UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 9:20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,
v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING et al.,

Defendants.
_____/

PLAINTIFF'S OPPOSTION TO MICHAEL FURMAN'S MOTION FOR NEW TRIAL

Defendant Michael Furman's Motion for a New Trial (DE 1129) ("Motion") is nothing more than an improper attempt to relitigate issues about which the Court has already ruled and to assign error and prejudice where clearly there is none. Furman fails to point to any errors that warrant a new trial. Furman's recycled arguments lack merit and his Motion must be denied.

I. LEGAL STANDARD

Motions for a new trial are governed by Federal Rule of Civil Procedure 59(a), and may be granted for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. *See* Fed. R. Civ. P. 59(a)(1). A party moving for a new trial has the burden to prove that the verdict is against the weight of the evidence. *Nat'l Union Fire Insur. Co. of Pitt, PA v. All American Freight, Inc.*, 197 F.Supp.3d 1376, 1381 (S.D. Fla. 2016) (citing *Dudley v. Wal-Mart Stores, Inc*., 166 F.3d 1317, 1320 n.3 (11th Cir. 1999)). This is an exceedingly high standard, as "the law is clear in this circuit that a district court should only grant . . . a new trial when the verdict is against the clear weight of the evidence or will result in a miscarriage of justice." *Ramirez v. E.I. Dupont De Nemours & Co*., 454 Fed. Appx. 760, 763 (11th Cir. 2011);

see also Peat, Inc. v. Vanguard Research, Inc., 378 F.3d 1154, 1162 (11th Cir. 2004) (a new trial is warranted for an evidentiary error "where the error has caused substantial prejudice to the affected party"). Indeed, the Eleventh Circuit has said that "new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence." *See Myers v. TooJay's Mgmt. Corp.,* 640 F.3d 1278, 1287 (11th Cir. 2011) (citation omitted).

Furman fails to meet this high burden for the extraordinary relief he seeks. Instead, he argues that a new trial is warranted based on: (1) the SEC's purported failure to properly plead fraud; (2) the admission and exclusion of evidence; (3) judicial prejudice; and (4) improper jury instructions. Each argument fails for the reasons set for below.

II. ARGUMENT

A. THE WEIGHT OF THE EVIDENCE SUPPORTS THE JURY'S VERDICT

Furman's bare assertion that he is entitled to a new trial because the verdict was against the weight of the evidence is wholly insufficient to warrant a new trial. Furman fails to describe what evidence the Court should consider in order to conclude that the evidence presented at trial regarding the false statements and omissions he made to investors could not support the jury's verdict. Thus, the Court need not consider this argument further. *Velasco v. U.S. Atty. Gen.,* 156 F. Appx. 157, 159 (11th Cir. 2005) ("a motion that merely republishes the reasons that had failed to convince the tribunal in the first place is inadequate to support a motion for reconsideration because it gives the tribunal no reason to change its mind").

Moreover, given the evidence presented at trial, Furman could not possibly meet the necessary thresholds to warrant a new trial. Over the course of the seven days of trial, the SEC presented a voluminous amount of evidence to the jury. Three state regulators testified that they

had entered cease and desist orders against Par Funding that remain in effect to date. The SEC presented evidence, including recordings, of Furman telling a FBI agent posing as an investor that these cease and desist orders had been retracted. The SEC also presented evidence of several investors who testified they were not informed that Par Funding was the subject of the state regulators' cease and desist orders or that Par Funding executive Joseph LaForte had a criminal record. Defendant Furman testified that he was aware of Joseph LaForte's criminal history and that he did not tell all of his investors about that history or the cease and desist orders. Such evidence was more than sufficient to sustain the jury's findings of liability. Where "the record provides some support for the jury's decision, the verdict is not against the great weight of the evidence," and the district court will not abuse its discretion by denying the motion. *See Quick v. City of Birmingham,* 346 F. Appx. 494, 496 (11th Cir. 2009). Indeed, the overwhelming weight of the evidence supports the jury's verdict.

B. PLAINTIFF'S ALLEGATIONS OF FRAUD WERE PROPERLY PLED

In its Amended Complaint (DE 119), the SEC brought six counts for fraud against Furman. In his Motion, Furman asserts that the Complaint's fraud allegations are bundled with those alleged against other Defendants and not stated with the particularity required under Fed. R. Civ. P. 9(b). Furman argues that the result was confusion as to the SEC's theory of liability against him.

Furman made similar arguments in Defendants' Joint Motion to Dismiss Plaintiff's Amended Complaint (DE 363), wherein he alleged that the SEC's Amended Complaint failed to meet the heightened pleading standard under Rule 9 because the SEC lumped defendants together and failed to define the conduct of the individual defendants. The Court denied the Motion to Dismiss, explaining that the SEC's allegations that Furman had made statements to an agent posing as an investor that New Jersey had retracted its action against Par Funding and that Par Funding

was "good" were "sufficient to satisfy Rule 9(b)'s particularity standard." *See Order Denying Motion to Dismiss* (DE 583 at 32-33). In that same Order, the Court also found that "the SEC has sufficiently pleaded scienter for Furman." *Id.*

Furman's repetition of arguments already rejected by the Court is insufficient to warrant a new trial. *See Chapman v. AI Transport*, 229 F.3d 1012, 1027 (11th Cir. 2000) ("The district court did not abuse its discretion in refusing to re-open after the trial . . . the summary judgment it had previously granted . . ."); *see also Algie v. RCA Global Commc'ns, Inc.*, 891 F. Supp. 875, 881-83 (S.D.N.Y. 1994) (rejecting defendant's post-trial motion for judgment as a matter of law that sought reconsideration of partial summary judgment entered in plaintiff's favor)), *aff'd*, 60 F.3d 956 (2d Cir. 1995). Nothing has changed since the Court's initial Order. The Motion to Dismiss was properly denied, and this Motion should be denied as well.

