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
______________________________/

REPLY IN SUPPORT OF MOTION FOR NEW TRIAL

Defendant, Michael Furman, by and through the undersigned counsel, hereby files this Reply in Support of his Motion for a New Trial, and in support thereof states:

SUMMARY OF ARGUMENT

Even if one of the litany of errors made by the trial court does not necessitate a new trial, the errors taken together show that Furman, cumulatively should be granted a right to a new trial. There is also substantial record evidence showing that Furman was not provided a fair day in Court, and, was severely prejudiced. These errors individually, and cumulatively, necessitate that the Motion be granted and Furman be granted a new trial.

THE REFERENCE TO THEIR EXCLUSION OF THE INVESTORS MANDATES A NEW TRIAL AND ESTABLISHES THAT FURMAN SHOULD HAVE BEEN ALLOWED TO INTRODUCE THEIR TESTIMONY

The SEC argues that the trial court properly prevented Furman from introducing evidence of statements that Furman made to investors to substantiate his credibility, and to show that Furman had in fact made disclosures to each of the investors by claiming that the foregoing information was irrelevant and improper, and constituted inadmissible evidence. However, the SEC during closing argument, made reference, in its initial closing argument and during its rebuttal

closing argument that Furman's failure to introduce testimony from a single investor established that the forgoing testimony was relevant, or, should not have mentioned in closing. These statements, which were made during the SEC's closing argument, show that the testimony concerning disclosure by Furman to other investors was relevant to the instant proceeding, and it certainly was not hearsay. Fed. R. Evid. 802 (noting that hearsay is an out of court statement being introduced **for the truth of the matter asserted**) (emphasis added). Indeed, and contrary to the SEC's contention, permitting Furman to introduce testimony from various investors showing his disclosure was critical to the defense of his case, as each of the investors who the SEC had testify demonstrated a clear credibility issue, bias, faulty memory, or other issue with respect to their testimony, which cast significant doubt on the veracity of their testimony. And, more importantly, the SEC put Furman's credibility into issue by trying to introduce prior inconsistent statements in connection with the case, through their improperly disclosed rebuttal witness.

Instead of addressing the inherent inconsistency in its position, the SEC claims that Furman's failure to raise a contemporaneous objection to its reference of that exclusion during closing constitutes a waiver of his right to object to it. However, "where the interest of substantial justice is at stake," improper argument may be the basis for a new trial even if no objection has been raised." *McWhorter v. City of Birmingham*, 906 F.2d 674, 677 (11th Cir. 1990). As a result, the reference to Furman being precluded from introducing testimony of investors mandates a new trial, in and of itself. *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).

THE INVESTIGATORY PRIVILEGE WAS ABUSED

Not only was the SEC's reference to the excluded evidence concerning investor testimony prejudicial, but so too was its introduction of undisclosed witnesses, and other testimony concerning its investigation of Furman and Par Funding, while it simultaneously hid behind the investigatory privilege. Specifically, the SEC introduced testimony from numerous FBI Agents, and evidence, as business records, without laying the proper predicate for its introduction, as well as evidence from various regulators concerning the impact of various regulatory actions. However, when Furman sought to question or cross examine these parties about their statements, and the interpretation of same, the SEC successfully maintained that the investigatory privilege prevented Furman from inquiring into those matters. Since the SEC was able to introduce testimony concerning its investigation, it opened the door to Furman introducing evidence concerning its investigation, and, otherwise waived the right to claim that facts concerning its investigation of Furman and par funding was relevant. Moreover, Furman was precluded from asking the regulators if they were provided additional documentation from Par Funding, or other issues which would have verified his statements to them.[1] At a minimum, Furman should have been permitted to ask questions concerning the statements he made to the undercover FBI agent, and the SEC was allowed to use facts concerning its investigation in prosecution of its claims against Furman, while preventing Furman from addressing any of the foregoing issues and the **significant deficiencies** in how it conducted the investigation. Moreover, the false statements and lack of knowledge by the SEC would have been a substantial factor in refuting the SEC's allegations.

