UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Case No. 9:20-cv-81205-RAR
Civil Division

SECURITIES & EXCHANGE COMMISSION,
Plaintiff
v.
COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING,
Defendant
_____/

MOTION FOR NEW TRIAL

The Defendant, MICHAEL C. FURMAN, by and through undersigned counsel, pursuant to Federal Rule of Civil Procedure 59 and Local Rule 7.1, hereby requests that this Court enter an order granting a new trial in the above-styled cause and, in support thereof, states the following:

INTRODUCTION

On December 15, 2021, the Defendant, MICHAEL C. FURMAN ("FURMAN") was found liable, by jury verdict, of multiple counts of fraud and illegal trade in securities brought by the Plaintiff, SECURITIES & EXCHANGE COMMISSION ("SEC"). FURMAN's trial was beset by error resulting in confusion and misdirection for the jury and an acrimonious atmosphere between the defense and the Court, which prevented FURMAN from having a fair trial, and unduly prejudiced him. FURMAN requests that this Court exercise its discretion in the interest of fairness and equity and grant a new trial. FURMAN's grounds for the requested relief are set forth below.

I. **Memorandum Of Law**

A. Standard

"A judge should grant a motion for a new trial when 'the verdict is against the clear weight of the evidence or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.'" *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001). "Rule 59(a)(1)(A) states that a court may grant a motion for new trial 'for any reason for which a new trial has heretofore been granted in an action at law in federal court." *Kahn v. Cleveland Clinic Fla. Hosp.*, No. 16-61994-CIV, 2018 WL 1582957, at *1 (S.D. Fla. Mar. 30, 2018). While the determination of a motion for new trial is left to the sound discretion of the court, the standard for the motion is less stringent than for a motion for judgment as a matter of law. *Id.*

B. The Plaintiff Failed to Plead with Specificity

"Allegations of fraud are subject to a heightened pleading standard. Rule 9(b) requires that '[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.'" *Solomon v. Blue Cross & Blue Shield Ass'n*, 574 F. Supp. 2d 1288, 1293 (S.D. Fla. 2008). The court in *Solomon* stated further that a claim of fraud must:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

In its Amended Complaint [ECF No.119], the SEC brought six (6) counts for fraud against FURMAN. Amend. Compl. 47:52. In all of the counts, FURMAN's alleged violations are bundled with that of multiple other defendants and none of the counts state with the precision defined in *Solomon*.

As an example, Count I makes vague references to the timing and substance of alleged violations by FURMAN as follows: "…FURMAN and United Fidelis, beginning no later than November 2017 through present, and Fidelis Planning beginning no later than August 2019 through present, directly or indirectly, by use of the means and instrumentalities of interstate commerce, or of the mails, in connection with the purchase or sale of securities, knowingly or recklessly, employed devices, schemes or artifices to defraud in connection with the purchase or sale of securities." Amend. Compl. ¶ 269.

When FURMAN raised the issue at trial, the Court suggested that the SEC would be permitted to amend the Amended Complaint on the eve of trial despite the obvious prejudice to FURMAN. The result was confusion as to the SEC's theory of liability and the specifics of its claims. This was compounded by the fact that the SEC's case in chief focused on issues pertaining to PAR FUNDING and its business practices, as opposed to the issues pertaining to FURMAN and what he actually did.

FURMAN was prejudiced at trial as a result of the Plaintiff's failure to plead with specificity, which allowed the SEC to have an expanded trial that focused on issues beyond FURMAN, and beyond the allegations of the Amended Complaint, despite FURMAN's objection, and this Court should grant a new trial as remedy.

C. The Court Improperly Denied FURMAN from Introducing certain Documentary and Testimonial Evidence

i. *Denial of Testimony from Joel Glick*

A belated disclosure is harmless when the opposing party had an opportunity to depose the witness prior to the discovery deadline." *Signor v. Safeco Ins. Co. of Illinois*, No. 19-61937-CIV, 2021 WL 4990314, at *4 (S.D. Fla. Apr. 16, 2021).

On November 16, 2021, FURMAN disclosed Joel D. Glick, CPA/CFF, CFE as an expert witness for the first time. [ECF No. 966-4]. FURMAN intended to have Mr. Glick testify regarding the condition of Defendant, COMPLETE BUSINESS SOLUTIONS GROUP, INC., d/b/a PAR FUNDING's ("PAR FUNDING"), business operations. Mr. Glick had been previously disclosed by Defendant, LISA MCELHONE. Additionally, the SEC was provided with Mr. Glick's initial and rebuttal reports and was deposed by the Plaintiff on September 2, 2021.