C. THE COURT PROPERLY PREVENTED THE INTRODUCTION OF IRRELEVANT AND CONFUSING EVIDENCE

The admissibility of evidence is committed to the broad discretion of the trial court. *Walker v. NationsBank of Fla.,* 53 F.3d 1548, 1554 (11th Cir. 1995). A new trial may not be granted based on an evidentiary ruling unless there has been both error and an adverse impact on the moving party's "substantial rights." *See* Fed. R. Civ. P. 61 ("the court must disregard all errors and defects that do not affect any party's substantial rights"). *See also Middlebrooks v. Hillcrest Foods, Inc.,* 256 F.3d 1241, 1248 (11th Cir. 2001); *Rosa v. City of Fort Myers*, 2008 WL 398975 (M.D.Fla., February 12, 2008). Contrary to Furman's assertions, in this case there were not any evidentiary errors that affected Furman's "substantial rights" or that were unduly prejudicial.

1. The Court Properly Denied Expert Testimony from Joel Glick

Furman's contention that the Court's preclusion of Joel Glick's testimony, an expert retained by co-defendant McElhone, warrants a new trial must fail. The Court did not err in

preventing Glick's testimony and Furman has not shown that preventing Glick's testimony was unduly prejudicial. Here, the Court rightfully excluded Glick from testifying at trial on the grounds that: (1) Glick's testimony was not relevant to whether Furman made false statements to investors; and (2) Furman had not properly filed expert disclosures regarding Glick's testimony in violation of the Federal Rules of Civil procedure and the local rules. *See* Fed.P.Civ.P. 26(a)(2)(D), S.D.Local Rule 16.1(e)(10); Amended Order Setting Jury Trial Schedule. (D.E. 521).

Prior to trial, the SEC moved to exclude Glick from testifying as to several irrelevant topics. In its Motion in *Limine* (DE 929 at 20), the SEC specifically argued Glick should not be allowed to testify at trial as to: (1) whether the LIBR analysis or a FIFO analysis is the proper way to track the cash flow of Par Funding's business model; (2) Par Funding's business model or the MCA business model in general; and (3) the Receiver's efforts at running Par Funding. The SEC argued that such testimony should be precluded as it was not relevant to prove or disprove the SEC's allegations at issue in the trial: whether the individual Defendants made misrepresentations or omissions in the marketing and sales of the Notes to investors. The Court ruled in the SEC's favor to preclude Glick's testimony on such matters. *See* Order on Motion in *Limine* (DE 1044). Furman, however, did not move for reconsideration of this ruling.

Despite the Court's prior ruling, at trial, Furman attempted to present Glick's testimony regarding the same issues raised in the Motion in *Limine*: specifically, that Glick reviewed the KPI reports and that they were accurate, and his review of Par Funding's books and records. *See* 12-10-21 Trial Tr. at 202:13-17. Again, the SEC objected on the basis that the subjects contained in Glick's prior declarations were not at issue in the case against Furman and Glick's testimony would be irrelevant and prejudicial. The Court sustained the SEC's objection, and also added that Glick could not testify as Furman had not filed expert witness disclosures on his own behalf for Glick

and that disclosures filed by other Defendants regarding Glick did not cover Furman. *See* 12-10-21 Trial Tr. at 220-221.

The Court's ruling was not in error, as Glick's opinions about Par Funding's business model and the proper accounting method were irrelevant to the allegations brought by the SEC against Furman. The Supreme Court's decision in *Daubert v. Merrell Dow Pharms.,* 509 U.S. 579 (1993), requires district courts to act as "gatekeepers" to ensure expert opinions are reliable and relevant. *see also Hendrix, ex rel. G.P. v. Evenflo Co*., 609 F.3d 1183, 1194 (11th Cir. 2010) (describing gatekeepers are to engage in a "rigorous three-part inquiry"); *Rink v. Cheminova, Inc*., 400 F.3d 1286, 1291 (11th Cir. 2005). The party seeking to admit the expert testimony bears the burden of laying the proper foundation for its admissibility by a preponderance of the evidence. *Rink*, 400 F.3d at 1292. Expert evidence, like all other evidence, may also be excluded under Federal Rule of Evidence 403 if it is confusing or misleading, or if its probative value would be substantially outweighed by the risk of unfair prejudice. *United States v. Henderson*, 409 F.3d 1293, 1302 (11th Cir. 2005). Misleading and confusing expert testimony is at odds with the very purpose of expert testimony contemplated by Federal Rule of Evidence 702.

In his Motion, Furman states without support that because Glick was not permitted to testify, he was unable to rebut the testimony of witnesses (specifically Sharp) to show Par Funding's books and records were accurate. Furman's argument fails to identify what trial testimony he asserts Glick would have rebutted as the accuracy of Par Funding's books and records was not at issue at trial. Nor does Furman point to any testimony by Glick that, if admitted, would have assisted in Furman's defense. Glick was not hired, nor did he opine, on the actions of the agent fund managers, the registration and exemption requirements of the agent fund managers, or any of the statements or omissions Furman made to investors. Glick's testimony related to the

allegation that Defendants (other than Furman) were essentially running a Ponzi scheme and misrepresenting Par Funding's default rate. Furman has failed to show how Glick's testimony could have been relevant to disprove any of the evidence presented against Furman, by Sharp, or any other witness. Thus, Furman has not met his burden of showing that the Court's ruling was an error that affected his "substantial rights" or was unduly prejudicial.

