.D. Fla. 2011) ("A party seeking to pierce the corporate veil and prove alter ego liability must show both a blurring of corporate lines, such as ignoring corporate formalities or using a corporation for the stockholder's personal interest, and that the stockholder used the corporation for some illegal, fraudulent or other unjust purpose."). Here, the SEC has failed to *plead*, or demonstrate the extreme abuse of the corporate form, to justify piercing the corporate veil. As a result, it cannot without pleading a proper integration claim, seek to hold Furman liable for the sale of unregistered securities with respect to Par Funding and/or CBSG Promissory Notes.

INTEGRATION DOCTRINE

Contrary to the SEC's assertion, the only time when a series of offerings can be consolidated is if SEC can establish that the offering is integrated, as defined by 17 C.F.R. § 230.506(b)(2)(1); *Donohoe v. Consol. Operating & Prod. Corp.*, 982 F.2d 1130, 1140 (7th Cir. 1992) ("The doctrine of integration prevents issuers of securities from avoiding the requirements of section 5 by breaking offerings into small pieces"). The integrated offering doctrine applies to

a series of offerings of unregistered securities issued pursuant to a single financing plan which, if sanctioned would subvert the statutory scheme. The more substantial question concerns the factual circumstances under which the doctrine should be applied. *Bowers v. Columbia Gen. Corp.*, 336 F. Supp. 609, 624–25 (D. Del. 1971). This doctrine was first established by the SEC, in 17 C.F.R. § 230.506(b)(2)(i), which also explained that:

> A determination whether an offering is public or private would also include a consideration of the question whether it should be regarded as a part of a larger offering made or to be made. The following factors are relevant to such question of integration: whether (1) the different offerings are part of a single plan of financing, (2) the offerings involve issuance of the same class of security, (3) the offerings are made at or about the same time, (4) the same type of consideration is to be received, (5) the offerings are made for the same general purpose.
>
> What may appear to be a separate offering to a properly limited group will not be so considered if it is one of a related series of offerings. A person may not separate parts of a series of related transactions, the sum total of which is really one offering, and claim that a particular part is a non-public transaction. (Release No. 33-4552, Nov. 6, 1962)

Bowers v. Columbia Gen. Corp., 336 F. Supp. 609, 624–25 (D. Del. 1971); *APA Excelsior III, L.P. v. Premiere Techs., Inc.*, 03-15552, 2004 WL 6064402, at *4 (11th Cir. Sept. 23, 2004) (citing Non–Public Offering Exemption, SEC Release No. 33–4552, 27 Fed. Reg. 11316, 11317 (Nov. 6, 1962)); *see also Doran v. Petroleum Management Corp.,* 545 F.2d 893, 901 n. 9 (5th Cir. 1977); *Ciuffitelli for Tr. of Ciuffitelli Revocable Tr. v. Deloitte & Touche LLP*, 3:16-CV-580-AC, 2017 WL 2927481, at *14 (D. Or. Apr. 10, 2017), *report and recommendation adopted sub nom. Ciuffitelli v. Deloitte & Touche LLP,* 3:16-CV-00580-AC, 2017 WL 2927150 (D. Or. July 5, 2017); *see also Wingsco Energy One v. Vanguard Groups Res. 1984, Inc.,* 699 F. Supp. 1232 (S.D. Tex. 1988); *Sec. & Exch. Comm'n v. Mapp*, 4:16-CV-00246, 2017 WL 5177960, at *7 (E.D. Tex.

Nov. 8, 2017) ("The 'integration theory' has been utilized by courts to determine whether to treat two separate securities issuances as one.") (citing *Bayoud v. Ballard*, 404 F. Supp. 417, 424 (N.D. Tex. 1975)).