The SEC did not formally object to Mr. Glick's inclusion in FURMAN's witness list until trial. *Signor*, No. 19-61937-CIV, 2021 WL 4990314, at *4. ("A party's failure to promptly bring a disclosure violation to the court's attention supports the conclusion that any violation was harmless."). The result at trial; was that FURMAN was unable to effectively rebut much of the opinion-based testimony permitted from some of the SEC's lay witnesses, and to show that PAR FUNDING's books and records were accurate (See e.g., Section F *infra*).

The inclusion of Mr. Glick as FURMAN's expert witness posed no prejudice to the Plaintiff as Mr. Glick and his findings had been previously disclosed and the SEC had already taken his deposition. The Court also ruled on Daubert issues concerning Mr. Glick's testimony. Consequently, there was no prejudice and the Court committed error in striking Mr. Glick and should grant FURMAN a new trial. While the Court claimed that the local rules prevented FURMAN from relying on Glick's testimony, there is no local rule that prevents a party from using another's expert, whose interests are aligned with that party's, if the expert witness was properly disclosed.

ii. Denial of Testimony From Investors

"A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony

in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.' *Horrillo v. Cook Inc.*, No. 08-60931-CIV, 2014 WL 8186705, at *5 (S.D. Fla. June 6, 2014).

During the trial several of the SEC's witnesses alleged that FURMAN omitted or misrepresented certain information regarding aspects of PAR FUNDING and/or its officers and employees. FURMAN sought to introduce the testimony of several of his disclosed witnesses who had invested with his companies and would have stated that FURMAN had fully advised them of the risks associated with PAR FUNDING.

The SEC objected to the introduction of these "investor" witnesses' testimony as irrelevant and because their testimony would otherwise constitute hearsay, and the Court struck the witnesses from FURMAN's list. FURMAN was, subsequently, unable to effectively rebut the Plaintiff's attack on his character for truthfulness, or to establish that he disclosed certain misconduct to investors. The proffered testimony was not being introduced for the truth of the matter asserted, but rather for purposes of independent significance. However, the Court summarily found that he was seeking to introduce evidence of disclosure for the truth of the matter asserted, which was not the case. This erroneous and resulting prejudicial impact on FURMAN's defense can only be adequately remedied with a new trial, which was compounded by the SEC's reference to the excluded testimony during its closing argument.

iii. Denial of Entry of Certain Documents

"'In determining whether the failure to disclose is substantially justified or harmless, the Court considers four factors: '(1) the importance of the excluded testimony; (2) the explanation of the party for its failure to comply with the required disclosure; (3) the potential prejudice that would arise from allowing the testimony; and (4) the availability of a continuance to cure

such prejudice.'" *Kroll v. Carnival Corp.*, No. 19-23017-CIV, 2020 WL 4926423, at *5 (S.D. Fla. Aug. 20, 2020).

As set forth in FURMAN's Motion to Compel [ECF No. 846], the SEC agreed to provide FURMAN discovery after the deadline to do so had expired and received a request from FURMAN to disclose and produce all of the documents that supported its claims against him but refused to do so. During the course of trial, the Court prohibited FURMAN from seeking to cross-examine witnesses that were called by the SEC about documents that they signed, or from using documents to refresh witnesses' recollection (including a text message between FURMAN and SEC witness Perry Abbonizio), while allowing the SEC to introduce any document it sought to introduce. Surprisingly, the basis of the Court's refusal to allow FURMAN to seek the introduction of such documents into evidence was the unsubstantiated assertion by the SEC that the SEC would be prejudiced by the alleged failure by FURMAN to produce documents, when the SEC in fact had a forensic copy of all of FURMAN's e-mails and text messages. Moreover, FURMAN was prevented from seeking to introduce any e-mails or other correspondence which would have been circumstantial evidence showing his state of mind, or which could have been used to support his credibility which was a critical issue in the instant case, unless FURMAN could establish that the SEC had access to the foregoing information, which was impossible because the SEC had produced more than 3 million pages of documents to FURMAN after seizing from the Receiver FURMAN's iCloud account and cell phone.