Moreover, Furman did not move for reconsideration of the Court's ruling on the Motion in *Limine* prohibiting Glick's testimony and never filed an expert report or other designation of what he intended Glick to testify as to at trial. Thus, the Court correctly prohibited Furman from allowing Glick to testify as an expert at trial on Furman's behalf, as his expert testimony had not been correctly designated as required by the Federal Rules of Procedure. *See* Fed.P.Civ.P. 26(a)(2)(D); S.D.Local Rule 16.1(e)(10). Therefore, a new trial may not be ordered on this basis.

2. The Court Properly Denied Testimony From Investors

During its case in chief, the SEC presented several investor witnesses who testified regarding various misrepresentations Furman told them (or information he omitted) in order to prove elements of the fraud. In his defense, Furman sought to introduce the testimony of other investors whom he proffered would testify that they received full disclosures regarding the risks of the investment. Furman now asserts the Court erred in excluding these witnesses because he was denied the right to rebut the attack on his character for truthfulness or to establish that he disclosed certain representation to investors.

The basic premise of Furman's argument is misguided. That some investors may have gotten full disclosures or not been told misrepresentations is irrelevant to whether Furman violated the securities laws on other occasions with other investors. *See United States v. Marrero,* 904 F.2d 251, 260 (11th Cir. 1990) ("The fact that Marrero did not overcharge in every instance in which

she had an opportunity to do so is not relevant to whether she, in fact, overcharged as alleged in the indictment").

Furman's assertion that these investor witnesses should have been allowed to show his truthfulness of character is similarly unavailing. As addressed in the SEC's Motion in *Limine* (DE 929 at 4-6), and the Court in its Order on same (DE 1044), Furman was properly excluded from presenting evidence regarding investors' impressions that he was "straightforward," "truthful" or similar character evidence. Character evidence and evidence of specific instances of good conduct are inadmissible for these purposes. Specifically, Federal Rule of Evidence 404(a) provides: "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 trait." Courts have frequently found that this rule applies in SEC enforcement actions.[1] Additionally, specific instances of a defendant's good character are not a defense to any of the substantive violations the SEC alleged against Furman. Evidence of good character does not bear on or negate intent to defraud, and is therefore properly excludable by the court as irrelevant. *United States v. Ellisor*, 522 F.3d 1255, 1270 (11th Cir. 2008). The only effect of character testimony would be to suggest Furman was not the type of person to violate the securities laws, which is precisely what Rule 404 prohibits.

Moreover, any character evidence that may have been proffered by the investors would not have been permissible under Federal Rule of Evidence 608(a), which provides: "A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a

[1] *See SEC v. Morelli*, No. 91 CIV. 3874 (LAP), 1993 WL 603275, at *1 (S.D.N.Y. Dec. 21, 1993) (ordering that defendants may not introduce evidence of character for truthfulness and honesty at trial); *SEC v. Towers Finl Corp.*, 966 F.Supp. 203 (S.D.N.Y. 1997) (excluding character witnesses in Ponzi scheme trial and citing cases and commentary excluding such evidence); *SEC v. Johnson*, Civil Action No. 05-36 (GK), 2008 WL 11408530 (D.D.C. Feb. 21, 2008) (excluding evidence of "traits of honesty, integrity, and fair dealing"); *SEC v. Jacobs*, 1:13 CV 1298, 2014 WL 12597832, at * 3 (N.D. Ohio, Feb. 25, 2014) (granting SEC's Motion in *Limine* regarding character evidence).

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." The Commission's witnesses did not attack Furman's character for truthfulness at any point in the trial, they simply testified as to what they were told by (and not told) by Furman. Thus, character evidence was properly excluded by the Court under Rule 404, and there was no error warranting a new trial with regards to same.

3. The Court Properly Denied the Entry of Documents that Furman Failed to Show Were Produced Prior to Trial

In its Order on the Motion in *Limine* (DE 1044) the Court, following Fed.R.Civ.P. 37(c)(1), ruled that previously undisclosed witnesses and documents would not be allowed to be presented at trial. Despite this Order, Furman again asserts that he was wrongfully prevented from seeking to introduce documents such as emails or other correspondence which would have evidenced his state of mind or supported his credibility, unless he could establish that the SEC had access to the document prior to trial. Furman fails, however, to identify what documents he would have introduced if permitted to do so, making it is impossible for this Court to determine whether such documents could have made any difference to the jury's verdict or to show that he was prejudiced by the Court's denial. Thus, the Court should summarily disregard this contention.

Furman's argument should also be denied because: (1) it is well-established under Rule 37(a)(1) that parties cannot introduce documents at trial unless they have been previously produced or identified in discovery; and (2) any failure to establish whether documents had previously been produced by Furman, is his own. Furman has simply not advanced any reason why the well-established rules of civil procedure should not apply to him, much less why the Court should order a new trial due to his own failures.

Under Fed.R.Civ.P. 26(a)(1)(ii), a party must provide to the other party a copy or description by category and location of all documents, electronically stored information, and tangible things that the disclosing party has in its possession or control and may use to support its claims or defenses. Rule 26 requires that these disclosures be supplemented "in a timely manner" if the party learns they are incomplete. This Rule is enforced by the mandatory exclusion provisions of Rule 37(c)(1), which provides, "if a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless." *See also Calicchio v. Oasis Outsourcing Group Holdings, L.P.*, 2021 WL 3123767 (S.D. Fla., July 22, 2021)(slip op).