The undersigned has been unable to locate any case where the SEC or any other party has been able to consolidate a series of transactions for purposes of imposing liability with respect to the sale of an unregistered securities offering without seeking integration, and the SEC has refused to provide any authority on that issue either. The SEC has also disavowed integration, and, in reliance on its position, Furman has yet to contest whether Par Funding is subject to an exemption for registration. *See also Ciuffitelli v. Deloitte & Touche LLP*, No. 3:16-cv-580-AC, 2017 U.S. Dist. LEXIS 106883, at *46-47 (D. Or. Apr. 10, 2017) ("Plaintiffs conclude that "Aequitas" is the issuer of all securities sold by any Aequitas entity, and therefore that the Disputed Securities and any other securities sold by an Aequitas entity are part of an integrated offering. The court disagrees. Even if the Aequitas group is the issuer of all of the securities its subsidiaries and affiliates sold, it does not follow that the securities are all part of an integrated offering for purposes of determining secondary liability for misrepresentations, omissions, and selling unregistered securities.").

Nonetheless, it appears as though the SEC is attempting, over Furman's objection, to pursue a theory of integration without properly putting it at issue and is otherwise asking the Court to find that Furman was engaged in the sale of unregistered securities because he sold promissory notes in Fidelis Financial Planning, LLC, which then purchased notes in Par Funding, while only being a purchaser of securities, which does not give rise to liability. This will prejudice Furman

who may be precluded from introducing evidence of Par Funding's compliance with the applicable registration requirements.

MERE CONDUIT

While not pled in this matter either, it may be possible for the SEC to obtain the relief sought if it can prove that Fidelis was a mere *conduit* for the sale of securities. Although the undersigned has not located any authority that supports the existence of that remedy, it may be possible to hold Fidelis and Furman can be held liable under Section 5, if they were mere conduits. However, to act as a mere conduit and be liable, the party cannot have any beneficial interest in the funds or money. *See, e.g., In re Munford, Inc.,* 98 F.3d 604, 606–10 (11th Cir.1996) (concluding that transfers of stock and funds in a leveraged buyout through a bank was not covered by section 546(e) because the bank "was nothing more than an intermediary or conduit" and never obtained a beneficial interest in the stock or funds); *In re The IT Group, Inc.,* 359 B.R. 97, 100 (Bankr. D. Del. 2006). Here, there is no question that Fidelis took possession of the investor money and had a beneficial interest in that money, therefore, the SEC cannot ask the Court to disregard the corporate form in this instance.

FURMAN DOES NOT CONSENT TO AMENDMENT AND WOULD BE PREJUDICED BY IT TOO

To the extent that the SEC may also claim that Furman has tried or agreed to try the integration issue by consent, Furman has repeatedly objected to that effort, and the SEC has

consistently disavowed seeking such a claim.[2] *See George & Co. LLC v. Cardinal Indus., Inc., 2*18CV154FTM38MRM, 2019 WL 7423509, at *1 (M.D. Fla. June 14, 2019) ("The requirement for consent or leave is not a pointless formality. It promotes judicial economy by encouraging parties to confer about amendments. And when the parties cannot agree, it protects against undue delay, bad faith, dilatory motive, undue prejudice to the opposing party"); *McNall v. Credit Bureau of Josephine County*, 689 F. Supp. 2d 1265, 1269 (D. Or. 2010)(denying delayed amendments when opposing party did not consent). Because Furman has not and does not consent to the foregoing amendment, has consistently objected to the trial of such issues, and would be unduly prejudiced if he was forced to address such issues, turning the matter into a trial over Par Funding's exemptions, then amendment should not be permitted, to the extent that one is sought.

WHEREFORE, Defendant Michael Furman respectfully requests that the Court consider the enclosed memorandum in connection with the issues being tried in this matter clarify the nature of what is being tried and limit the introduction of evidence by the SEC and submission of issues to the jury to the issues that are properly before the Court.

Respectfully submitted,

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By: *s/ Zachary P. Hyman*

[2] Furman also does not consent to trial on the mere conduit issue, which also has not been raised by the pleadings. However evidence presented on the issue has been presented to the jury, such that the prejudice is minimal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **13th** day of December, 2021, the foregoing was filed using the Court's CM/ECF Filing system which will transmit Notices of Electronic Filing generated by CM/ECF to all counsel of record.

By: *s/ Zachary P. Hyman*
Zachary P. Hyman