D. The Court Permitted the SEC to Improperly Deploy the Law Enforccement Investigatory Privilege

The proponent of the law-enforcement privilege bears the ultimate burden of demonstrating its applicability." *F.T.C. v. Timeshare Mega Media & Mktg. Grp., Inc.*, No. 10-62000-CIV, 2011 WL 6102676, at *4 (S.D. Fla. Dec. 7, 2011). A court must evaluate the manner in which the

privilege is asserted and the impact on the opposing party in determining the privilege has been forfeited. *Id.* at 7. "In other words, it is simply not fair to allow a party to wield a privilege as a sword to cut out the heart of an opposing party's case while simultaneously brandishing it as a shield from disclosure of any Achilles heels." *Id.* "Key to determining that a forfeiture has occurred, therefore, is reliance on the information sought, to the detriment of the moving party by the party invoking the privilege." *Id.*

Here, the SEC elicited significant testimony from several different governmental entities and agencies, which made it appear as though PAR FUNDING was engaged in misconduct, these witnesses included representatives from the FBI, the New Jersey Attorney General's Office, the Texas Attorney General's Office, and the Pennsylvania Attorney General's Office. On direct each of these officers was permitted to provide testimony concerning their agency's efforts to engage in a substantial investigation concerning Par Funding, and other related entities. However, when asked questions which would have supported FURMAN's defense, each of the foregoing witnesses asserted the law enforcement privilege, and the Court sustained the objection on the issue. The testimony of the foregoing government agencies and officials constituted a waiver of the law enforcement privilege, and FURMAN should have been allowed to question them about issues concerning the investigation at issue. The failure to do so, prejudiced FURMAN, and prevented him from having a fair trial.

This prejudice was compounded by the fact that Court refused to allow FURMAN to introduce evidence concerning the nature of the investigation and the significant and material misstatements that lead to the appointment of a Receiver, as set forth in the *Motion to Dismiss the Amended Complaint Due to Misconduct by the Securities and Exchange Commission* [ECF No. 663] which is incorporated by reference, and should have permitted FURMAN to introduce

substantial evidence concerning the issues which gave rise to the instant investigation. However, FURMAN was prohibited from eliciting testimony concerning the nature of the investigation or the foregoing misstatements by the Court, which also prohibited FURMAN, improperly, from relying on the deposition designations of the SEC, and *sua sponte* struck them.

E. The Court Improperly Permitted a Previously Undisclosed Witness During the Plaintiff's Rebuttal Case

"In deciding whether to exclude an undisclosed witness, courts consider '(1) the importance of the testimony, (2) the reason for the [the non-disclosing party's] failure to disclose the witness earlier, and (3) the prejudice to the opposing party if the witness had been [admitted at trial.]'" *Calicchio v. Oasis Outsourcing Grp. Holdings, L.P.*, No. 19CV81292RUIZREINHAR, 2021 WL 2637637, at *8 (S.D. Fla. Apr. 29, 2021), *report and recommendation adopted in part*, rejected in part, No. 19-CV-81292-RAR, 2021 WL 3123767 (S.D. Fla. July 22, 2021). "[M]erely labeling an individual as a rebuttal witness does not exempt the witness from disclosure." *Id.* at 10.

The SEC called a single witness during its rebuttal case, Adam Weisenstine, an agent with the Federal Bureau of Investigation (FBI). Agent Weisenstine was part of a team of FBI agents that had swarmed FURMAN's business office on or about July 27, 2021, and subjected him to questioning. Agent Weisenstine had not been previously disclosed as a witness and was purportedly called solely for impeachment of FURMAN's testimony. When he took the witness stand, however, Agent Weisenstine began supplying direct evidence regarding matters that FURMAN made clear *he could not recall* during questioning by the SEC. In other words, Agent Weisenstine's testimony did not address inconsistencies, but rather alleged information that the SEC had been unable to establish through any other witness, which had otherwise been raised by the SEC during its case in chief.

Additionally, while the SEC was permitted to scour Agent Weisenstine's recollection of his initial contact with FURMAN, defense counsel's questioning on cross-examination was repeatedly restricted by the Court citing the law enforcement investigatory privilege.