Here, Furman *never* provided such copies as part of initial discovery as provided by Rule 26. Instead, Furman stated in his initial disclosures that the items were in the possession custody or control of the Receiver. For more than a year, Furman failed to produce any documents in response to discovery claiming he was unable to do so because the Receiver had taken his laptop and phone. Furman, however, refused to tell the Receiver his laptop's password (despite several requests), and the Receiver was unable to retrieve the laptop's contents. Months following the initial disclosure, the Receiver did receive many of Furman's documents from the cloud and did produce those to the SEC. At no point prior to trial, did Furman state which of these documents he intended to rely on at trial, Bates stamp them, or provide any other indicia of production to indicate the source of the documents.

Despite being given the opportunity and fair warning of his duty to do so, Furman failed to sufficiently identify what documents he proposed to use at trial, failed to properly identify many documents on his exhibit list, and otherwise failed to show that many of the documents he sought

to use at trial were previously produced. Thus, when Furman attempted at trial to introduce documents not previously identified, the SEC objected, and the objection was correctly sustained by the Court. Here, there was no justification for failing to disclose discoverable information until the eve of trial. If the documents were important enough to use at trial, they should have been previously disclosed and identified. To hold otherwise would have prejudiced the SEC, who had a clear right not to have a trial conducted by ambush. Thus, the Court correctly excluded exhibits not disclosed in discovery from presentation at trial. *See* Rule 37(c)(1).[2]

4. The Court Properly Applied the Law Enforcement Investigative Privilege

Furman next argues that the Court improperly permitted the SEC to deploy the law enforcement privilege, prejudicing him in two respects. First, Furman alleges that the SEC was allowed to present the testimony of several state government regulators, but that he was not permitted to ask the witnesses questions about their underlying investigation when the investigative privilege was invoked. Second, Furman asserts he was wrongfully prevented from introducing evidence concerning the nature of the investigation and purported "material misstatements" that led to the appointment of a Receiver, and from presenting the deposition testimony of the SEC's representative.[3]

As to the first contention, Furman has failed to show how the Court's sustaining the investigative privilege was an error or substantially prejudicial. Contrary to Furman's unsupported

[2] Despite these issues being raised at least a month before trial in the SEC's Motion in *Limine*, Furman made no effort to aid in this discovery burden and instead sat on his hands leaving the SEC to weed through documents. However, it was not the SEC's responsibility to mark Furman's discovery or create his exhibit list. Thus, any error here was not committed by the Court, but by Furman himself.

[3] That the parties would not be permitted to delve into the SEC's investigative decisions and its underlying investigation was at issue several times prior to trial, and each time the Defendants were told their efforts were improper. *See* Order on Motion in *Limine* DE 1044; Order on LaForte's Second Motion to Dismiss (DE 847). Thus, Furman's attempt to take a third bite at the apple as a basis for a new trial should fall flat.

assertion, *none* of the state regulators testified about *any* details surrounding the state's regulators' investigations."[4] Thus, there was no sword arising from the investigatory details from which Furman needed a shield. Instead, each of the witnesses from the state regulatory agencies testified about the cease and desist orders entered against Par Funding and its executives, whether the cease and desist orders were still in effect, and whether the Orders were publicly available. The SEC only presented evidence of the timing of the cease and desist orders and that the orders were still in effect – evidence that Furman needed to rebut or explain why he told investors otherwise. The underlying details investigations supporting the state regulatory cease and desist orders were of no import to Furman's defense, and were properly excluded.[5] *SEC v. Keating*, 1992 WL 207918 at *4 (C.D. Cal. 1992) ("The scope and conduct of the SEC's pre-filing investigation bears absolutely no relevance to [defendant's] culpability, which will be decided upon a presentation of the evidence*."); United States v. Patrick,* 248 F.3d 11, 22 (1st Cir. 2001) ("Merely showing that an investigation is sloppy does not establish relevance").

For these same reasons, Furman's second argument, that the exclusion of the SEC's 30(b)(6) witness' deposition from admission into evidence warrants a new trial, is unavailing. Notably, courts have repeatedly held that 30(b)(6) depositions of Commission staff seeking the factual basis for the Commission's allegations are improper because the Commission has no independent knowledge of facts and such knowledge is derived solely from investigation that staff attorneys take in anticipation of litigation. *See SEC v. Monterosso,* 2009 WL 8708868 at *1-2 (S.D. Fla. June 2, 2009); *SEC v. Jasper*, 2009 U.S. Dist. LEXIS 46678 (N.D. Cal. May 25, 2009);

[4] Furman fails to cite from the record any examples of this so-called substantial investigative testimony. Indeed, he cannot, as it never occurred. None of the state regulators gave any testimony regarding the investigation that led to the cease and desist orders on either direct or cross.

[5] Even if Furman had shown that the state regulators' investigations were faulty (and there is no evidence they were), that would not have rebutted Furman's misrepresentations to investors that the cease and desist orders had been "retracted" and that the regulators approved of Par Funding's business practices.

SEC v. SBM Inv. Certificates, 2007 WL 609888 at *22-23 (D.Md. Feb. 23, 2007); *SEC v. Buntrock,* 2004 WL 1470278 (N.D. Ill. June 29, 2004); *SEC v. Rosenfeld*, 1997 U.S. Dist. LEXIS 13996 at *5 (S.D.N.Y. Sep. 16, 1997). Here, the SEC's 30(b)(6) witness had no personal knowledge of the facts of this case. Thus, the deposition testimony of the SEC's 30(b)(6) witnesses was properly excluded from presentation at trial. *See SEC v. Revolutions Medical Corp*., Case No., 1:12-cv-03298-LMM (N.D. Ga. Oct. 22, 2015) (minute order ruling that SEC lawyers would not be required to testify at trial); Federal Rule of Evidence 602 (a "witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.")