The prejudice was compounded by the SEC calling Mr. Weisenstine as a purported rebuttal

[1] The SEC claims that the recorded statement by Furman that New Jersey had "retracted" its cease and desist order was false. However, in reality Furman stated that the fine was retracted, which was in fact an accurate statement.

witness. While the SEC claims that Mr. Weinestien was properly permitted to testify because "1) Furman testified that he was forced to talk to the FBI", and 2) he did not what he said to the FBI, the forgoing testimony was elicited during the SEC's case in chief, as counsel for the SEC questioned Furman on statements made to Weisenstine, based on Weisenstine's notes. Because the SEC, and not Furman, elicited the testimony concerning Weisenstine, by asking Furman questions about statements to Weisenstine during its case in chief, the testimony of Weisenstine was not rebuttal testimony and should have been excluded. *See e.g. Tramonte v. Fibreboard Corp.*, 947 F. 2d 762, 765 (5th Cir. 1991) (A trial court does not abuse its discretion in excluding rebuttal evidence when the offering party already has presented evidence on the same issue as a part of its case). *Benedict v. United States*, 822 F. 2d 1426, 1428 (6th Cir. 1987)("rebuttal testimony [should] not be allowed, [if] it logically belonged in the case-in-chief and went to the case's central issue of causation"); *Morgan v. Commercial Union Assur. Companies*, 606 F. 2d 554, 555 (5th Cir. 1986) ("Rebuttal is a term of art, denoting evidence introduced by a Plaintiff *to meet new facts brought out in his opponent's case in chief*") (emphasis added). Because Furman did not introduce or seek to introduce any evidence of his statements to the FBI, but was questioned extensively about those statements, Weisenstein was not a rebuttal witness, and even if he was, he would have needed to be disclosed, or, at a minimum, the notes upon which he based his testimony needed to be produced so that he could properly be subject to cross-examination. Because the SEC claimed that the notes which it used to refresh Weisenstine's recollection was protected by the investigative privilege, it used that privilege as both a sword and a shield. Allowing the SEC to use the investigative privilege in such a manner prejudiced Furman and mandates that he be granted a new trial.

THE REFUSAL TO PROVIDE JURY INSTRUCTIONS WITH RESPECT TO FURMAN'S CLAIMS OF EXEMPTION PREVENTED FURMAN FROM HAVING A FAIR TRIAL ON THE FRAUD CLAIMS, AND WAS IMPROPER

During the SEC's closing argument, the SEC argued that Furman committed securities fraud because the number of investors listed was not accurately reported. As the Jury asked the Court about why Furman's exemption defense was not at issue, it is clear that the Court's refusal to provide that instruction prejudiced Furman, not only with respect to the claims for selling unregistered securities, but also with respect to the fraud claims against him. Moreover, the Court committed error by refusing to instruct the jury of Furman's claim of exemption.

In response to Furman's Motion for a New Trial, the SEC claims that the Court should disregard his argument as one of "substance over form" because Furman through Fidelis, **purchased securities**, from Par Funding, even though the evidence showed that the sale of securities in Fidelis, itself was exempt from registration. In support of its position, the SEC relies on *SEC v. Sierra Brokerage Services, Inc.* , 608 F. Supp. 2d 923, 951 (S.D. Ohio 2009) and *S.E.C. v. Murphy*, 626 F.2d 633, 645 (9th Cir. 1980) cases where SEC alleged integration and sought integration. *Id.* ("The SEC contends that each of these transactions involved an issuer or underwriter and that all of these sales were part of an integrated scheme to distribute shares to the public"). The remaining cases that the SEC referenced do not apply to a series of transactions, such as the ones at issue, which could only be consolidated if the SEC alleged integration, something that it never asserted. The remaining cases cited by the SEC are inapposite, and deal with the level of involvement in a transaction for a person to be a "participant" or whether a contract is a security. *See Geiger v. S.E.C.*, 363 F.3d 481, 488 (D.C. Cir. 2004) (noting that someone who found a buyer for securities, negotiated the terms, and facilitated the resale cannot avoid liability by claiming no direct involvement in the act); *Sec. & Exch. Comm'n v. Bailey*, 41 F. Supp. 647, 650 (S.D. Fla. 1941) ("In essence, what the defendants are really offering, and certainly what the average purchaser is really buying is, not land for its intrinsic value, but a producing tung grove as a source