FURMAN was prejudiced as the SEC was granted the "second bite" at introducing evidence that had been introduced by the SEC. Calicchio v. Oasis Outsourcing Grp. Holdings, L.P., No. 19CV81292RUIZREINHAR, 2021 WL 2637637, at *10 (S.D. Fla. Apr. 29, 2021), report and recommendation adopted in part, rejected in part, No. 19-CV-81292-RAR, 2021 WL 3123767 (S.D. Fla. July 22, 2021) (internal citations omitted). Rebuttal evidence is evidence that is intended to refute evidence introduced **by the other party**, which is not anticipated by the party seeking to introduce it, and not evidence that a party introduces itself. As such, the testimony of Mr. Weisenstine prejudiced FURMAN.

The Court further prejudiced FURMAN by allowing Mr. Weisenstine to be questioned based on his notes, which were never provided to FURMAN. Thus, there was additional undue prejudice and surprise in allowing the cumulative undisclosed witness to testify.

F. The Court Improperly Allowed the Plaintiff's Witness, Bradley Sharp, to Testify as to his Opinion on Various Items of Evidence

Only a witness qualified by knowledge, skill, opinion, training, or education may testimony on particular subject matter in opinion form. *Regions Bank v. Commonwealth Land Title Ins. Co.*, No. 11-23257-CIV, 2013 WL 3279939, at *1 (S.D. Fla. June 27, 2013).

The SEC never disclosed Bradley Sharp, an employee of the appointed Receiver, as an expert witness. Yet, at trial, Mr. Sharp was permitted to testify as to his opinions and conclusions regarding PAR FUNDING's business operations and customs within the Merchant Cash Advance industry. No predicate had been laid as to any qualifications Mr. Sharp possessed to testify in

opinion form. As a result, FURMAN was prejudiced as he was unable to effectively rebut Mr. Sharp's unexpected opinion testimony. Consequently, a new trial should be granted.

G. FURMAN Was Not Provided a Fair Trial Due to Judicial Bias

In addition to the foregoing, FURMAN was not provided a fair trial as a result of judicial bias, which should have resulted in the Court recusing itself. In addition to the assertions in Defendants LaForte, Mcelhone, and Cole's Motion for Recusal [ECF No. 630] which is incorporated by reference, the Court should have recused itself pursuant to 28 U.S.C. § 455. In this circuit, the test for determining whether a judge's impartiality might reasonably be questioned is an objective one and requires asking whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt as to the judge's impartiality." *See United States. v. South Florida Water Mgmt. Dist.*, 290 F. Supp. 2d 1356, 1359 (S.D. Fla. 2003) (citing *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988)) (collecting cases). Here, a lay observer would entertain significant doubts as to this Court's impartiality given its stated preference for the SEC's view of the facts and law over that of the Defendant. Indeed, as explained below, lay observers—investors observing these conferences—openly expressed such doubts. Examples of the Court's bias is demonstrated by the following:

- At the beginning of trial the Court blindly accepted the SEC's false representation that it did not question FURMAN about the topics where Defendant pled the Fifth Amendment in response to Requests for Admission, during Defendant's deposition, when FURMAN was questioned for more than eight (8) hours about nearly every possible area of inquiry and FURMAN's counsel attempted to read portions of the FURMAN's deposition transcript into the record;

- The Court *sua sponte* struck FURMAN's filing of deposition designations of the SEC, and ignored FURMAN's showing of excusable neglect and admonished FURMAN's counsel when faced with the foregoing explanation;

- The Court allowed the SEC to ask almost every question during its direct examination in a leading manner, acknowledged that the SEC was allowed

significant leeway in asking leading questions, and then admonished FURMAN'ss counsel for objecting to each question, which was leading;

- The Court instructed the SEC on how to lay the predicate for the admission of business records of Mr. Sharpe, ignored the fact that Mr. Sharpe lacked personal knowledge of how the records he was supposed to authenticate were prepared in the ordinary course of business, and *sua sponte* located legal authority to permit Mr. Sharpe to testify about the documents at issue;

- The Court allowed the SEC to introduce e-mail correspondence between an undercover agent and officers of PAR FUNDING, as "business records" without any predicate to establish how or why the documents, which were part of an investigation were in fact business records;

- The Court allowed the SEC to introduce any document it wished regardless of whether the document was in fact bates stamped, while requiring FURMAN to establish that any document that he wished to introduce into evidence was in fact produced prior to seeking its introduction into evidence;

- The Court refused to allow FURMAN's counsel to have any side bar discussions when FURMAN's counsel requested them but allowed the SEC to have any side bar discussions it desired;