5. **The Court's Allowance of Weisenstine's Testimony Was Proper**

Furman's assertion that the Court should not have allowed FBI Agent Adam Weisenstine to testify as he was not disclosed on the SEC's witness list and gave prejudicial cumulative testimony, does not warrant a new trial. The SEC did not include Weisenstine on its trial witness list. Instead, the SEC had Weisenstine testify as a rebuttal and impeachment witness only *after* Furman testified that: 1) he was forced to talk to the FBI, and 2) he did not recall telling the FBI that he knew Defendant LaForte was a convicted felon as early as a year after he began selling Par Funding notes. After Furman testified and made statements that the SEC believed were untrue, the SEC requested it be allowed to put on a witness to rebut Furman's testimony, and called Agent Weisenstine to rebut Furman's testimony regarding what happened during the FBI's interview.

The use of rebuttal witnesses rests on the discretion of the trial judge. *See United States v. Lezcano*, 296 Fed.Appx. 800, 803 (11th Cir. 2008) (rebuttal evidence is utilized to respond to matters first introduced by the opposing party and is offered "to explain, repel, counteract, or disprove the evidence of the adverse party.") (*quoting United States v. Frazier*, 387 F.3d 1244,

1269 (11th Cir. 2004)). As such, there was no requirement for the SEC to disclose Weisenstine on its trial witness list. *Luxottica Group, S.P.A. v. Airport Mini Mall, LLC*, 932 F.3d 1303, 1320 (11th Cir. 2019) ("Rebuttal witnesses are a recognized exception to all witness disclosure requirements,")(*quoting United States v. Windham*, 489 F.2d 1389, 1392 (5th Cir. 1974)).

Nor was Weisenstine's testimony unduly prejudicial. During his testimony, Furman testified about his July 2020 meeting with the FBI. Furman testified that he spoke with the FBI "forcibly," that he did not recall telling the FBI agents that he thought Dean Vagnozzi raised funds for fraudulent investments, and that he was aware of Joe LaForte's criminal record as early as a year after he started selling the Par Funding investments.[6] Weisenstine, who attended the July 2020 meeting, testified that Furman voluntarily agreed to speak with the FBI, that Furman stated that Par Funding had two sets of accounting records, and that Furman stated he was aware within a year of doing business with Par Funding that Joseph LaForte had a criminal record.[7] Weisenstine did not introduce any new evidence that had not been previously introduced during Furman's testimony. Rather, Weisenstine's testimony was limited to explaining what occurred at the July 2020 meeting, and was offered to counteract and disprove the evidence of the adverse party–squarely within the bounds of allowable rebuttal and impeachment testimony.

6. Bradley Sharp's Testimony Was Proper

Bradley Sharp, who has been employed by the Receiver to assist in the management of Par Funding's merchant cash advance business, was disclosed as a lay witness on the SEC's witness list. At trial, Sharp testified about what records he had found at Par Funding, and the information that was contained in those records. Contrary to Furman's unsupported contention, Sharp did not testify regarding his opinions about Par Funding's business, or give any conclusions whether Par

[6] See 12-10-21 Trial Tr. at 118:3-9, 131-140, 156.
[7] See 12-14-21 Trial Tr. at 42:13-16, 43:20-24, 44:18-22, 50:12-13.

Funding's operations were typical of the merchant cash business. Rather, his testimony was limited to discussing basic facts from what he observed in his role a manager: Par Funding's operational structure, its debt collection efforts, and the amount of monies received by individuals from Par Funding. Furman simply has not pointed to any evidence that could be fairly categorized as "expert" testimony.[8] *See SEC v. The Nutmeg Group*, LLC, 2017 WL 1545721, *12 (N.D. Ill. April 28, 2017) (accountant appointed by the Court to provide valuation services while Defendant company was subject to Temporary Restraining Order could offer lay opinion testimony based on facts the witness perceived "the mere fact that a witness has specialized training does not preclude her from offering a lay opinion limit to what she observed . . . or to other facts derived from a particular investigation.")

Moreover, the issue of Sharp's testimony was addressed at length prior to his taking the stand. *See* Order Denying Ore Tenus Motion to Exclude the Testimony of Bradley Sharp (DE 1048). It was also addressed during his testimony, and in Furman's Motion for Reconsideration of Order Denying Motions in *Limine* (DE 1029). Each time, Furman made the same arguments he repeats now, that Sharp's testimony equated to impermissible "expert" testimony, and each time the Court rejected that argument. *See* 12-7-21 Trial Tr. at 97-110. The Court, should reject the latest reiteration of this arguments, for the same reasons as it has before.

As previously argued, the fact that Sharp has unique knowledge and experience does not make him an expert. *United States v. Lecroy*, 441 F.3d 914, 927 (11th Cir. 2006) ("[j]ust because [a lay witness's] position and experience could have qualified him for expert witness status does not mean that any testimony he gives at trial is considered 'expert testimony'"). This analysis is also true for professional witnesses who testify to facts observed through their employment. *United*

[8] Furman's failure to support his contentions with citation to the trial record make it difficult, if not impossible, to directly address what statements he asserts were opinion, and the Motion should be denied on this basis alone.

States v. Jeri, 869 F.3d 1247, 1265 (11th Cir. 2017) ("[l]ay witnesses may draw on their professional experiences to guide their opinions without necessarily being treated as expert witnesses"); *United States v. Hamaker*, 455 F.3d 1316, 1331-32 (11th Cir. 2006) (allowing lay witness testimony of FBI analyst who reviewed and summarized thousands of pages of financial documents; "while his expertise and the use of computer software may have made him more efficient at reviewing MCC's records, his review itself was within the capacity of any reasonable lay person"). Thus, Sharp is not an expert merely because he has areas of expertise; to the contrary, because his testimony involves historical facts learned through his employment as the Receiver's employee, he testified as a lay witness with respect to what he has learned from his review of Par Funding's records. Thus, Furman has failed to point to any evidence that should have been precluded as expert opinion evidence, and his motion fails again on such grounds.