of income, without which he would not be interested in purchasing the land."); *Sec. & Exch. Comm'n v. Chinese Consol. Benev. Ass'n*, 120 F.2d 738, 741 (2d Cir. 1941) (noting that underwriters could be liable for participating in the sale of unregistered securities); *S.E.C. v. M & A W., Inc.,* 538 F.3d 1043, 1053 (9th Cir. 2008) ("The express purpose of the reverse mergers at issue in this case was to transform a private corporation into a corporation selling stock shares to the public, without making the extensive public disclosures required in an initial offering."); *S.E.C. v. Comcoa Ltd.*, 855 F. Supp. 1258, 1262 (S.D. Fla. 1994) ("In determining whether or not Comcoa's offering constitutes a security, the Court is not bound by the operative agreement between Comcoa and its investors.")

And while *Ackerberg v. Johnson,* 892 F.2d 1328, 1335-36 (8th Cir.1989) stands for the proposition that a person involved who is a "conduit" for the transfer of securities to the public, there was no evidence that Fidelis was in fact a mere conduit for the sale of securities.

Contrary to the SEC's assertion, the overwhelming weight of authority demonstrates that for Furman to be liable for the unregistered sale of securities, as the jury found, the SEC would have needed to allege integration. The SEC's failure to allege integration, which, the Court conceded could not be established, is fatal to its claims, and demonstrates that the Furman should have been granted judgment as a matter of law with respect to the unregistered securities claims.

Even if Furman was not granted such instruction, the failure to clarify that the SEC, had withdrawn its challenge to the sale of securities to Fidelis, unduly prejudiced Furman in his claims, and rendered the trial so unjust that a new trial should be held. In fact, the SEC itself has acknowledged that the framework of using a series of exempt offerings can and is often used, in determining whether a particular offering is subject to registration, which should be considered on

an offering by offering basis. *See Press Release*, SEC Harmonizes and Improves "Patchwork" Exempt Offering Framework, *available at https://www.sec.gov/news/press-release/2020-273* ; SECURITIES AND EXCHANGE COMMISSION Concept Release on Harmonization of Securities Offering Exemptions Release Nos. 33-10649 at 158-170, available at https://www.sec.gov/rules/concept/2019/33-10649.pdf ("The integration doctrine provides an analytical framework for determining whether multiple securities transactions should be considered part of the same offering."). Because Furman was clearly entitled to an instruction on the issue of exemption and was otherwise entitled to judgment as a matter of law, the Court must grant a new trial, or reverse its entry of judgment with respect to the claims concerning the sale of unregistered securities.

At a minimum, the Court should have allowed Furman to avail himself to the exemptions of Par Funding, as he presented a prima facie case that Par Funding only sold securities to accredited investors, there was no evidence of it engaging in general solicitation, and because holding that only the issuer of securities, *and not any affiliate of the issuer*, could be entitled to the defense of an exemption would lead to limitless liability for the sale of exempt securities.

JUDICIAL BIAS PERMEATED THE ENTIRE PROCEEDING

The foregoing rulings, which constitute a clear error, also demonstrate a judicial bias which could clearly be seen by the Court's comments and attitude during the course of the proceedings. While the SEC points to the fact that the Court granted Furman limited leeway in asking a narrow set of questions, it ignores the significant number of comments that the Court made, as well as the general attitude of the Court with respect to the process. In fact, not only did the Court refuse to rule in Furman's favor on a significant number of issues, but the Court completely disregarded arguments made by Furman, while simultaneously applying a double standard to the parties. For

example, if Furman tried to introduce any document, Furman was forced to show that the document was either produced by Furman or by the SEC by showing a production bates stamp, but, in the same vein, the Court simply permitted the SEC to make representations as to whether a particular document was or was not produced, when a document did not have a bates stamp, and, in some instances, the SEC successfully prevented Furman from introducing evidence, by claiming that a document was not produced, and then introduced the same exact exhibit into evidence, while claiming that it was produced. Similarly, the Court blindly accepted the SEC's blatant misrepresentation concerning what happened during Furman's deposition, and while threatening Furman's counsel with sanctions, due to confusion over whether the Receiver or the SEC had access to a particular set of documents.