- The Court admonished the FURMAN for going to trial and for trying to prove that the securities that FURMAN was selling were exempt from registration stating that the FURMAN failed to realize that he was facing significant fraud charges which was why the other defendants settled;

- The Court demanded that FURMAN proffer the testimony of each and every witness in its witness list to limit the time that FURMAN could present its case in chief, while allowing the SEC unlimited time to prepare its defense;

- The Court referred to arguments made by the SEC and the position taken as its own argument;

- The Court refused to allow former Defendant, Dean Vagnozzi, to appear to testify via zoom, which prevented FURMAN, whose assets were frozen by the Court, from calling him as a witness during trial;

- The Court *sua sponte* provided authority to explain why it would have overruled objections of FURMAN's counsel after the FURMAN had withdrawn those objections;

- The Court admonished FURMAN's counsel for discussing the nature of objections with Defendant, which were well-founded, as was later acknowledged by the Court

- The Court accepted the misleading statement of the SEC that it did not have any documents from Defendant, when it actually produced, to FURMAN, more than 3 million pages of documents that were provided from him, and had a complete copy of FURMAN's cellular phone, and threatened FURMAN's counsel with sanctions for trying to explain the nature of what was produced and that there was no prejudice to the SEC;

- The Court blindly accepted the SEC's misrepresentations concerning the integration doctrine, and refused to consider the SEC's own materials which refuted its position during trial;

- The Court required FURMAN to authenticate the signature on business records that FURMAN was familiar with while allowing the SEC to avoid laying the predicate;

- The Court refused to allow Defendant to introduce testimony of Joel Glick, because Defendant did not pay for Mr. Glick to serve as an expert witness, even though Mr. Glick and the substance of his opinions had been disclosed and there is no local rule prohibiting his testimony;

- The Court allowed the SEC to introduce evidence concerning the investigation into PAR FUNDING and the FURMAN through an undisclosed surprise witness, which was called to testify about questions that the SEC asked during its case in chief;

- The Court refused to allow FURMAN to provide an instruction on the exemptions to registration and mocked FURMAN's counsel when FURMAN's counsel made arguments about the matter and in doing so mocked FURMAN's counsel;

- The Court refused to allow FURMAN to introduce testimony concerning whether he disclosed certain facts to investors, claiming that even though the testimony was not being pursued to show the truth of the matter asserted that it was hearsay while allowing the SEC to introduce any out of court statement it propounded;

- The Court threatened potential witnesses of FURMAN, via zoom, of adverse consequences of testifying;

- The Court would mute the zoom proceedings when admonishing FURMAN's counsel to avoid having the public witness its tone with counsel; and

- The Court repeatedly and consistently addressed FURMAN's counsel in a disrespectful manner, rolling his eyes whenever FURMAN would raise an objection, while clearly demonstrating a preference towards the SEC.

Given the Court's prejudicial representations, and the displeasure the Court seemed to direct towards FURMAN, a lay person would reasonably entertain significant doubts regarding future rulings touching on these issues. *Sentis Group, Inc. v. Shell Oil Co,* 559 F.3d 888, 904 (8th

Cir. 2009) (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994)) ("reassignment[1] may be necessary based solely on events transpiring in current court proceedings or on a court's statements or rulings where 'they reveal such a high degree of favoritism or antagonism as to make fair judgement impossible'") (emphasis supplied). This conduct created an unfair trial, and prejudiced FURMAN. It prevented FURMAN from having his day in Court. manding recusal and a new trial.

H. The Court Improperly Denied FURMAN's Motion for Judgment as a Matter of Law, and Jury Instructions Concerning his claim of Exemption

"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*. There was no evidence that FURMAN, through Fidelis ever **sold any securities** with respect to CBSG, d/b/a Par Funding and as a result, FURMAN was entitled to judgment as a matter of law with respect to the foregoing counts.

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

[1] The court applied Section 455(a) standard to determine whether the court should order reassignment pursuant to 28 U.S.C. Section 2106. *Id.* at 904.

(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. 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). 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.

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 as such, could not circumvent the fact that FURMAN was never involved in the sale of a single security to Par Funding. *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.").