D. THERE IS NO EVIDENCE OF JUDICIAL BIAS AGAINST FURMAN

Furman's allegation that he was denied a fair trial due to judicial bias and that the Court should have recused itself is unsupported and should be denied. It is also another rehash of arguments previously made and rejected by the Court in the Defendants' Motion for Recusal (DE 630) and the Court's Order denying same. (D.E. 631).

A judge must disqualify himself from a proceeding if he "has a personal bias or prejudice concerning a party." 28 U.S.C. 455(b)(1). To disqualify a judge under section 455(a), the bias "must stem from extrajudicial sources," not court rulings, "unless the judge's acts demonstrate such pervasive bias and prejudice that it unfairly prejudices one of the parties." *United States v. Spuza,* 194 F. App'x 671, 676-77 (11th Cir. 2006) (*quoting United States v. Bailey*, 175 F.3d 966, 968 (11th Cir. 1999)). "The test for determining whether a judge's impartiality might reasonably be questioned is an objective one, and requires asking whether a disinterested observer fully

informed of the facts would entertain a significant doubt as to the judge's impartiality." *Bivens Gardens Office Bldg., Inc. v. Barnett Banks, Inc.*, 140 F.3d 898, 912 (11th Cir. 1998).

As the Supreme Court has explained, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States,* 510 U.S. 540, 555 (1994). Similarly, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.*; *see also Jaffe v. Grant,* 793 F.2d 1182, 1189 (11th Cir. 1986) (denial of recusal motion was appropriate where the Court's statements reflected its "perception of the underlying facts of the case" and a party's litigation tactics). Furthermore, "expressions of impatience, dissatisfaction, [or] annoyance" made in the course "ordinary efforts at courtroom administration" do not establish bias or partiality. *Liteky*, 510 U.S. at 555-56. Rather, in order for a judge's "judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable)" to warrant recusal, they must both "derive[] from an extrajudicial source" and "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.*

Here, the record does not show that the Court held any bias or prejudice against Furman or favoritism to the SEC. To the contrary, the Court gave Furman considerable latitude during the proceedings.[9] To be sure, the Court often ruled against Furman, but that is insufficient to demonstrate that any of the Court's rulings "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky*, 510 U.S. at 555. Indeed, Furman has not even shown that any of the Court's rulings were in error. Having failed to demonstrate that any of the Court's

[9] For example, the Court statements that: "I'm very happy that Mr. Furman has good counsel." 12-6-21 Trial Tr. at 113:15, "I'm willing to give you guys, as I've done, some wiggle room." 12-6-21 Trial Tr. at 114.

comments or rulings derive from an extrajudicial source, or reveal a high degree of favoritism such that a fair judgment was impossible, a new trial should not be ordered on these grounds.

E. THE COURT PROPERLY DENIED FURMAN'S REQUESTED JURY INSTRUCTIONS CONCERNRING A CLAIMED EXEMPTION

The Eleventh Circuit has made clear "[w]e apply a deferential standard in reviewing jury instructions" and "[t]his court reviews the district court's refusal to give a defendant's requested jury instruction for abuse of discretion." *Maiz v. Virani,* 253 F.3d 641, 657 (11th Cir. 2001) (internal citations omitted). The refusal to give a requested jury instruction is an abuse of discretion only when "(1) the requested instruction correctly stated the law, (2) the instruction dealt with an issue properly before the jury, and (3) the failure to give the instruction resulted in prejudicial harm to the requesting party." *Goulah v. Ford Motor Co.,* 118 F.3d 1478, 1485 (11th Cir.1997). Thus, a motion for new trial premised on erroneous jury instructions is properly granted only where there is "substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *Johnson v. Barnes & Noble Booksellers, Inc.*, 437 F.3d 1112, 1115 (11th Cir. 2006). The key inquiry is "whether the jury charges, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled." *Johnston v. Companion Prop. & Cas. Ins. Co.,* 318 F. App'x 861, 864 (11th Cir. 2009).

Here, Furman complains about the Court's rejection of his proposed jury instructions on the applicability of an exemption to the registration provision of Section 5 of the Securities Act of 1933 ("Securities Act") and argues that the SEC should have been made to show the offering at issue was an integrated offering. Furman's arguments regarding Section 5's requirements and exemptions are incorrect under the law and were properly rejected by the Court.

1. Section 5 Exemption

Section 5(a) of the Securities Act prohibits the direct or indirect sale of securities through the mail or interstate commerce unless a registration statement has been filed and is in effect. Similarly, Section 5(c) prohibits the offer to sell securities through the mail or interstate commerce unless a registration statement has been filed. The purpose of the registration requirement is to "protect investors by promoting full disclosure of information thought necessary to informed investment decisions." *SEC v. Ralston Purina Co*., 346 U.S. 119, 124 (1953).

Section 4 of the Securities Act provides several exemptions from the registration requirements. Together, Sections 5 and Section 4 require registration for public offerings of securities (a distribution) emanating from an issuer through conduits ("underwriters") into the hands of investors, and exempts subsequent transactions once securities have come to rest with investors. Congress enacted a broad definition of underwriter in order to "include as underwriters all persons who might operate as conduits for securities being placed into the hands of the investing public." Thomas Lee Hazen, The Law of Securities Regulation 431 (4th ed. 2002). For purposes relevant to the facts of this case, Section 2(a)(11) of the Securities Act defines underwriter to include any person "who offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking * * *." A "distribution" as that term is used in Section 2(a)(11) is equivalent to a public offering of securities. *Gilligan, Will & Co. v. SEC*, 267 F.2d 461 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959).