The judicial bias goes beyond that set of conduct, as the Court assisted the SEC in laying the predicate for the admission of evidence, referred to arguments that the SEC raised as "our" position, allowed the SEC to ask every single question on direct as a leading question, and *sua sponte* raised objections and issued rulings on issues that were not even addressed or were otherwise withdrawn. The Court also consistently and repeatedly admonished Furman's counsel for speaking with Mr. Furman, refused to allow Furman's counsel any side bars, and decided, after hearing more than five (5) days of testimony from the SEC and its witnesses that it needed to cut down Furman's case in chief by having an impromptu hearing on issues in *limine.* It comes as no surprise that Court was so biased in its ruling, that it smiled when reading the verdict of the jury. Even if the Court's conduct on the transcript itself does not mandate recusal, it certainly prejudiced Furman in his presentation of evidence and during trial.

SHARPE SHOULD HAVE BEEN EXCLUDED, THE EVIDENCE ELICITED THROUGH SHARP SHOULD NOT HAVE BEEN PERMITTED OR JOEL GLICK SHOULD HAVE BEEN ALLOWED TO TESTIFY

While it is well established that a receiver or trustee is and can be permitted to testify on behalf a corporation, that status does not eliminate the need to set forth a predicate with respect to the issues which a person will testify about. The SEC's witness, Bradley Sharp failed to set forth the predicate with respect to business records that he introduced, as he had no idea as to which entity they originated from, or how they were produced. Moreover, the introduction of summary charts concerning litigation was improper, as those charts were inadmissible hearsay. *Johnson v. Ford Motor Company*, 988 F.2d 573, 579 (5th Cir. 1993) (noting that summaries of pending litigation is inadmissible hearsay). Because Sharp was allowed to testify about the number of lawsuits as an indication of the default rate, he was actually providing expert testimony, **as an undisclosed expert witness**, and should not have been allowed to do so.

Although the SEC was allowed to introduce testimony through Bradley Sharp, Furman was prevented from introducing testimony through Joel Glick. The SEC claims that because the Court prevented Glick from testifying about the MCA business model, or whether the LIBOR or FIFO analysis was the proper way to track Par Funding's cash flow, that Glick was properly precluded from testifying. However, Furman sought to elicit testimony from Glick on the veracity of the KPI reports, which was directly relevant to the SEC's assertion that Furman made material representations of the default rate of Par Funding, which were disclosed in the KPI report. Because that testimony would have refuted the SEC's contentions concerning the default rate of Par Funding, Furman should have been permitted to elicit testimony from Joel Glick, especially since there was no prejudice or surprise in allowing Glick to testify on those issues.

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.

CONCLUSION

Because, as set forth in further detail in the Motion, the Reply, and as demonstrated by the SEC's own response, Furman was denied the right to a fair trial. The prejudice of each of the errors set forth above, cumulatively and individually mandate that Furman be granted a fair trial, and as such the Motions should be granted.

Respectfully Submitted,

Knight Law, P.A.
2131 Hollywood Blvd., Ste. 501A
Hollywood, Florida 33020
Telephone: 786.480.0045

By: /s/ Jeremy I. Knight, Esq.
Florida State Bar No.: 1009132
Email: Yirmi@KnightLawFL.com
By: /s/ Elroy M. John, Esq.
Florida State Bar No.: 1002480
Email: Elroy@KnightLawFL.com
Attorneys for Defendant, Michael C. FURMAN

and

MILLENNIAL LAW, INC.
Attorneys for Michael C. FURMAN
501 E. Las Olas Blvd Ste 200/308
Fort Lauderdale Fl 33301
Phone: 954-271-2719

By: *s/ Zachary P. Hyman*
Zachary P. Hyman
Florida Bar No. 98581
zach@millenniallaw.com
millenniallawforms@gmail.com
jessica@millenniallaw.com