The failure by the SEC to allege integration, coupled with the Court's refusal to instruct the jury on the issue of whether the notes that Fidelis and FURMAN sold were exempt prejudiced FURMAN to the extent that not only did the jury enter findings against him with respect to the claims for unregistered securities. It also permeated the underlying fraud claims against FURMAN. Indeed, during closing, the SEC referenced immaterial misstatements in Fidelis' registration and claimed they were false, which, coupled with the argument that only one instance of fraud needed to be established, prevented FURMAN from having a fair trial. The Court also blindly accepted the SEC's misrepresentation concerning integrated offerings, as the SEC claimed that it everyone would avoid regulation by creating sub-funds to avoid registration when the SEC itself had in fact issued several releases showing that it regulated such offerings through the integration framework.

The error by the Court was compounded by the Court's failure to allow FURMAN to utilize the exemptions of Par Funding in defense of the claim for the sale of unregistered securities. The Court relied on the language of 17 C.F.R. §230.500(d), which provides, in relevant part "[u]se of Regulation D: (d) Regulation D is available only to the issuer of the securities and not to any affiliate of that issuer or to any other person for resales of the issuer's securities. Regulation D provides an exemption only for the transactions in which the securities are offered or sold by the issuer, not for the securities themselves." The plain language of this statute makes it clear that a party, such as FURMAN, can utilize the defense of Regulation D, in connection of any sale of securities, by the issuer, which, according to the SEC was Par Funding. However, the Court held that FURMAN was not entitled to an instruction concerning the foregoing exemptions, because he was not an issuer of Par Funding Securities, even though FURMAN was alleged to be a necessary participant in the sale of Par Funding Securities. Thus, the Court simultaneously found that while FURMAN was essentially an agent of Par Funding with respect to the sale of its securities, that he was not entitled to any of the benefits of the exemption that FURMAN was entitled to. The Court also improperly shifted the burden of proof to FURMAN, by finding that FURMAN was required to prove that Par Funding **did not engage in general solicitation**, when there was no evidence presented to show that it in fact did. As a result, the failure to allow FURMAN to avail himself to the foregoing instruction prejudiced him, because as stated below the SEC was able to argue that FURMAN made fraudulent misrepresentations in connection with the sale of unregistered securities, and was not entitled to any defense with respect to the claims that he sold unregistered securities. The Court's interpretation would of 17 CFR 230.500(d) would also lead to absurd results, as an affiliate of an issuer of securities is an owner of the issuer, which means that anyone associated with an issuer of securities is automatically liable for the sale of unregistered securities

under the Court and SEC's interpretation of the statute. This plainly erroneous interpretation of the statute prejudiced FURMAN warranting a new trial.

I. The SEC Improperly Referenced Excluded Evidence During Its Closing Argument

Despite the fact that the Court ruled that FURMAN could not bring any investors or other third parties to testify about his disclosure, the SEC argued, during its closing argument, that there was overwhelming evidence against FURMAN and his failure to disclose material facts because he did not present evidence from various investors. This testimony prejudiced the jury, in that it had no choice but to accept the testimony of the investors presented by the SEC, and disregard the lack of memory and credibility of several of the investors that were presented by the SEC. McWhorter v. City of Birmingham, 906 F.2d 674, 677 (11th Cir. 1990); See, e.g., Brown v. Royalty, 535 F.2d 1024, 1028 (8th Cir.1976) (repeated, deliberate reference to evidence excluded by district court is clear misconduct and grounds for new trial); Adams Laboratories, Inc. v. Jacobs Engineering Co., 761 F.2d 1218, 1226 (7th Cir.1985) (plaintiff's counsel's reference to excluded evidence in direct contravention of the district court's order held to constitute prejudicial error).

CONCLUSION

In the days and weeks leading to his trial, Mr. FURMAN made clear his weariness that the SEC would attempt to turn his trial into a referendum on his prior co-defendants. Despite assurances from the Court to the contrary, the SEC was permitted to regale the jury with the alleged wrongdoing of those same co-defendants while Mr. FURMAN was repeatedly restrained from putting forward a robust defense. In the end, the jury struggled to apply the jury instructions which emerged the confused proceedings. A new trial is necessary to remedy the errors articulated supra. Mr. FURMAN requests that this Court enter an order granting the same.

RULE 7.1(a)(3) CERTIFICATION

I HEREBY CERTIFY that on January 12, 2022, counsel for the movant conferred with Plaintiff's counsel, Alise Johnson, Esq., and counsel for the Receiver, Timothy A. Kolaya, Esq., via email. Ms. Johnson advised that the Plaintiff objects to the relief requested herein while Mr. Kolaya noted that the Receiver takes no position on the same.

Respectfully Submitted,

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