The consequence of this statutory framework is that when an issuer uses underwriters in its offering of securities, such offerings must be registered. "Section 4(a)(1) was intended to exempt routine trading transactions with respect to securities already issued and not to exempt

distributions by issuers or acts of others who engage in the steps necessary to such distributions." *SEC v. Murphy*, 626 F.2d 633, 648 (9th Cir. 1980) (citing Preliminary Note to Rule 144, 17 C.F.R. 230.144); *SEC v. Chinese Consol. Benev. Ass'n*, 120 F.2d 738, 741 (1941) (Section 4(1) "does not in terms or by fair implication protect those who are engaged in steps necessary to the distribution of security issues.").

Here, the jury properly found Furman liable under Section 5 for his role in Par Funding's ongoing public distribution of securities. The evidence shows that Par Funding initially sold its securities directly to investors using people like Furman who served as finders and were paid commissions. Once the state securities regulators sued Par Funding for its illegal securities offering, Par Funding changed its practices – but in name only. Par Funding attempted to circumvent the registration requirement by using finders, including Furman, to offer investments in Par Funding through a papered up construct in which Furman and other finders would solicit investors, collect their money for what everyone knew was intended to be deposited with Par Funding. In exchange, Par Funding provided a note to Furman, who, in turn, issued his own notes to the investors he solicited. At all times, Par Funding's offering deprived investors of all of the information a registration statement would have provided, in violation of Section 5.

Here, Defendant is liable because he offered and sold securities for the issuer (Par Funding) and was thus an underwriter in Par Funding's unregistered offering. His argument that all he did was "purchase" Par Funding securities and thus cannot be liable under Section 5 for Par Funding's sales, cannot be credited. Section 5 prohibits not only sales, but "offers," which includes "every attempt or offer to dispose of, or solicitation of an offer to buy" a security for value. *See* Section 2(a)(3). "The term 'distribution' refers to the entire process in a public offering through which a block of securities is dispersed and ultimately comes to rest in the hand of the investing public."

Geiger v. SEC, 363 F.3d 481, 487 (D.C. Cir. 2004) (*quoting In re Wonsover*, 1999 WL 100935 at *7 n. 25 (Mar. 1, 1999), *aff'd*, 205 F.3d 408 (D.C.Cir.2000)). *See also Ackerberg v. Johnson*, 892 F.2d 1328, 1335-36 (8th Cir.1989) (Congress intended "to cover all persons who might operate as conduits for the transfer of securities to the public"). And it has long been established—since the Second Circuit's seminal decision in *SEC v. Chinese Consolidated Benevolent Association* in 1941—that activities like those of Defendant bring him squarely within the prohibitions of Section 5. Thus, the jury properly found that through all of his activities, Furman was a necessary participant and substantial factor in Par Funding's offering. The jury could scarcely conclude otherwise given Furman's own concession at trial that his investors would not have been able to invest in Par Funding without him.

Moreover, this Court should reject Defendant's invitation to limit the reach of Section 5 by focusing solely on his purchase of Par Funding's notes. Par Funding's offering encompasses the entire process through which securities are dispersed by the issuer to land in the hands of investors. Defendant's construction elevates form over substance and ignores economic reality, something courts have been careful not to endorse for risk that investors will be deprived of fulsome disclosures required by the federal securities laws. *See, e.g., SEC v. Sierra Brokerage Services, Inc.*, 608 F.Supp.2d 923, 951 (S.D. Ohio 2009) ("Where, as here, each transfer was taken in furtherance of a later public distribution, the Court will not exalt form over substance by myopically viewing each transfer as an isolated occurrence.") *citing SEC v. M&A West*, *Inc.,* 538 F.3d 1043, 1053 (9th Cir. 2008) ("The Supreme Court has long instructed that securities law places emphasis on economic reality and disregards form for substance."). "Dynamic scrutiny of investment schemes is essential to carrying out the remedial purpose of disclosure under the [s]ecurities act[s]." *SEC v. Comcoa Ltd.,* 855 F.Supp. 1258, 1260 (S.D. Fla.1994) (*quoting Stowell*

v. Ted S. Finkel Inv. Servs., Inc., 489 F.Supp. 1209, 1223 (S.D. Fla.1980)); *SEC v. Bailey*, 41 F.Supp. 647 (S.D. Fla. 1941) (rejecting form over substance because "[t]o consider only the formalistic aspect of these contracts is to lose sight of the background and underlying spirit of these transactions, thus seeing only the skeleton while disregarding the flesh surrounding it").

Defendant's claim that Par Funding's offering was an exempt private offering under Section 4(a)(2) fares no better. In considering its application, courts look to four factors: 1) the number of offerees and their relationship to each other and to the issuer; 2) the number of units offered; 3) the offering size; and 4) the manner of the offering. *Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893, 899-900 (5th Cir. 1977); *see also Murphy*, 626 F.2d at 644-45. In evaluating the first and most critical factor, courts look primarily to whether "the class of persons affected need the protection of the Act." *See Doran*, 545 F.2d at 899-906, *quoting Ralston Purina,* 346 U.S. at 124. In addition, the Section 4(a)(2) private offering exemption is available only for the issuer, and it matters not whether the underwriter can show that he did not engage in general solicitation or limited his offerees to 35. Unless proven otherwise, the issuer was engaged in a public offering, not an exempt private offering, and defendant culpably participated in that offering.[10]

Regulation D is a safe harbor for issuers who want to claim the private offering exemption. Regulation D is premised on the fact that if all of the requirements of the safe harbor are met, the purposes of registration have been otherwise satisfied, *i.e.*, that offerees "have access to the kind of information which registration would disclose." *Ralston Purina*, 346 U.S. at 127. A safe harbor is not a means by which to circumvent Section 5 by using an underwriter as a conduit to dump

[10] Defendant's reliance on Section 506(c) suffers from the same flaws. An issuer may engage in a general solicitation so long as it limits its sales to accredited purchasers. While Defendant claims that he did attempt to verify accredited status with his clients, and that he believed Par Funding took steps to otherwise verify accredited status, his proof was so lacking, this Court properly concluded that any exemption claim could not be presented to the jury. It was Defendant's burden to prove that Par Funding's offering limited sales to accredited investors and did not do so at trial. He cannot now flip the burden onto the SEC to prove that Par Funding sold to non-accredited investors.

securities to an uninformed market. "When a company fails entirely to register its securities and nonetheless proceeds to sell them generally to the public, however, the entire system of mandatory public disclosure is evaded to public detriment." *SEC v. Platforms Wireless Intern. Corp.*, 617 F.3d 1072, 1085-86 (9th Cir. 2010).

Here, Furman bore the burden to show that Par Funding engaged in the required steps under Regulation D to claim the exemption as a private offering. While Par Funding filed a Form D with the Commission asserting that its offering was exempt under Section 506(b), Furman did not establish its fundamental requirements: that Par Funding did not engage in general solicitation, and limited its offering to no more than 35 purchasers. Furman did not present any evidence in this regard at all. Thus, the Court did not err in refusing to include an exemption instruction.

2. The Integration Doctrine Does Not Apply Here

Finally, Defendant's repeated arguments that the SEC failed to charge anything addressing the "integration doctrine" is of no legal consequence. As this Court noted, the integration doctrine is applied to prevent an issuer from engaging in what it claims are separate exempt offerings when they should be viewed as an integrated offering that requires registration. The SEC's position is that Par Funding engaged in an ongoing single offering in which defendant culpably participated and thus is himself liable under Section 5. The integration doctrine is thus not at issue. Nor is the SEC's theory dependent on "piercing the corporate veil." Furman's liability is his own; he participated in Par Funding unregistered public offering.

F. THE SEC's CLOSING REMARKS WERE PROPER

A new trial is seldom warranted because of counsel's remarks during closing argument. Indeed, the Eleventh Circuit has clearly expressed a "reluctan[ce] to set aside a jury verdict because of an argument made by counsel during closing arguments." *See Vineyard v. County of Murray,*

Ga., 990 F.2d 1207, 1214 (11th Cir. 1993). "A party must raise an objection to errors in the opposing party's argument." *Ruiz v. Wing, 991 F.3d 1130, 1141 (11th Cir. 2021)*. When a timely objection is made, the Court "must determine whether the inappropriate comment "impaired a substantial right of the objecting party." *Id.* The standard for granting a new trial based on improper conduct by counsel, including improper closing argument, is whether the conduct was "such as to impair gravely the calm and dispassionate consideration of the case by the jury*." Id.*

In this case, no objections were made during the SEC's closing. When no objections are raised to the allegedly improper comment, the Court reviews for plain error, "but a finding of plain error 'is seldom justified in reviewing argument of counsel in a civil case." *Id. (quoting Oxford Furniture Cov. v. Drexel Heritage Furnishings, Inc.,* 984 F.2d 1118, 1128 (11th Cit. 1993)). A plain error requires a showing that (1) an error occurred; (2) the error was plain: (3) it affected substantial rights; and (4) not correcting the error would seriously effect the fairness of the whole proceeding. *Id*.

Here, Furman's argument that he was prejudiced because in closing the SEC stated that he failed to rebut the evidence showing he made material misrepresentations with investor testimony (when the Court prevented him from putting on investor testimony), fails whether it is reviewed for plain error or under a substantial "right standard."[11] At trial, the SEC presented multiple sources of evidence that Furman made misrepresentations to investors which included: (1) recordings of Furman misstating that state regulators cease and desist orders had been retracted; (2) emails to all investors with knowing misrepresentations; and (3) five investors who testified as the misrepresentation told to them by Furman. Any implication by the SEC that Furman failed to rebut this evidence with investor testimony did not impair Furman's rights. As argued above, that

[11] Furman's failure to cite to the record to specify the "inappropriate comments" he is referencing hinders an analysis here. The SEC is unable to find a reference in closing referring to Furman's failure to present evidence from investors.

some investors may not have been told misrepresentations does not rebut the evidence that Furman supplied other investors with misrepresentations and omission.

In addition, the other evidence presented was more than sufficient to support the jury's verdict, even if Furman presented multiple other investors who testified they were not misinformed. Moreover, investor testimony was not the exclusive method by which Furman could have rebutted the allegations of fraud. Indeed, Furman testified himself as to what he told investors and as to his state of mind at the time the statements were made. Furman also had access to thousands of documents and emails between him and investors that he could have used to prove his defense, if it was meritorious. That Furman failed to sufficiently rebut the evidence had nothing to do with failing to allow additional investors to testify and any inference made in closing regarding this failure was not prejudicial error.

III. CONCLUSION

For all of the foregoing reasons, Defendant's Motion for New Trial should be denied.

Respectfully submitted,

February 9, 2022

s/Alise Johnson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this 9th day of February 2022 via cm-ecf on all defense counsel in this case.

s/ Alise Johnson
Alise Johnson